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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN**

Public

**Prosecution's Response to Defence's "Motion for Immediate Ruling on Standard to
Assess Multiple Charging and Convictions"**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. The Trial Chamber should reject *in limine* the Defence's "Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions."¹ The Defence does not justify why the Trial Chamber should provide what in substance is an advisory opinion. Whether multiple convictions should be entered in Mr Ongwen's case should be addressed in the article 74 judgment.

2. In any event, the Defence Motion lacks merit. *First*, its reliance on article 20(1) of the Statute² and other documents and cases,³ to argue that the Statute requires a *conduct-based approach* to multiple charges, is misplaced.⁴ Article 20(1) prohibits a second trial by the Court of a person for conduct which formed the basis of crimes for which he or she has already been convicted or acquitted by the Court. It is not concerned with, and therefore does not prohibit, the Court from entering multiple convictions at the end of a trial if the same underlying conduct fulfils the legal elements of more than one crime.

3. In any event, there is no need to resort to a *conduct-based* approach addressed to article 20(1) situations to resolve the question of whether multiple convictions should be entered at the end of a trial if such convictions are based on the same underlying conduct. A *materially distinct legal-elements* approach is the correct approach to apply at the Court for the imposition of multiple convictions. The broad *conduct-based* approach for article 20(1) situations is, on the other hand, justified by fairness concerns that may arise if a person already convicted or acquitted by the Court is tried again at the Court. The same concerns do not arise in the case of multiple convictions based on the same conduct when entered at the end of a trial. In

¹ ICC-02/04-01/15-1697 ("Defence Motion").

² Defence Motion, paras.9-23.

³ These include the article's drafting history (Defence Motion, para. 14); the *Katanga* Article 108 decision (Defence Motion, paras.18-20); the case-law of the European Convention on Human Rights (Defence Motion, paras.34-39).

⁴ Defence Motion, paras.9-23.

any event, the *materially distinct legal elements* approach addresses any fairness concerns.

4. *Second*, the Appeals Chamber of this Court has already endorsed the *materially distinct legal elements test* first articulated in the ICTY's *Delalic et al* case⁵ to address multiple convictions based on the same conduct when entered at the end of a trial.⁶ In any case, even assuming there is any ambiguity in the Appeals Chamber's case-law, the *materially distinct legal elements test* is the correct approach to apply, because it best promotes the object and purpose of the Rome Statute.

5. *Third*, the Defence's request that *contextual elements* should be ignored when assessing multiple convictions is incorrect.⁷ Contextual elements are mandatory elements of all crimes falling within the Court's jurisdiction, and engage an accused's criminality.⁸

II. SUBMISSIONS

(A) The Motion should be dismissed *in limine*

6. The Defence does not show why the Trial Chamber at this stage of the proceedings should provide what in substance is an advisory opinion on the approach to adopt regarding multiple convictions.

7. Proceedings at the Court normally engage many legal issues, and it is not in the interests of judicial economy for the Chambers to provide opinions in the course of the proceedings. Trial Chambers regularly address any matters of law in an article 74 judgement. The Defence does not demonstrate that issues concerning multiple convictions are of any exceptional nature to justify a departure from this practice. To

⁵ *Prosecutor v. Delalic et al*, Judgement, IT-96-21-A, 20 February 2001 ("*Delalic et al* Appeal Judgement").

⁶ Defence Motion, paras.4-5. And the ICC Chambers adopting this test are correct – contrary Defence Motion, paras.32-33.

⁷ Defence Motion, paras.43-44.

⁸ Defence Motion, paras.43-44.

the contrary, the parties are already at the closing stage of the case, and there is no need for the Trial Chamber to resolve this matter at this time. The Motion should be dismissed *in limine*. In any case, as shown below, the Defence Motion lacks merit.

(B) The Defence's reliance on article 20(1) is misplaced

8. The Defence Motion incorrectly relies on article 20(1),⁹ and cases and commentary¹⁰ to argue that the Statute requires a conduct-based test to multiple convictions. But the subject-matter of article 20(1) is entirely different from the question of multiple convictions. The reliance is thus misplaced.

