

THE PRACTICE OF CUMULATIVE CHARGING AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
International Criminal Court
OFFICE



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CHARGING AT THE
INTERNATIONAL CRIMINAL
COURT**

WAR CRIMES RESEARCH OFFICE
International Criminal Court
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INTRODUCTION AND EXECUTIVE SUMMARY

On 15 June 2009, Pre-Trial Chamber II of the International Criminal Court (ICC) issued a decision confirming several of the charges lodged against Jean-Pierre Bemba Gombo and sending the case to trial.

Notably, however, the Chamber declined to confirm certain of the charges brought by the Prosecution, including the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime. The Prosecution had alleged that the accused bore responsibility for these crimes based on evidence establishing, *inter alia*, Mr.

The Practice of Cumulative Charging in International Criminal Bodies

The first bodies established to try individuals suspected of committing international crimes in the wake of World War II each entertained charges of crimes against peace, war crimes, and crimes against humanity based on the same underlying conduct. Furthermore, these tribunals entered multiple convictions based on the same underlying conduct, as long as there was a materially distinct element in each of the relevant crimes. Subsequent international tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), have similarly entertained multiple charges against an accused based on the same underlying acts. Importantly, this has been the case even where one charge is fully subsumed in another charge, as in the case where an individual is charged with both extermination and murder as a crime against humanity and the Trial Chamber of the ICTY (see *Prosecutor v. Kordić and Čabrović*, Trial Chamber II, Judgment, paras. 1414-1415). The Trial Chamber for the ICTY has explained that the practice of cumulative charging is warranted because, prior to trial, the Prosecutor may not be able to determine with certainty which charges will ultimately be proven, and because the Trial Chamber is in a better position to determine the appropriate charge after the presentation of all of the evidence. This is particularly true in the context of international criminal bodies, as the crimes within the jurisdiction of these bodies are broad and jurisprudence in the area of international criminal law is continuing to develop. Furthermore, the ICTY has explained that the real harm which a prohibition of cumulative charging is intended to guard against – namely, that an accused might

Mr. Bemba, the Pre-

it chose to confirm only what it determined to be the more specific crime: rape as a crime against humanity. The Chamber made similar findings with regard to the

Analysis and Recommendations

Based on the foregoing, there are two broad issues that arise from the *Bemba* Pre- approach to cumulative charging. The first is whether the Chamber adopted the correct approach in determining that the practice of cumulative charging is not warranted in the context of the ICC where the charges rest on the same underlying conduct. The second is whether, assuming that the Chamber did adopt the correct approach in finding that multiple charges may be brought only where each charge has a materially distinct element, the Chamber applied that test correctly in the context of the *Bemba* case.

Nothing Prohibits the Practice of Cumulative Charging at the International Criminal Court, and Persuasive Reasons Exist to Permit the Practice

It is important to stress that nothing in the documents governing the ICC prohibits the Prosecution from bringing multiple charges against an accused based on the same underlying conduct. To the contrary, the Rome Statute affords the Prosecution broad discretion in selecting the appropriate charges in a given case. At the same time, the Rome Statute expressly limits the authority of the Pre-Trial Chamber in a way that makes it difficult to understand the *Bemba* Pre-Trial Chamber's role to characterize the facts set forward by the Prosecutor, as well as its finding that the Chamber is free to dismiss charges for which there is sufficient evidence to establish substantial grounds to believe the accused is responsible.

Furthermore, as recognized by other international criminal bodies, there are persuasive reasons to permit cumulative charging, including the fact that it may be unrealistic to expect the Prosecution to determine prior to trial which charges will be proven. Importantly, the existence of Regulation 55 does not necessarily alter this reality, as

be convicted under both headings, even if the underlying conduct was the same.⁵ Along the same lines, the International Military Tribunal for the Far East declined to enter convictions on multiple charges where certain charges were fully subsumed within other charges, although it stressed that the multiple charges were valid.⁶

Subsequent international tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), have each similarly entertained multiple charges against an accused based on the same underlying acts.⁷ Importantly,

⁵ *Brandt, et al., supra* n. 2, at 174.

⁶ Judgment of the International Military Tribunal for the Far East, *supra* n. 2, at 32-33. The crime of conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfillment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, *although we do not question the validity of the charges* we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts [relating to planning or preparing for the aggressive

⁷ See, e.g., *The Prosecutor v. Delalić, et al.*, Appeals Chamber Judgement, Case No. IT-96-21-A, ¶ 400 (20 February 2001); *The Prosecutor v. Rutaganda*, Trial Judgement and Sentence, ICTR 96 3 T, ¶¶ 108-119 (6 December 1999); *The Prosecutor v. Musema*, Trial Judgement and Sentence, ICTR 96 13 T, ¶¶ 289-99 (27 January 2000); *The Prosecutor v. Sesay, et al.*, Appeals Chamber Judgment, SCSL-04-15-A, ¶ 1192 (26 October 2009). Note that in one early decision of the Tribunal, the court found it appropriate to enter convictions on multiple counts only where the offences have differing elements or where laws in question protect differing social

the ground that those charges were subsumed in the charge of genocide. *The Prosecutor v. Kayishema & Ruzindanda*, Trial Judgement, ICTR-95-I, ¶¶ 625-650

this has been the case even where one charge is fully subsumed in another charge. For instance, a tribunal may entertain charges of both extermination as a crime against humanity and murder as a crime against humanity based on the same underlying conduct.⁸ The ICTY Appeals Chamber in *Prosecutor v. Delali* explained that the practice

possible to determine to a certainty which of the charges brought

better poised, after

evaluate which of the charges may be retained, based upon the

⁹ The SCSL Appeals Chamber has adopted similar reasoning, upholding the practice of cumulative charging based on the evidence, it is not possible to determine to a certainty which of the

