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International Criminal Court

Original: English **No. ICC-02/04-01/15 A**
Date: 23 December 2021

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding**
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public

OBSERVATIONS OF THE ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE INTERNATIONAL COURTS AND TRIBUNALS (ADC-ICT) AS *AMICUS CURIAE* REGARDING QUESTIONS POSED BY THE APPEALS CHAMBER IN *PROSECUTOR v. ONGWEN*

Source: **Association of Defence Counsel Practising before the International Courts and Tribunals (ADC-ICT)**

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I. Introduction

1. This brief is filed following the Appeals Chamber's "Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)"[1] and "Decision on the requests to file observations pursuant to rule 103 of the Rules of Procedure and Evidence".[2]

2. The Association of Defence Counsel practising before the International Courts and Tribunals (ADC-ICT) files observations on four of the five issues raised by the Appeals Chamber:

> *i) the legal interpretation of article 31(1)(a) and (d) of the Statute concerning grounds for excluding criminal responsibility;*
> *(ii) evidentiary issues relating to mental disease or defect;*
> *(iii) the burden of proof when asserting a ground for excluding criminal responsibility; and the standard of proof applicable to the assessment of mental disease or defect or duress; and*
> *(v) the permissibility or otherwise of entering cumulative convictions when the conduct in question violates two or more distinct provisions of the Statute.*[3]

II. Observations related to excluding criminal responsibility

3. As the three sub-questions raised in the Appeals Chamber's first area of interest overlap to a large degree, the ADC-ICT addresses them together.

4. The ADC-ICT submits that (1) the affirmative defences enumerated in Article 31(a) and (d) of the Statute, if proved, serve as a complete bar to a conviction; (2) even if the conditions required to exclude criminal responsibility are not met, the defences may be used as mitigation when determining the sentence imposed, if relevant; and (3) while the Prosecution always maintains the burden to prove its case beyond a reasonable

[1] *Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15 A, Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), dated 25 October 2021, (hereinafter "Order Inviting Expressions of Interest").
[2] *Prosecutor v. Dominic Ongwen*, No. ICC-02/04-01/15 A, Decision on the requests to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, dated 24 November 2021.
[3] Order Inviting Expressions of Interest, para. 19.

doubt, an accused opting to present an affirmative defence under Article 31 must establish that defence by a preponderance of the evidence.

5. The legislative history of the Rome Statute suggests the drafters intended to distinguish the Statute from the contemporaneous jurisprudence at the *ad hoc* tribunals regarding affirmative defences.

6. The ADC-ICT draws the Appeals Chamber's attention to the 1997 *Erdemović* decision[4] at the International Criminal Tribunal for the former Yugoslavia (ICTY), not only for the legal principles addressed therein, but more importantly for the context in which the decision took place vis-à-vis the negotiations over the Rome Statute that took place shortly after.

7. In *Erdemović*, the ICTY Appeals Chamber faced for the first time the question of an affirmative defence (duress) and its impact on the crimes charged.[5] The ICTY Statute provided no guidance on the matter,[6] leaving the judges to look elsewhere for legal authority. Through four written opinions, the judges surveyed international and domestic jurisprudence and statutory provisions. Three judges, forming the majority opinion, decided that duress was not a complete defence,[7] with one judge specifically finding that it could be used only in mitigation.[8] Two dissenting judges, viewing the same international and domestic jurisprudence and statutory provisions, reached the opposite conclusion—that duress was a complete bar to conviction.[9]

8. Thus, five ICTY judges, by a bare majority looking at the same law, reached different conclusions. It is not out of the question that a different composition of the Appeals Chamber would have ruled differently. In any event, all five judges appeared to agree that there was no clear rule regarding affirmative defences that could be discerned.

[4] ICTY, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, (Appeal) Judgement, 7 October 1997.
[5] The *Erdemović* Trial Chamber, in its Sentencing Judgement, held that the Statute provided no guidance and referred to the Secretary-General's report proposing the ICTY Statute as suggesting duress was a mitigating circumstance. ICTY, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996, paras. 16-17, *referring* to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993.
[6] ICTY, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 13, (hereinafter "Stephen Opinion").
[7] ICTY, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 88; ICTY, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, 7 October 1997, para. 12, (hereinafter "Li Opinion").
[8] Li Opinion, para. 12.
[9] Stephen Opinion, paras. 24, 26, 64, 66; ICTY, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, paras. 12, 47.