9. Except as provided elsewhere in the Statute,¹¹ article 20(1) prohibits a second or further trial by the Court of a person for conduct which formed the basis of crimes for which he or she has already been convicted or acquitted by the Court. It is not concerned with, and therefore does not prohibit, the conviction of a person in the same trial for multiple crimes based on the same underlying conduct as long as each of the crimes possesses a materially distinct legal element from each other, and the underlying conduct satisfies each of those elements.

10. In the *Bemba et al* case, the Appeals Chamber dismissed a similar objection to multiple convictions which, like the Defence Motion, was based on article 20(1). The Appeals Chamber considered the objection misplaced because article 20(1) “[c]oncerns the question whether a person may be tried more than once for the same conduct. At issue (...) however, is the question of whether a trial chamber, at the end of the trial, may enter multiple convictions if the same conduct fulfils the legal requirements of more than one offence.”¹²

⁹ Defence Motion, paras.9-23.

¹⁰ These include the article's drafting history (Defence Motion, para. 14); the *Katanga* Article 108 decision (Defence Motion, paras.18-20); the case-law of the European Convention on Human Rights (Defence Motion, paras.34-39).

¹¹ This includes article 81(1) (permitting Prosecution appeals against article 74 judgements, including acquittals); article 83(2) (retial); article 84 (concerning the revision of judgment upon discovery of new evidence that was not available at the time of the first trial).

¹² ICC-01/05-01/13-2275-Red A A2 A3 A4 A5 (“*Bemba et al* Appeal Judgment”), para.478.

11. The cases and commentary cited by the Ongwen Defence to support a *conduct-based approach* generally deal with the question of whether a person who has already been convicted or acquitted can be tried again, and how, in those circumstances, the second trial should deal with the underlying conduct. They are not concerned with whether a Trial Chamber can enter multiple convictions at the end of a single criminal trial if the same underlying conduct satisfies the legal elements of more than one crime.

12. The commentary by *Tallgren & Coracini* deals with article 20 of the Statute – including its sub-paragraph 2. This sub-paragraph concerns a second trial in another court of a person already convicted or acquitted by the Court.¹³ The *Katanga* article 108(1) decision has nothing to do with multiple convictions based on the same underlying conduct when entered at the end of a trial.¹⁴ It addresses restrictions on domestic prosecutions or punishment of a person already sentenced by the Court. The *Zolotukhin* judgement of the European Court is concerned with subsequent prosecution following a conviction or acquittal, and its compatibility with article 4 of Protocol No. 7.¹⁵ It appears to endorse a conduct-based approach¹⁶ within a context similar to that envisaged in article 20 of the Statute.

13. In any event, there is no need to import the *conduct-based* approach for article 20(1) situations to resolve multiple convictions based on the same conduct when entered at the end of a trial. A *materially distinct legal-elements* approach is sufficient.¹⁷

14. The broad conduct-based approach for article 20(1) situations appears justified by fairness concerns that may arise from conducting a second trial by the Court of a

¹³ Defence Motion, para.14; fn.8; Annex B.

¹⁴ Defence Motion, paras.17-23.

¹⁵ Defence Motion, paras.34-39. *Sergey Zolotukhin v. Russia*, Application no. 14939/03, Judgment 10 February 2009. Article 4(1) of Protocol No. 7 provides that, “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance the law and penal procedure of that State.”

¹⁶ *Sergey Zolotukhin v. Russia*, paras.59, 78-83.

¹⁷ Defence Motion, e.g., paras.24-33.

person already convicted or acquitted by the Court. The same concerns do not arise in the case of multiple convictions based on the same conduct when entered in the same trial so as to justify a conduct-based approach. In any event, the *materially distinct legal elements* approach to multiple convictions based on the same conduct when entered in the same trial best serves the Rome Statute's goal of ending impunity, while also addressing any fairness concerns.¹⁸

15. Leaving aside the situations set out in the Statute,¹⁹ a second trial of a person who has already been convicted or acquitted by the Court would enable the Prosecution to take a 'second bite' of the cherry. This could unduly prejudice an accused. For instance, relying on the first trial, the Prosecution could seek to improve the presentation of the second trial.²⁰ A second trial by the Court of a person who has already been convicted or acquitted by the Court may also undermine the principle of finality of criminal proceedings. In relation to this principle, the European Court of Human Rights has stated that the principle of legal certainty is one of the fundamental aspects of the rule of law, requiring where courts have finally determined an issue, their ruling should not be called into question.²¹ The concerns, however, do not arise when a person receives multiple convictions based on the same conduct after a trial.

