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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

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

Public Document

**CLRV Response to Defence “Motion for Immediate Ruling on Standard to Assess
Multiple Charging and Convictions”**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. The Common Legal Representative of the Victims¹ (the “CLR”) submits that the Defence “Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions” (the “Motion”)² should be rejected *in limine* as untimely. Indeed, as already ruled by the Chamber in relation to previous Defence’s requests, motions challenging the formulation of the charges must be brought in a timely manner after they arise and the issue of multiple charges was certainly known to the Defence since the beginning of this proceedings.

2. In any event, the CLRV opposes the Motion and posits that the Defence’s arguments are unfounded. The Defence does not identify a proper legal basis for its Motion and portrays the existing jurisprudence on the matter incorrectly. Moreover, the Defence simply disagrees with the jurisprudence developed by various Chambers of this Court and fails to demonstrate that the relevant jurisprudence is legally erroneous or inapplicable to the specific features of this case.

II. PROCEDURAL BACKGROUND

3. On 18 January 2016, the Defence filed the “Defence Brief for the Confirmation of Charge Hearing” arguing that “*charging someone for multiple crimes stemming from*

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-350](#), 27 November 2015, p.19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/15-369](#), 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. [ICC-02/04-01/05-384](#), 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. [ICC-02/04-01/15-445](#), 26 May 2016, para. 13.

² See the “Motion for Immediate Ruling on Standard to Assess Multiple Charging and Convictions”, No. [ICC-02/04-01/15-1697](#), 10 December 2019 (the “Motion”).

*the same act, no matter how serious, directly contradicts principles of justice”.*³ The Defence further submitted *“that cumulative convictions have the same effect as the retrial of the same conduct and should therefore not be allowed on the basis of the principle of ne bis in idem.”*⁴ The Defence also argued that *“cumulative charges are only permissible where those charges require proof of different facts in order to be established”*.⁵

4. On 23 March 2016, Pre-Trial Chamber II issued the “Decision on the confirmation of charges against Dominic Ongwen” considering that *“when the relevant evidentiary standard is met, the Prosecutor shall be allowed to present cumulative charges at trial and that deference shall be given to the Trial Chamber, which, following a full trial, will be better placed to resolve questions of concurrence of offences.”*⁶ Pre-Trial Chamber II also noted that the Defence had relied on minority opinions from the *ad hoc* Tribunals.⁷ It further underlined that *“[i]ndeed, and importantly, certain crimes under the Statute may, although based on the same set of facts, be not alternative to each other, but concurrently lead to a conviction. Notably, this is the case when each of these crimes requires proof of a distinct legal element or offends a different protected interest.”*⁸

5. On 29 April 2019, in its “Decision on the Defence request for leave to appeal the decision on the confirmation of charges”, Pre-Trial Chamber II noted that the Defence did not seek leave to appeal said issue⁹ and later reiterated that *“questions*

³ See the “Defence Brief for the Confirmation of Charge Hearing”, No. ICC-02/04-01/15-404-Conf, 18 January 2016. The latest public reacted version of this submission was filed on 25 May 2016, see No. [ICC-02/04-01/15-404-Red3](#), para. 68.

⁴ *Idem*, para. 72.

⁵ *Idem*, para. 81.

⁶ See the “Decision on the confirmation of charges against Dominic Ongwen” (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Conf, 23 March 2016, paras. 29-33. A public redacted version was filed the same day, see No. [ICC-02/04-01/15-422-Red](#) (the “DCC”), para. 33 (Emphasis added).

⁷ *Idem*, para. 29.

⁸ *Idem*, para. 32 (Emphasis added).