Subsequent cases at the ICTY did not rely on the defence of duress in any meaningful sense, leaving the *Erdemović* majority position largely undisturbed.

9. Shortly after the *Erdemović* decision, a collection of scholars and lawyers negotiated the terms of the Rome Statute.[10] Instead of adopting the approach of the ICTY as set out in *Erdemović* permitting affirmative defences only in mitigation, the drafters of the Rome Statute included these affirmative defences as "excluding criminal responsibility."[11] This clearly expresses a different approach to the listed defences than the narrower approach taken by the ICTY. As one scholar put it, the consequence of Article 31 of the Rome Statute was to "set aside the precedent established by the [ICTY] and to reinstate the defence of duress."[12]

10. A year later, ICTY defendant Esad Landžo raised at trial the defence of diminished or lack of mental capacity.[13] The Trial Chamber ruled that the burden of proof for this affirmative defence remained on the accused and the standard of proof to prove the defence was by a balance of probabilities.[14] The Appeals Chamber affirmed the defence of lack of mental capacity placed the burden of proof on the accused, requiring proof "that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong."[15] The Appeals Chamber referred to the Rome Statute as part of its analysis, seeking to distinguish the concepts of destruction (complete) of mental capacity from partial or diminished capacity.[16] The destruction of capacity mentioned in the Rome Statute, which the Appeals Chamber likened to an insanity defence, results in an acquittal.[17] The

[10] *See, e.g.*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, A/Conf.183/C.1/SR.1.
[11] Rome Statute, Art. 31.
[12] Schabas, William A., An Introduction to the International Criminal Court, 4th Ed., Cambridge University Press, 2011, p. 242.
[13] ICTY, *Prosecutor v. Delalić et al*., Case No. IT-96-21-T, Judgement, 16 November 1998, para. 78, (hereinafter "*Delalić* Trial Judgement"); *see also*, ICTY, *Prosecutor v. Delalić et al*., Case No. IT-96-21-T, Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998. The *Delalić et al.* case is commonly referred to as the *Čelebići* case.
[14] *Delalić* Trial Judgement, paras. 1160, 1172.
[15] ICTY, *Prosecutor v. Delalić et al*., Case No. IT-96-21-A, (Appeal) Judgement, 20 February 2001, para. 582, (hereinafter "*Delalić* Appeal Judgement").
[16] *Delalić* Appeal Judgement, para. 587.
[17] *Id.*

Appeals Chamber held that, before the ICTY, diminished capacity was a matter of mitigation in sentencing only.[18]

11. Legal scholars have similarly drawn this distinction between complete and partial incapacity,[19] although it is worth noting that some have suggested that "destruction" of capacity is an "unrealistic hurdle", and that something between substantial impairment and destruction would be more appropriate.[20]

12. The Rome Statute provides no guidance in terms of the scope of Article 31. Considering ICTY jurisprudence at the time of Rome Statute negotiations, the drafters of the Rome Statute demonstrated a clear departure from ICTY position. Indeed, the ICTY Appeals Chamber recognized immediately thereafter that the language of Article 31 did not follow the line of reasoning at the ICTY. With this in mind, the only reasonable reading of Rome Statute is that drafters envisaged that the defences in Article 31, if proven, constituted complete defences. Partial proof, while not constituting a complete defence, may still be used as mitigating circumstances during the sentencing phase.

13. The Rome Statute provides little guidance regarding the burden and standard of proof for affirmative defences, beyond the unassailable maxim that the burden of proof for the crimes charged never leaves the Prosecution. [21] For the crimes charged, the defence only has to demonstrate reasonable doubt, which it can do even in the absence of leading affirmative evidence or presenting a defence.[22] The Article 31 grounds for excluding criminal responsibility, however, are "excuses" that negate the culpability of the defendant.[23] Where the defence opts to invoke Article 31, the defence bears the responsibility to prove that defence to a preponderance of the evidence, particularly where the defence is based on information in possession of the defence only.[24] To be