(C). The *materially distinct legal elements* test has been endorsed by the Appeals Chamber

(i) The Appeals Chamber has settled the issue

¹⁸ For further analysis, see below, paras. 21-24.

¹⁹ Including article 81(1) (permitting Prosecution appeal against article 74 judgements, including acquittals); article 83(2) (retrials); article 84 (concerning the revision of judgment upon discovery of new evidence).

²⁰ See also *Grady v. Corbin*, 495 U.S. 508 (1990) (US Supreme Court) – stating as follows in respect of successive prosecutions: “[T]he State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. [The defendant] would be forced to contest each of these trials or to plead guilty to avoid the harassment and expense.”

²¹ *Xheraj v. Albania*, Application 37959/02, Judgement 29 July 2008, para.51.

16. The Motion's request for a *conduct-based approach* to multiple convictions is incorrectly premised on the claim that the legal standard under the Rome Statute for assessing multiple convictions is unsettled.²² Yet, the Appeals Chamber of this Court has already endorsed the *materially distinct legal elements based test* first articulated by the ICTY in the *Delalic et al case* for assessing multiple convictions based on the same underlying conduct or transaction.²³ According to this test – which has also been adopted at other *ad hoc* Tribunals:²⁴

[r]easons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.²⁵

17. The Appeals Chamber of this Court endorsed this test in the *Bemba et al case*.

18. On appeal – and similar to the Motion in this case - Bemba had submitted that “article 20(1) of the Statute prohibits multiple convictions being entered in relation to the same underlying conduct, and, as the focus of this provision is on conduct rather than on the legal elements of the crime, the approach taken at this Court should differ from the approach taken at the *ad hoc* tribunals.”²⁶

19. After recalling that at trial, the Trial Chamber had indeed “sought to determine whether multiple convictions based on the same conduct were permissible”²⁷ by

²² Defence Motion, paras.4-5.

²³ Defence Motion, paras.4-5 and paras.31-34.

²⁴ *Musema v. Prosecutor*, Judgement, ICTR-96-13-A, 16 November 2001, (“*Musema Appeal Judgement*”), para.36; *Prosecutor v. Fofana et al*, Judgement, SCSL-04-14-A, 28 May 2008, para.220; *Prosecutor v. Sesay*, Judgement, SCSL-04-15-T, 2 March 2009 (“*Sesay et al Trial Judgement*”), para.2300.

²⁵ *Delalic et al Appeal Judgement*, para.412.

²⁶ *Bemba et al Appeal Judgment*, para.743 (referring to Bemba's Appeal Brief, para. 19).

²⁷ *Bemba et al Appeal Judgment*, para.750.

applying the test applied in *Delalic et al* case,²⁸ the Appeals Chamber “[found] no error in the Trial Chamber’s reliance on this test.”²⁹

20. Although the Appeals Chamber referred to some limits³⁰ or situations where the *Delalic et al* test may not apply,³¹ this did not undermine its earlier endorsement of the *materially distinct legal elements* test that the Trial Chamber had adopted. Moreover, some of the exceptions identified by the Appeals Chamber are already part of the *Delalic et al* test – and they exist as exceptions to the general principle. For instance, “if one offence is fully consumed by the other offence (...)”³² a conviction is entered only for one of them. Indeed, for example, cumulative convictions for murder and extermination as crimes against humanity based on the same underlying conduct are impermissible. Extermination is killing on a large scale³³—such that the underlying individual killings or murders are subsumed under extermination.³⁴ The Defence does not show that multiple charges in his case fall under such exceptions.

(ii) *The materially distinct legal elements test best serves the object and purpose of the Statute*

21. Even assuming there is any ambiguity in the *Bemba et al* judgement, the *materially distinct legal elements* approach to multiple convictions best promotes the object and purpose of the Statute. There is no need to adopt the ‘conduct-based’ approach in article 20(1).

²⁸ *Bemba et al* Appeal Judgment, para.750.

²⁹ *Bemba et al* Appeal Judgment, para.750.