⁹ See the “Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision”, No. [ICC-02/04-01/15-423](#), 29 March 2016.

concerning concurrence of offences are better addressed by the Trial Chamber upon airing the entirety of the evidence".¹⁰

6. On 23 October 2019, the Presiding Judge of Trial Chamber IX issued the Decision modifying the deadline regarding closing briefs and closing statements ruling that any closing briefs have to be filed by 26 February 2020 and that the closing statements will commence on 10 March 2020.¹¹ Finally, on 4 December 2019, following a Defence's Request to reconsider and postpone the date of the closing statements,¹² the Chamber preponed the deadline for the submission of the closing briefs to 19 February 2020.¹³

7. On 10 December 2019, the Defence filed the Motion.¹⁴

8. On 12 December 2019, Trial Chamber IX declared the closing of the submission of evidence in the case.¹⁵

III. SUBMISSIONS

9. In the Motion, the Defence seeks an immediate ruling on the standard for multiple convictions, *"in order [...] to prepare properly prior to closing arguments and briefs"*.¹⁶ It argues that *"[m]ultiple convictions should be barred not only when the legal elements of one crime subsume the elements of another crime, but also when the same conduct*

¹⁰ See the "Decision on the Defence request for leave to appeal the decision on the confirmation of charges" (Pre-Trial Chamber II), No. [ICC-02/04-01/15-428](#), 29 April 2016, para. 38 (Emphasis added).

¹¹ See the "Modification of Deadline Regarding Closing Briefs and Setting of Dates for Closing Statements" (Trial Chamber IX, Presiding Judge), No. [ICC-02/04-01/15-1645](#), 23 October 2019.

¹² See the "Defence Request to Change the Start Date of the Closing Statements", No. [ICC-02/04-01/15-1668](#), 14 November 2019.

¹³ See the "Decision on Defence Request to Reconsider the Date of the Closing Statements" (Trial Chamber IX, Presiding Judge), No. [ICC-02/04-01/15-1691](#), 4 December 2019.

¹⁴ See the Motion, *supra* note 2.

¹⁵ See the "Declaration on the Closure of the Submission of Evidence" (Trial Chamber IX), No. [ICC-02/04-01/15-1699](#), 12 December 2019.

¹⁶ See the Motion, *supra* note 2, para. 1.

*is charged as multiple offences.”¹⁷ Thus, the Defence asks the Chamber to adopt a *conduct test* as the standard for assessing multiple charges and convictions *in lieu* of an *elements test*; or, in the alternative, should the Chamber adopt the elements test, to focus its analysis solely on a comparison of the *actus reus* and the *means rea* elements, excluding the contextual *chapeau* elements of the crimes concerned.¹⁸ Moreover, the Defence states that “[p]ursuant to a *conduct test*, only one conviction can be sustained for the same underlying conduct [...] [which] has significant ramifications in this case where the same underlying conduct is repeatedly charged as both a war crime and a crime against humanity, as two or more crimes against humanity, or as two or more war crimes”.¹⁹*

1. The Motion should be rejected *in limine*

10. The CLRV submits that the Motion is untimely and is filed without providing a proper justification as to why the Chamber should suddenly issue an immediate ruling, instead of addressing the relevant issues as part of its assessment of the evidence for the purpose of articles 74 and 76 Judgments.

11. As already entertained by the Chamber in relation to previous Defence’s requests: “[...] *motions challenging the formulation of the charges must be brought in a timely manner after they arise. Rule 134(2) of the Rules requires that motions alleging defects in the confirmation decision may not, as a general rule, be brought after the commencement of trial. The Defence files its challenges on the formulation of the charges after the commencement of trial, the Prosecution’s evidence presentation and part of the Defence’s evidence presentation. It does so without sufficient justification for the timing of its motions. As such, the Chamber dismis[s]e[d] these arguments in limine. [...] The Chamber will decide*

¹⁷ *Idem*, para. 3.

¹⁸ *Idem*, paras. 43-44.

¹⁹ *Idem*, para. 8.

upon the proper legal interpretation of the charged crimes and modes of liability in the applicable law of its judgment."²⁰

12. The CLRV submits that the Motion is not different from the Defence's previous requests with regard to the formulation of the charges and thus should have been filed at the beginning of the trial, or, at the very least, at any time before the start of the presentation of the Defence's evidence. Indeed, if the Defence's arguments were correct to the effect that its case and its presentation of evidence heavily depended on the charges formulated, no Defence case could have been presented. Yet, the Defence efficaciously presented its evidence without needing an urgent ruling from the Chamber with regards to cumulative charging and convictions. Moreover, and despite of the purported necessity of such a ruling, the Defence had already announced its *defences*. The next step in this proceedings is the issuance of articles 74 and 76 Judgments in light of the totality of the evidence presented before the Chamber at trial.