[18] *Delalić* Appeal Judgement, para. 590.
[19] *See*, *e.g.*, Cryer et al, An Introduction to International Criminal Law and Procedure, 3rd Ed., Cambridge University Press, 2014, p. 401; Ohlin, Jens, "Mental Disease", in Cassese, Antonio (ed.), The Oxford Companion to International Criminal Justice, Oxford University Press, 2009, p. 415, (hereinafter "Ohlin").
[20] Code of International Criminal Law and Procedure, Annotated, Larcier Law Annotated, 2013, Paul De Hert, Jean Flamme, Mathias Holvoet, Olivia Struyven, eds., Art. 31, 3.3; *citing*, Eser, A., "Article 31: Grounds for Excluding Criminal Responsibility" in O. Tritterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Munich/Oxford/Baden-Baden/Hard/Nomos, 2008, p. 875.
[21] According to Article 66(2) of the Rome Statute, "the onus is on the Prosecutor to prove the guilt of the accused." Article 66(2) should be read together with Article 67(1)(i) which establishes the right of the Accused "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal."
[22] Rohan, Collen, "Reasonable Doubt Standard of Proof in International Criminal Tribunals", in Principles of Evidence in International Criminal Justice, Karim A.A. Khan, Caroline Buisman, and Christopher Gosnell, eds., Oxford University Press, 2010, p. 664, (hereinafter "Rohan").
[23] Ohlin, p. 415.
[24] Rohan, p. 664.

clear, however, even if an affirmative defence is ultimately not proved, the Prosecution still has the burden to prove the crimes charged beyond a reasonable doubt.

14. As far as evidentiary issues when asserting mental disease or defect as an affirmative defence, it is important to note the position of medical scholars and practitioners that mental illness is a ***medical concept***, and thus its definition should come from the medical profession, not from legislators or judges.[25] Competency (to stand trial) must be distinguished from capacity, which is defined as a medical condition to be determined by a physician, often (although not exclusively) by a psychiatrist, and not the judiciary.[26] Both legal and medical scholars recognise that legal professionals are not trained to assess the effect of medical conditions, on legal capacity such that medical and legal practitioners must work together to satisfactorily assess capacity.[27]

15. Proceedings before the *ad hoc* tribunals have recognised this principle. For example, appeals proceedings were suspended to allow independent neurological examination of appellant who had suffered a stroke and whose own medical experts diagnosed as unable to meaningfully participate in the proceedings.[28] In another case, the Appeals Chamber found unreasonable the Trial Chamber's rejection of expert medical evidence that a five day per week schedule was detrimental to the health of the accused.[29]

16. The ICC has similarly placed significant weight upon medical experts to determine the mental capacity of an accused.[30]

17. This jurisprudence demonstrates that the legal issue of impairment of mental capacity is a decision that must be based upon the medical opinions of experts specific to the individual concerened. To do otherwise would affect the fairness of criminal proceedings.

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[25] Weihofen, *The Definition of Mental Illness*, 21 Onxo ST. L.J. 1 (1960).
[26] Leo RJ. *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians.* Prim Care Companion J Clin Psychiatry, 1999, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC181079/.
[27] Purser & Rosenfield, *Evaluation of legal capacity by doctors and lawyers: the need for collaborative assessment*, Med J Aust 2014 Oct 20;201(8):483-5), https://www.mja.com.au/system/files/issues/201_08/pur11191.pdf.
[28] ICTY, *Prosecutor v Popović et al*, Case No. IT-05-88-A, Decision on Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition, 16 May 2011.
[29] ICTY, *Prosecutor v Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladic's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule due to Health Concerns (22 October 2013) at para. 13
[30] *See*, *Prosecutor v Gbagbo*, Case No. ICC-02/11-01/11-201, Decision on Issues Related to Proceedings Under Rule 135 and Postponing the Date of the Confirmation of Charges Hearing, 2 August 2012, paras. 15-16, 21-22.

18. By analogy, a determination of an accused's diminished capacity for purposes of asserting an affirmative defence similarly involves a decision on both the legal and medical concepts of "capacity". This decision would significantly impact the percieved fairness of the legal procedings. Article 31 of the Rome Statute, however, is silent as to the participation of medical experts and their examination on the issue of diminished mental capacity. In order to sufficiently safeguard the fairness of the proceedings and rights of the accused, the medical opinions of experts need to be afforded due weight in judicial determinations of the affirmative defence of mental disease or defect.

III. Observations related to cumulative convictions

19. As with affirmative defences, the ADC-ICT takes this opportunity to suggest that the ICC depart from the jurisprudence of the ICTY and ICTR on cumulative convictions. The line of cases at the *ad hoc* tribunals does not provide sufficient protection of the rights of the accused. Instead, it allows improper and unnecessarily punitive cumulative convictions.