³⁰ *Bemba et al* Appeal Judgment, para.750. For instance, the Chamber states that the *Delalic et al* test “only addresses the principle of speciality, namely a situation where one of the offences falls entirely within the ambit of another, and therefore only a conviction for the more specific crime is ultimately entered.” *Bemba et al* Appeal Judgment, para.750. However, a close reading of the *Delalic et al* Appeal Judgment shows that the judgement elucidates the test as applying to multiple convictions generally, and only identifies some situations where it may not be applied. See e.g., *Delalic et al* Appeal Judgment, paras.412-413.

³¹ *Bemba et al* Appeal Judgment, para.751.

³² *Bemba et al* Appeal Judgment, para.751.

³³ *Prosecutor v. Milan Lukić & Sredoje Lukić*, Judgement, IT-98-32/1-A, 4 December 2012 (“*Lukić* Appeal Judgement”), para.536; *Bagosora & Nsengiyumva v. Prosecutor*, Judgement, ICTR-98-41-A, 14 December 2011, (“*Bagosora & Nsengiyumva* Appeal Judgement”), para.394.

³⁴ *Bagosora & Nsengiyumva* Appeal Judgement, paras.416, 736; *Ntabakuze v. Prosecutor*, ICTR-98-41A-A, 8 May 2012, (“*Ntabakuze* Appeal Judgement”), para.261.

22. *First*, the fair trial concerns that may justify a conduct-based approach when a second or further trial of a person who has already been convicted or acquitted is sought under article 20, do not readily arise when a Trial Chamber enters multiple convictions based on the same conduct or transaction within the same/first trial. In any event (as shown below), the *Delalic et al* test properly addresses any fair trial concerns.

23. *Second*, the Defence ignores that the *materially distinct legal elements test* ensures that an accused's criminal liability fully reflects all the different crimes arising from his criminal conduct.³⁵ By so doing, the approach contributes to the Statute's object and purpose to end impunity for crimes of concern to the international community.³⁶ These crimes protect diverse values or interests.³⁷ For example, according to the Trial Chamber in *Akeyesu*, "the crime of genocide exists to protect certain groups from extermination or attempted extermination."³⁸ Crimes against humanity "exis[t] to protect civilian population from persecution,"³⁹ while violations of article 3 common to the Geneva Conventions and of Additional Protocol II "protect non-combatants from war crimes in civil war."⁴⁰ In a similar vein, prosecutions at the Court should ensure accountability for all crimes reflected in the accused's criminal conduct.

24. The approach suggested by the Defence – that any underlying criminal conduct of an accused must be charged as one crime (e.g., rape as a war crime)⁴¹ – undermines the objects and purposes of the Rome Statute of ensuring accountability

³⁵ *Prosecutor v. Stakić*, Judgement, IT-97-24-A, 22 March 2006, para.358; *Gatete v. Prosecutor*, Judgement, ICTR-00-61-A, 9 October 2012, para. 261.

³⁶ Statute, preambular, paras.4-5.

³⁷ Before the *Delalic et al* Appeal Judgement elaborated the *materially distinct legal elements test*, cases and litigation at the *ad hoc* Tribunals had considered different factors in resolving issues concerning multiple convictions. For instance, the Trial Chamber in *Akeyesu* considered three factors (a) whether the offences have different elements; (2) whether the provisions creating the offences protect different interests; (3) whether it was necessary to record a conviction for both offences in order to fully describe what the accused did. *Prosecutor v. Akeyesu*, Judgement, ICTR-96-4-T, 2 September 1998, ("Akeyesu Trial Judgement"), para.468. See also *Delalic et al* Appeal Judgment, paras.393-399. These concepts appear to inform some of the elements of the *Delalic et al* test.

³⁸ *Akeyesu* Trial Judgement, para.469.

³⁹ *Akeyesu* Trial Judgement, para.469.

⁴⁰ *Akeyesu* Trial Judgement, para.469.