13. The CLRV submits further that, in the Motion, the Defence simply disagrees with the jurisprudence developed by various Chambers of the Court²¹ and fails to demonstrate that the relevant jurisprudence on the matter is legally erroneous or inapplicable to the specific features of this case. Indeed, the issue is *res judicata*. Moreover, the Motion seems to confuse various legal issues and lacks legal basis.

14. Furthermore, the CLRV underlines that the Defence does not explain how not having such an immediate ruling would be prejudicial to the Accused. It merely raises arguments concerning its workload and Defence's strategies which do not themselves amount to a situation compelling the Chamber to render such a ruling. For instance, the Defence does not allege that the current charging practice renders impossible the preparation of its case. It merely states that the charges in this case

²⁰ See the "Decision on Defence Motions Alleging Defects in the Confirmation Decision" (Trial Chamber IX), No. [ICC-02/04-01/15-1476](#), 7 March 2019, paras. 36-37 (Emphasis added).

²¹ See the Motion, *supra* note 2, paras. 31-33.

“force” it to choose to present a defence and “argue the issue in the alternative, using up many critical pages in the brief that could be used to articulate other issues.”²² The CLRV submits that this, as burdensome as it may appear to be, does not equate and certainly does not qualify as a proper legal basis for the Motion.

2. The Defence merely disagrees with the existing jurisprudence of the Court

15. The law of this Court on the matter of cumulative charging is clear. It has recently been applied again by Trial Chamber VI in its Judgment in the *Bosco Ntaganda* case.²³ In said case, the Chamber ruled that it “can enter multiple convictions under different provisions of the Statute for the same conduct only if each statutory provision at stake has a ‘materially distinct’ element not contained in the other, i.e. an element which requires proof of a fact not required by the other. It is the legal elements of each statutory provision and not the acts and/or omissions of the accused that must be considered when applying the aforementioned test. Further, for the purpose of this determination, all elements, including the contextual elements, should be taken into account. Where the offences are not materially distinct, only a conviction under the more specific provision should be entered as the more specific offence subsumes the less specific one. Such a test ensures that an accused is convicted only for distinct offences and, at the same time, that the convictions entered fully reflect his or her criminality. However, where the same conduct underlies multiple convictions, this ought to be taken into account at the sentencing stage.”²⁴ In so doing, Trial Chamber VI referred to the jurisprudence developed by other trial chambers in the *Bemba et al.*, *Bemba* and *Katanga* cases. As mentioned *supra*, this approach was confirmed by the Appeals Chamber in the *Bemba et al.* case where it ruled that: “[t]he Trial Chamber thereafter sought to determine whether multiple convictions based on the same conduct were permissible. In so doing, the Trial Chamber applied the same test used by the ad hoc tribunals, namely the test articulated in the *Delalic et al.* case. The Appeals Chamber

²² *Idem*, para. 1.

²³ See the “Judgment” (Trial Chamber VI), No. [ICC-01/04-02/06-2359](#), 8 July 2019, paras. 1202 to 1206 (Emphasis added).

²⁴ *Idem*, para. 1202 (Emphasis added).

finds no error in the Trial Chamber's reliance on this test. The Appeals Chamber, however, is mindful that the Delalic et al. test only addresses the principle of speciality, namely a situation where one offence falls entirely within the ambit of another, and therefore only a conviction for the more specific crime is ultimately entered. The Appeals Chamber notes that it is arguable that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements, for instance if one offence is fully consumed by the other offence or is viewed as subsidiary to it. However, the Appeals Chamber will not dwell on this question any further in the context of the present case.”²⁵