20. To determine the permissibility of cumulative convictions at the ICC, the starting point must be the Rome Statute. Beyond the Statute, there is no clear answer to the issue of cumulative convictions, as there is no customary international law or general principle of law regarding cumulative convictions.[31]

21. The Statute does not directly address the matter of cumulative convictions, but it does provide that "no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."[32]

[31] "[T]o have resort to national jurisdictions is also highly problematic in light of the lack of a uniform approach to this issue, which is complex even in well developed national jurisdictions, requiring solutions peculiar to a specific national system. No clear, useful, common principle can be gleaned from the major legal systems of the world. It is in any case doubtful, given the unique nature of the international crimes over which the Tribunal has jurisdiction, whether any national jurisdiction has had to face a problem similar in scope to the one at hand." *Delalić* Appeal Judgement, Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, para. 20, (hereinafter "Separate and Dissenting Opinion of Judges Hunt and Bennouna").
[32] Art. 20(1).

22. Although this provision was considered by the *Bemba et al.* Appeals Chamber not to apply to cumulative convictions,[33] some national jurisdictions[34] and scholars[35] do consider the *ne bis in idem* principle to apply to the issue of cumulative convictions, and as a fundamental principle of law, it should not be simply disregarded. Rather, if there is doubt about whether *ne bis in idem* applies to the issue of cumulative convictions, this doubt must be resolved in favour of the accused, and it must be considered to apply.[36]

23. The Statute's focus on whether an accused is punished twice for the same "conduct" is important when considering the issue of cumulative convictions; the concern is with double punishment for the same conduct, rather than the legal characterization of that conduct.

24. The ADC-ICT directs the Appeals Chamber's attention to early cases at the ICTY. After Chambers initially took a variety of approaches to the issue of cumulative convictions,[37]

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[33] The *Bemba et al.* Appeals Chamber stated that it "consider[ed] 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." *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, 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", 8 March 2018, para. 748, (hereinafter "*Bemba et al.* Appeals Judgment").

[34] *See, e.g.*, United States of America, *Monge v. California*, 524 U.S. 721, 727-28 (1998), *citing*, *Blockburger v. United States*, 284 U.S. 299 (1932). *See also* the cases cited by the Ongwen Defence in *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Public Redacted Version of "Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021" filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, 19 October 2021, notes 291-294.

[35] Cristina Fernández-Pacheco Estrada, *The International Criminal Court and the Čelebići Test: Cumulative Convictions Based on the Same Set of Facts from a Comparative Perspective*, J. INT'L CRIM. JUST. 1, 22 (2017) ("Moreover, the oversimplified version to which the test has been reduced, that allows two murder convictions resulting from only one killing, affects the *ne bis in idem* principle"); Ildikó Erdei, *Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue*, 34 SUFFOLK TRANSNAT'L L. REV. 317, 321-22 (2011) ("Despite some ambiguities, academics have confidently stated that Article 20 prohibits subsequent trials for the same conduct. If this is true, it seems difficult to conceptually distinguish between repeated trials and overlapping convictions based on the same facts. If a court cannot try an accused for crimes against humanity after he has been convicted or acquitted of genocide on the same facts, why can it try him for both offenses at once and convict on both?"); Hong S. Wills, *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR*, 17 EMORY INT'L L. REV. 341, 377-79 (2003) ("Despite the lack of authorization or support from the language of the Statutes and practices of national legal systems, the jurisprudence of both the ICTY and the ICTR has generally allowed cumulative convictions where the convictions derive from the same conduct. Although not explicitly structuring their analysis of cumulative convictions in terms of double jeopardy avoidance, the tribunals have articulated and applied the tests and legal principles traditionally associated with the double jeopardy rule. […] Since the double jeopardy rule is applicable to the cumulative convictions practice, the issue then is whether the double jeopardy principle bars the practice.").

[36] "[T]he principle *in dubio pro reo* (or *favour rei*) requires that in the interpretation of criminal law instruments any doubt should benefit the accused." Dapo Akande, *Sources of International Criminal Law*, *in* ANTONIO CASSESE (ED.), THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 44-45 (2009).