⁴¹ Defence Motion, para.8.

for all crimes of concern to the international community. It would, for instance, prohibit the following conduct being charged as two separate war crimes of rape and sexual slavery: where an accused kidnaps and detains a non-combatant, and repeatedly rapes and forces her to do all house chores over the course of several months.⁴²

(iii) *The materially distinct legal elements test addresses any fairness concerns*

25. While ensuring full culpability of the accused, the *materially distinct legal elements test* also adequately responds to any fairness or ‘double jeopardy’ issues, thereby rendering the conduct-based approach suggested by the Defence unnecessary. Indeed, at the core of the *materially distinct legal elements test* are fairness considerations.⁴³

26. *First*, as correctly held by the *Bemba et al* Trial Chamber,⁴⁴ multiple convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision has a *materially distinct legal element* not contained within the other.⁴⁵ This means that, if the crimes, however differently described, share the same material legal elements, cumulative convictions cannot be entered.⁴⁶ It also means that the distinct legal elements must be clear – not merely apparent. In this way there should be “ideal concurrence” meaning that the alleged

⁴² See also below, paras.29-30.

⁴³ See e.g., *Delalic et al* Appeal Judgement, para.412; *Kunurac et al* Appeal Judgement, paras.173, 174; *Musema* Appeal Judgement, para.361; *Sesay et al* Trial Judgement, para.2301 (“In applying this test, the Chamber is mindful that it must be guided by the considerations of justice for the Accused, while at the same time ensuring that the convictions ‘describe the full culpability of a particular accused or provide a complete picture of his criminal conduct’”).

⁴⁴ *Bemba et al* Trial Judgement, para.951.

⁴⁵ See also *Delalic et al* Appeal Judgement, para. 412; *Musema* Appeal Judgement, para. 360.

⁴⁶ *Bemba et al* Trial Judgement, para. 951 (emphasising that cumulative convictions are only permissible if the conduct in question clearly violates two distinct provisions of the Statute, each demanding proof of a materially distinct element not required by the others). See also *Sesay et al* Trial Judgement, para.2300.

underlying conduct clearly violated more than one provision of the criminal law.⁴⁷ A contrary position could result in ‘double jeopardy.’

27. *Second*, and related to the above, “if one offence is fully consumed by the other offence (...)”⁴⁸ a conviction is entered only for one of them. In such a situation, there is no *materially* distinct legal element, and there would be a risk of ‘double counting’⁴⁹ if multiple convictions were entered. As noted earlier, one example concerns murder and extermination as crimes against humanity based on the same underlying conduct. Convictions will be entered only for extermination, because the ‘individual’ murders are already ‘counted’ or ‘covered’ under the element of ‘large scale’⁵⁰ killing that is required to prove extermination.⁵¹

28. But merely because, in practical application, the same conduct will support a finding of two crimes does not make the legal elements identical as a matter of law (or for one crime to be subsumed in the other crime) as to prohibit multiple convictions based on the same conduct.⁵² For instance, extermination is not subsumed in genocide merely because the conduct charged in a case for both crimes involved targeting a civilian population. Such targeting is mandatory for extermination, but is not required for genocide. Specific intent is mandatory for genocide, but is not required for extermination.

⁴⁷ Concepts such as “ideal concurrence” were extensively discussed in the *Delalic et al* case, which ultimately concretised the *materially distinct legal elements test*. See *Delalic et al* Appeal Judgment, paras.393-399. These concepts appear to inform some of the elements of the *Delalic et al* test.

⁴⁸ *Bemba et al* Appeal Judgment, para.751.

⁴⁹ The *ad hoc* Tribunals also address the concept of *speciality* – also endorsed by the *Bemba et al* Appeal Judgment, para.750. It is triggered when the *materially distinct legal elements test* is not met, and a Chamber has to decide which of the multiple crimes it will enter a conviction. *Delalic et al* Appeal Judgement, para.413. They have stated the law as follows: “[o]nly convictions under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.” *Semanza* Appeal Judgement, para.315; *Prosecutor v. Krstić*, Judgement, IT-98-33-A, 19 April 2004 (“*Krstić* Appeal Judgement”), para. 218. On this basis, a conviction will be entered for extermination and not for murder as crimes against humanity if based on the same underlying conduct. *Bagosora & Nsengiyumva*, Appeal Judgement, paras.416, 736; *Ntabakuze* Appeal Judgement, para.261.

⁵⁰ *Lukić* Appeal Judgement, para.536; *Bagosora & Nsengiyumva* Appeal Judgement, para.394.

⁵¹ *Ntabakuze* Appeal Judgement, para.261; *Bagosora & Nsengiyumva* Appeal Judgement, paras.416, 736.

⁵² *Krstić* Appeal Judgement, para.226; Defence Motion, paras.40-42.