16. Trial Chamber VI in the *Bosco Ntaganda* case further concurred “with Trial Chamber II and III and the ad hoc tribunals that war crimes and crimes against humanity have materially distinct elements, each requiring proof of a fact not required by the other. The crime against humanity of murder requires the existence of a widespread or systematic attack against a civilian population and a nexus between the perpetrator's conduct and the attack, while the war crime of murder requires that the victim was either hors de combat or was not taking part in hostilities and that the conduct in question was connected to an armed conflict. Similarly, the war crime of rape and the crime against humanity of rape as well as the war crime of sexual slavery and the crime against humanity of sexual slavery are permissibly cumulative since these crimes against humanity require the existence of a widespread or

²⁵ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red](#), 8 March 2018, 21 November 2011, paras. 750 and 751 (Emphasis added). See also the Delalic et al. Appeal's Judgement: International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Mucic et al.*, Case No. IT-96-21, [Judgement](#) (Appeals Chamber), 20 February 2011, paras. 412-413 which in the relevant part reads as follows: “[h]aving considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons 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. Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision”.

systematic attack against a civilian population and a nexus between the perpetrator's conduct and the attack, while these war crimes require that the conduct in question was connected to an armed conflict. The Chamber thus finds that Mr Ntaganda's conviction for murder as a crime against humanity and as a war crime, rape as a crime against humanity and as a war crime, and sexual slavery as a crime against humanity and as a war crime, for the same underlying conduct, is permissible, but will take into account for sentencing that the same conduct underlies several of the convictions."²⁶

17. In addition, specifically with regard to the Defence's contentions in relation to alleged overlapping crimes against humanity of rape and sexual slavery, the CLRV refers to the Decision of Trial Chamber VI "[which recalled] *its findings on sexual slavery [as being], in part, based on the same underlying conduct as its findings of rape. In this respect, the Chamber notes that rape requires the invasion of the body of a person by conduct resulting in penetration, however slight, committed under certain specific circumstances, while the act(s) of a sexual nature required for the crimes of sexual slavery do not require penetration. Moreover, the crimes of sexual slavery require that the perpetrator exercised any or all of the powers attaching to the right of ownership over the victim; an element not required for the crime of rape to have been committed. Convicting for rape as a war crime and as a crime against humanity and for sexual slavery as a war crime and as a crime against humanity, when based on the same underlying conduct, is therefore legally permissible.*"²⁷

18. Therefore, the CLRV posits that the Motion is groundless as it is not founded on any precise legal basis. It only refers to "*statutory interpretation and general criminal law principles*" which allegedly justify its submission that "*the Statute bars crimes that are based on the same underlying conduct*"²⁸ without further development. This is grossly insufficient for the remedy that the Defence now asks from the Chamber.

²⁶ See the "Judgment", *supra* note 23, para. 1203 (Emphasis added).

²⁷ *Idem*, para. 1204 (Emphasis added).

²⁸ See the Motion, *supra* note 2, para. 3.

3. The Defence's interpretation of Article 20 of the Rome Statute is incorrect

19. The CLRV submits further that the Motion is based on a wrong interpretation of article 20 of the Rome Statute. The Defence argues that the *ne bis in idem* principle “is determinative law in a decision on the parameters of multiple convictions”²⁹ and that “the ICC Statute uses a complex *ne bis in idem* approach”.³⁰

20. The CLRV recalls the Appeals Chamber's earlier determination on this issue in which it considered “Mr Bemba's arguments relating to article 20 (1) of the Statute to be misplaced. That provision concerns the question of whether a person may be tried more than once for the same conduct. At issue here, however, is the question of whether a trial chamber, at the end of a trial, may enter multiple convictions if the same conduct fulfils the legal elements of more than one offence.”³¹ In the same vein, the Appeals Chamber rejected - as being without merit - Mr. Bemba's argument that the imposition of both a fine and a term of imprisonment for the same offences require consideration of the principle of *ne bis in idem* enshrined in article 20 of the Statute.³²

21. Moreover, the examples cited by the Defence from the European Court of Human Rights³³ do not concern the issue of multiple charging and convictions in the same case before the same tribunal. While stressing the use of the word “conduct”, the Defence ignores the fact that the same provision also associates without ambiguity to this word the terms “which formed the basis of crimes for which the person has been convicted or acquitted by the Court.” The same goes for the jurisprudence cited by the Defence in support of its argumentation, notably the Presidency Decision in

²⁹ *Idem*, paras. 6 and 9 to 23.