[37] Hong S. Wills has identified four different tests used by the ICTY and ICTR: the "*Akayesu* Different Elements or Interests Test," the "*Tadić* Totality of Culpable Conduct Test," the "*Kupreškić* Blockburger and Different Value

the *Čelebići* test was settled on at the *ad hoc* tribunals.[38] It has been suggested that one reason for its acceptance at the *ad hoc* tribunals has been its simplicity.[39]

25. The *Čelebići* test allows multiple convictions to be entered under different statutory provisions based on the same conduct only if each statutory provision involved has a materially distinct element not contained in the other.[40]

26. Its use at the *ad hoc* tribunals has been controversial, drawing significant criticism even within the ICTY itself. Two of the judges in the *Čelebići* Appeals Chamber dissented, arguing for a different test and stating that "the perceived virtue of such an approach – certainty or predictability – is in fact illusory. In practice, it is likely to be an inflexible approach with the potential to produce outcomes which are, in the circumstances of any given case, arbitrary and artificial."[41] The *Kunarac* Appeals Chamber, while subscribing to the test, warned that it is "deceptively simple" and that noted that "[i]n practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice."[42]

27. The *Čelebići* test has the potential to lead to irrational and unfair outcomes. As Judges Hunt and Bennouna explain, under this test, a single act of rape could lead to a conviction as a war crime as well as a conviction as a crime against humanity,[43] a result these judges consider "highly artificial."[44] According to Judge Dolenc, another critic of the *Čelebići* test, "such results are not consistent with basic principles of law. Logically, and pursuant to the civil law principle of *ultima ratio*, a lawmaker should repress socially harmful conduct or results through a single criminalisation only as a last resort.

Test," and the "*Čelebići* Two-Prong Materially Distinct Element Test." Hong S. Wills, *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR*, 17 EMORY INT'L L. REV. 341 (2003).

[38] *See Delalić* Appeal Judgement, paras. 389-413.

[39] Cristina Fernández-Pacheco Estrada, *The International Criminal Court and the Čelebići Test: Cumulative Convictions Based on the Same Set of Facts from a Comparative Perspective*, J. INT'L CRIM. JUST. 1, 22 (2017). Professor Fernández-Pacheco Estrada explained that the test is based on the United States *Blockberger* test, which has been criticized: "The Blockburger test has been subject to intense doctrinal criticism. It has been considered mechanical, rough-grained, unsatisfactory, and imprecise, bringing uncertainty and disarray. […] [T]he same-evidence test substitutes formalism for substance, and 'action theory is submerged under other, less satisfying ways of structuring the analysis'. As such, the 'Court has failed to achieve a stable interpretation of the double jeopardy clause'. Even supporters of the Blockburger test recognize that it does not successfully address all kinds of overlap among crimes." *Id.*, p. 24.

[40] *Delalić* Appeal Judgement, para. 412. An element is considered materially distinct if it requires proof of a fact not required by the other. *Id.*

[41] Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 45.

[42] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 172, (hereinafter "*Kunarac* Appeal Judgment").

[43] *Id.*, paras. 30-32.

[44] *Id.*, para. 33.

It is also an elementary principle of justice that an accused should be punished for his criminal conduct only once."[45]

28. Allowing cumulative convictions based on the same conduct can create a real risk of prejudice to the accused, as noted by the ICTY *Kunarac* Appeals Chamber.[46] "At the very least, such persons suffer the stigma inherent in being convicted of an additional crime for the same conduct. In a more tangible sense, there may be such consequences as losing eligibility for early release under the law of the state enforcing the sentence."[47] Multiple convictions could also lead to increased sentences or habitual offender status if the accused is subsequently convicted of different crimes in national proceedings.

29. Thus, while the *ad hoc* tribunals themselves have applied the same test for much of their existence, the criticism of that test is merited. The ICC has an opportunity to develop a fairer test, more attentive to the rights of the accused.

30. The Rome Statute itself suggests a different approach than that in place at the *ad hoc* tribunals. The Rome Statute recognizes that a person should not be convicted twice based upon the same *conduct.*[48] As the *Čelebići* test focuses on the legal definition of crimes, is not conduct-based, and has proved to be insufficient to protect an accused from prejudice, a different test must be employed by the ICC.

31. In this regard, the *Bemba et al* Appeals Chamber, despite its rejection of Article 20(1),[49] recognised the important issues to be decided. The *Bemba et al* Appeals Chamber noted that the question is whether a trial chamber "may enter multiple convictions if the same conduct fulfils the legal elements of more than one offence."[50] It continued that "it is arguable that a bar to multiple convictions could arise in situations where the same conduct fulfils the elements of two offences even if these offences have different legal elements…"[51] Based on the case before it, however, the *Bemba et al* Appeals Chamber opted not to develop further the jurisprudence on cumulative convictions.