29. As explained in *Krstić*, “[t]he intent requirement for genocide is not limited to instances where the perpetrator seeks to destroy only civilians. Provided the part intended to be destroyed is substantial, and provided the perpetrator intended to destroy that part as such, there is nothing in the definition of genocide prohibiting, for example a conviction where the perpetrator killed a detained military personnel belonging to a protected group because of their membership in that group. It may be that in practice, the perpetrator’s genocidal intent will almost invariably encompass civilians, but that is not a legal requirement of the offence of genocide.”⁵³ Based on the same example, an additional conviction for the war crime of murder based on the killing of the detained military personnel (or the rape or torture of detained military personnel) is not impermissible. These war crimes contain materially distinct elements not required for the other offences (i.e., of genocide or crimes against humanity) – including the *war nexus* requirement. Similarly, the other offences (i.e., genocide and crimes against humanity) contain materially distinct legal elements not required for the war crimes. Genocide requires proof of specific intent, and crimes against humanity require proof of a widespread or systematic attack against a civilian population. It also follows from these examples that the Defence Motion’s objection to the multiple charges summarised in paragraph 40 should be dismissed.⁵⁴

⁵³ *Krstić* Appeal Judgement, para.226.

⁵⁴ See also *Bagosora & Nsengiyumva* Appeal Judgement, para.415 (permitting cumulative convictions for murder as a crime against humanity and violence to life as a war crime); *Prosecutor v. Galić*, Judgement, IT-98-29-A, 30 November 2006, para.165 (permitting cumulative convictions for acts or threats of violence as war crimes and murder and inhumane acts as crimes against humanity); *Prosecutor v. Kunarac et al*, IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al* Appeal Judgement”), para.179 (allowing cumulative convictions for rape and torture as separate crimes against humanity. They contain materially distinct legal elements: “[A]n element of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime”); *Kunarac et al* Appeal Judgement, para.196 (allowing cumulative convictions for rape and enslavement as crimes against humanity. On the same reasoning, the Appeals Chamber upheld cumulative convictions for rape and torture as war crimes); *Prosecutor v. Kordić & Čerkez*, Judgement, IT-95-14/2-A, paras.1041-1042 (upholding cumulative convictions for murder and persecution as crimes against humanity; and other inhumane acts and persecution as crimes against humanity. Among others, the specific intent to discriminate required for persecution, is not mandatory for the other crimes).

30. *Third*, and consistent with the above principles, an element is materially distinct from another if it requires proof of a fact not required by the other element.⁵⁵ This means that the evidence or the underlying conduct must satisfy the materially distinct elements of each of the respective crimes for cumulative convictions to be imposed. It also means that, although the accused's underlying conduct is the same, it must be such as to meet the distinct material legal elements of each of the multiple crimes.

31. *Finally*, to avoid 'inflating punishment' on the basis of cumulative convictions, a Trial Chamber may consider multiple convictions in determining a sentence,⁵⁶ and in ordering that sentences be served concurrently.⁵⁷ The *ad hoc* Tribunals took similar approaches when applying the *materially distinct legal element test* to multiple convictions in order to address any question of overlap among the crimes at the factual level.⁵⁸

(D) Contextual elements are elements of crimes and relevant in the application of the *materially distinct legal element test*

32. The Trial Chamber should dismiss the Defence's argument that the contextual *chapeau* elements of the crimes should be ignored when assessing cumulative convictions.⁵⁹ The Defence request is based on a separate opinion in the *Delalic et al* case,⁶⁰ in which they argued, among others, that *chapeau* elements did not relate to the conduct and mental state of the accused person.⁶¹ But the majority in that case correctly disagreed with it.

⁵⁵ *Bemba et al* Trial Judgment, para. 951; *Delalic et al* Appeal Judgment, para.412; *Musema* Appeal Judgment, para.360.

⁵⁶ *Bemba et al* Trial Judgment, para. 956.

⁵⁷ ICC-01/05-01/08-3399 (*Bemba* Sentencing Judgement), para.95.

⁵⁸ *Delalic et al* Appeal Judgement, para.428; *Musema* Appeal Judgement, para. 360.

⁵⁹ Defence Motion, paras.43-44.

⁶⁰ Defence Motion, paras.43-44, referring to the Separate and Dissenting Opinion of Judge Hunt and Bennouna, paras.32-33.