³⁰ *Idem*, para. 24.

³¹ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute””, *supra* note 25, para. 748 (Emphasis added).

³² See the “Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Decision on Sentence pursuant to Article 76 of the Statute”” (Appeals Chamber), No. [ICC-01/05-01/13-2276-Red](#), 8 March 2018, para. 201.

³³ See the Motion, *supra* note 2, paras. 34 to 39.

the *Katanga* case³⁴ and commentaries.³⁵ Even if the drafters intended the word *conduct* to carry a broader meaning than the term *crime* for the purposes of subsequent prosecutions,³⁶ the key element remains that it would play a role in the context of “*subsequent*” prosecutions and is hence not applicable to the case at hand.

22. Moreover, the principle of lenity cannot require an interpretation of the Statute that would exclude the contextual *chapeau* elements of the crimes charged.³⁷ Thus, the Defence’s arguments to the effect that “*criminal culpability would remain for the underlying conduct and the sentence would reflect that harm*”³⁸ is not tenable. The jurisprudence cited by the Defence in the *Bemba* case at pre-trial³⁹ did not correctly portray either the conducts of the alleged perpetrators or the sufferings of the victims. Indeed, by considering the crimes of torture and outrages against personal dignity *fully subsumed* by the crime of rape, all individual victims of torture without the additional act of penetration were automatically excluded from the proceedings. The CLRV submits that such an incoherent reasoning should not be adopted in this case.

23. Moreover, in arguing that “*the dominant interpretation in the ICC case law to date erroneously follows the ICTY and ICTR precedent rather than understanding the different approach in the Rome Statute*”,⁴⁰ the Defence fails to articulate exactly what other approach the Statute should employ and what legal principle must underpin it. The alleged complexity of the *ne bis in idem* principle enshrined in article 20 does not justify the Defence’s arguments.

³⁴ See the Motion, *supra* note 2, para. 18.

³⁵ *Idem*, paras. 18-20.

³⁶ *Idem*, para. 21.

³⁷ *Idem*, paras. 23 and 44.

³⁸ *Idem*, paras 43-44.

³⁹ *Idem*, para. 31.

⁴⁰ *Idem*, para. 39.

24. Lastly, the CLRV submits that the jurisprudence of this Court makes a distinction between cumulative charging and convictions and sentencing. In this regard, Trial Chamber VI held that “[it was] *mindful of the Appeals Chamber’s consideration that a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences, even if these offences have different legal elements, such as where one offence is fully consumed by the other offence or is viewed as subsidiary to it. In this regard, the Chamber [recalled] its findings on the second legal element of sexual slavery, both as a crime against humanity and as a war crime, are based on its findings that the victims concerned had been subjected to rape by members of the UPC/FPLC. For the purpose of sentencing, the Chamber will thus take into account that some of the conduct underlying the convictions for rape and sexual slavery is the same.*”⁴¹

25. Finally, the CLRV submits that the interests of victims would be gravely jeopardised should the Chamber follow the Defence’s erroneous interpretation of article 20 of the Statute in relation to the question of multiple charging and convictions. As mentioned at the confirmation hearing, the CLRV strongly believes that “*in order to ensure fairness towards the victims and fully depict their sufferings, the charges must reflect the totality of Mr Ongwen’s liability.*”⁴² As long as facts and conducts correspond to the legal elements of crimes in the Statute and reflect correctly the sufferings of the victims of these acts, the CLRV posits that alleged social stigma faced by an accused should not be determinative.⁴³

⁴¹ See the “Judgment”, *supra* note 23, para. 1205 (Emphasis added).

⁴² See the transcript of the hearing held on 25 January 2016, No. [ICC-02/04-01/15-T-22-ENG ET WT](#), p. 18, lines 11 to 21 (Emphasis added).

⁴³ See the “Defence Brief for the Confirmation of Charge Hearing”, *supra* note 3, para. 79.

IV. CONCLUSION

26. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Motion *in limine*. In the alternative, the CLRV requests the Chamber to reject the Motion as unfounded.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 20th day of December 2019

At The Hague, The Netherlands