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[45] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Separate and Dissenting Opinion of Judge Pavel Dolenc, 15 May 2003, para. 17 (hereinafter "Dolenc Opinion").
[46] *Kunarac* Appeal Judgement, para. 169, *citing* Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 23.
[47] *Id.*
[48] Rome Statute, Art. 20(1).
[49] *Bemba et al.* Appeals Judgment, para. 748.
[50] *Id.*
[51] *Id*., para. 751.

32. In determining the appropriate test, the ADC-ICT suggests the ICC should draw inspiration not from the *Čelebići* test itself, but from other proposals arising in *ad hoc* tribunal jurisprudence. Dissenting in the *Čelebići* case, Judges Hunt and Bennouna proposed a "different elements" test.[52] Under this test, like the *Čelebići* majority test, an accused may only be convicted of more than one offence in respect of the same conduct where each offence has a unique element that the other offence does not. However, Judges Hunt and Bennouna consider that only elements which go to the *actus reus* and *mens rea* of the crimes should be considered. The *chapeaux* elements are not to be considered when applying the test. This is because:

> the fundamental consideration arising from charges relating to the same *conduct* is that an accused should not be penalised more than once for the same *conduct*. The purpose of applying this test is therefore to determine whether the *conduct* of the accused genuinely encompasses more than one crime. For that reason, we believe that it is not meaningful to consider for this purpose legal prerequisites or contextual elements which do not have a bearing on the accused's conduct, and that the focus of the test should therefore be on the substantive elements which relate to an accused's conduct, including his mental state. […] The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct. We believe that taking into account such abstract elements creates the danger that the accused will also be convicted – with, as discussed, the penalty inherent in that conviction alone – in respect of additional crimes which have a distinct existence only as a purely legal and abstract matter, effectively through the historical accidents of the way in which international humanitarian law has developed in streams having distinct contextual requirements.[53]

33. Judge Dolenc agrees that the starting point should be the comparison of the different elements of the crimes and agrees, unlike Judges Hunt and Bennouna, that *chapeaux* elements should be included in this comparison.[54] However, under his proposed test, "this comparison must include a substantive assessment of whether the contextual elements of each article are of such significance that they considerably change the nature or gravity of the crimes in question and therefore justify cumulative convictions for the ideal concurrence of crimes under several articles."[55] He then refers to the

[52] Separate and Dissenting Opinion of Judges Hunt and Bennouna, paras 24-35.
[53] Separate and Dissenting Opinion of Judges Hunt and Bennouna, paras 26-27 (emphasis in original).
[54] Dolenc Opinion, para. 23.
[55] *Id.*

principles of consumption,[56] subsidiarity,[57] and inclusion,[58] which he considers could also be applied to determine the propriety of cumulative convictions.[59]

34. The common theme underlying these two tests is the focus on the conduct, rather than the elements. In the absence of a clear test in the Rome Statute, it is suggested that a test following a conduct-based approach is appropriate, especially in light of the language of Rome Statute Article 20(1) and the *Bemba et al*. Appeals Chamber.

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Respectfully submitted,

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[56] "Consumption refers to relationships between offences of the same kind, but of considerably different gravity, that are designed to protect the same or closely related social interests, but which differ in relation to particular elements. In such circumstances, the more grave crime consumes the lesser crime. Similarly, the more serious forms of participation consume the less serious forms, so that the direct commission of a crime would consume instigation or assistance and even forms of superior responsibility." *Id.*, para. 24.
[57] Pursuant to this principle, "a less authoritative or 'inferior' criminalisation only applies when the competing 'superior' criminalisation is not applicable." *Id.*, para. 25.
[58] "Where an accused's conduct violates two or more substantially different criminalisations, but where it would be unreasonable to render cumulative convictions because of the insignificance of the lesser crime, the principle of inclusion permits the less serious crime to be included in the more serious crime." *Id.*, para. 26.
[59] One could argue that consumption and subsidiarity are what the Bemba et al. Appeals Chamber refer to in its analysis, in addition to speciality, which is covered by the *Čelebići* test. *Bemba et al*. Appeals Judgment, para. 751.