⁶¹ *Delalic et al* Appeal Judgement, Separate and Dissenting Opinion of Judge Hunt and Bennouna, paras.32-33; Defence Motion, para.43-44

33. Contextual elements are mandatory constituent components of the crimes in the Court's jurisdiction. They are part of the definition of the crimes and form an integral part of any case brought against a person charged with crimes at the Court.⁶² They engage an accused's criminality and form part of any convictions that may be entered under article 74.⁶³ Indeed, the Document Containing the Charges must plead the relevant facts concerning contextual elements.⁶⁴ And if during the confirmation proceedings, they are not proven to the requisite degree, the person cannot be tried at the Court.⁶⁵

34. The plain terms of the *chapeau* of crimes in article 7 of the Statute specifically state that "for the purpose of this Statute, "crimes against humanity" means any of the following acts *when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.*"⁶⁶

35. Moreover, "[i]n the Elements of Crimes, the nexus element is one of the legal requirements for establishing the commission of acts such as murder and rape as crimes against humanity and is thus developed as a constituent element of each underlying offence."⁶⁷ Any charged act therefore is 'incomplete' without establishing a 'bridge' or 'nexus' with the contextual elements.

36. The nexus requirement also means that the underlying or charged offence and the contextual elements are not 'stand-alone' components of the case against a person charged with crimes at the Court. They are part and parcel of it. Indeed, although the underlying charged acts/offence "does not need to constitute the [widespread or systematic] attack", it must "form a part of the attack" or, "comprise

⁶² ICC-01/05-01/08-424 (*Bemba* Confirmation Decision), para.85; ICC-01/04-01/10-465-Red (*Mbarushimana* Confirmation Decision), para.244.

⁶³ Defence Motion, paras.43-44.

⁶⁴ ICC-01/05-01/08-3636-Red, (*Bemba* Appeal Judgment), para.117.

⁶⁵ *Mbarushimana* Confirmation Decision, paras.244-267.

⁶⁶ Article 7(1); Emphasis added.

⁶⁷ *Bemba* Confirmation Decision, para.85.

[...] part of a pattern of widespread and systematic crimes directed against a civilian population.”⁶⁸

37. Finally, contextual elements engage the suspected person’s conduct or criminality.⁶⁹ For instance, the plain terms of the *chapeau* of article 7 specifically require that the suspect must perpetrate the charged acts “as part of a widespread or systematic attack against any civilian population, *with knowledge* of the attack.”⁷⁰ The suspect must thus act at least knowingly.⁷¹ The same applies to war crimes. As stated in the *Mbarushimana* Confirmation Decision, “in accordance with the Elements of Crimes, the war crimes charged by the Prosecution require that (a) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (b) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.”⁷²

38. It follows therefore that contextual elements must form part of any assessment of whether multiple convictions should be entered when the different charges are based on the same underlying conduct. Indeed, as emphasised by the *ad hoc* Tribunals, in applying the *materially distinct legal element test*, a Chamber must take account of all the legal elements of the crimes, including those contained in the *chapeau* or introductory paragraphs.⁷³ Accordingly the Defence’s arguments in this respect must be rejected.

⁶⁸ *Prosecutor v. Kunarac et al* , Judgement, IT-96-23-T and IT-96-23/1-T, 22 February 2001, para.417, citing *Prosecutor v. Tadić*, Judgement, IT-94-1-A, 15 July 1999, paras.248, 255.

⁶⁹ Defence Motion, paras.43-44.

⁷⁰ Article 7(1); Emphasis added

⁷¹ *Bemba* Confirmation Decision, para.74; ICC-01/05-01/08-3343 (*Bemba* Trial Judgement), para.164.

⁷² *Mbarushimana* Confirmation Decision, para.93.

⁷³ *Prosecutor v. Nahimana et al* , Judgement, ICTR-99-52-A, Appeal Judgement, para.1019; *Musema* Appeal Judgement, para.363; *Kunarac et al* Appeal Judgement, para.177; *Sesay et al* Trial Judgement, para.2302.

III.CONCLUSION

39. Based on the foregoing, the Prosecution requests the Trial Chamber to dismiss the Defence Motion.



Fatou Bensouda, Prosecutor

Dated this 20th day of December 2019
At The Hague, The Netherlands