¹⁰ This is particularly true in the context of international criminal tribunals, as the crimes over which the Tribunal has jurisdiction are frequently

¹¹

harm to be guarded against by the prohibition of cumulative charges is to ensure that an accused is not punished more than once in respect of

permitted multiple charges based on the same underlying conduct where each charge contains a distinct legal element, is discussed below. *See infra* n. 100 *et seq.* and accompanying text.

⁸ *See, e.g., Sesay, et al.*, Appeals Chamber Judgment, *supra* n. 7, ¶ 1192.

⁹ *Delali, et al.*, Appeals Chamber Judgment, *supra* n. 7, ¶ 400. *See also* Attila Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 Melbourne

sentencing stage.¹²

In addition to broadly permitting cumulative *charging*, the ICTY, ICTR, and the SCSL, like the post-World War II tribunals, have each upheld the practice of entering multiple *convictions* against an accused based on the same underlying conduct, so long as each of the relevant crimes contains a materially distinct legal element.¹³ The ICTY Appeals Chamber described the practice as follows:

[M]ultiple convictions entered under different statutory provisions, but based on the same conduct, are

materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction 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.¹⁴

The rationale for permitting cumulative convictions, as set forth by the ICTY Appeals Chamber and endorsed by the SCSL Appeals Chamber, is that it allows the court to provide a complete picture of the particular accused or provide a complete picture of his criminal

¹² *Id.* It is worth noting that many domestic jurisdictions also permit the practice of cumulative charging. See, e.g., Bogdan, *supra* n. 9 (discussing the approach of both common law and Romano-Germanic jurisdictions to the issue of cumulative charging).

Importantly, in determining whether cumulative convictions are permissible in a given case, the ICTY has held what must be

Central African Republic during the relevant time period.³⁷ However, torture as a crime against humanity.³⁸

Explaining its position, the Chamber stated that the Prosecution a cumulative charging approach by characterizing [the crime against humanity of torture] ther forms of and] that the same criminal conduct can be prosecuted under two different counts, namely the count of torture as well as the count of rape, the acts of rape being the

charging approach is followed by national courts and international³⁹ citing, *inter alia*, a number of decisions by the International Criminal Tribunals for the former Yugoslavia and Rwanda in which those tribunals recognized that the Prosecutor may be justified in bringing cumulative charges.⁴¹

above from its decision granting the Prosecution warrant, in which the Pre-Chamber to characteris

42

prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defenc⁴³ matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be

provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the

⁴⁴ The Chamber further supported its holding by adding:

[T]he ICC legal framework differs from that of the *ad hoc* tribunals, since under [R]egulation 55 of the Regulations [of the Court⁴⁵], the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.⁴⁶

Applying its adopted framework to the Prosecution

Mr. Bemba, the Pre-Tria

elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent

act of r ⁴⁷ However, because the ditional specific material element of

legal characterisation in this particular ⁴⁸

⁴⁴ *Id.* ¶ 202, n. 277.

⁴⁵ Regulation 55, which provides that, under certain circumstances, a Trial Chamber

discussed in further detail below. *See infra* n. 87 *et seq.* and accompanying text.

⁴⁶ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 21, ¶ 203.

⁴⁷ *Id.* ¶ 204.

⁴⁸ *Id.* It should be noted that the Chamber acknowledged that, at the confirmation hearing, the Prosecutor presented evidence showing not only acts of rape that would

Id. ¶ 197. However, the Chamber found that

rape, the Prosecutor planned to rely upon to support his charge of torture as a crime

facts at the Hearing to support the submission that some acts of torture are different

Id.

¶¶ 206-08. Hence, the Chamber declined to confirm the charge of torture as a crime

immediate resolution by the Appeals Chamber may materially advance
⁵⁴ In support of its request, the Prosecution argued
that the decision raised, *inter alia* -Trial

ground that they are cumulative of rape charges; and whether torture
and outrages against [personal] dignity are, either objectively as a
matter of law or in particular based on the facts alleged, wholly
⁵⁵ The Pre-Trial Chamber, in analyzing
-issues,
namely: (i) whether the Pre-Trial Chamber has the authority under the

charged. Based on its determination, the Pre-Trial Chamber *shall*:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a partitermiCv3s

the Prosecutor, and not the Pre-Trial Chamber, to choose the charges

rights of the Defence at any tim

not confirm all charges as such, in case the essence of the violation of⁶⁸

At the same time, however,

Furthermore, although the plain language of Article 67(1) is unambiguous, it is worth noting that the drafters of the Rome Statute expressly considered proposals suggesting that the Pre-

2. *In Some Circumstances, It May Be Unrealistic to Expect the Prosecution to Determine, Prior to Trial, which Charges Will Ultimately Be Proven Beyond a Reasonable Doubt*

As recognized by the ICTY Appeals Chamber in *Delali* , before the

⁸³ Only after

singled out individuals, that accused arguably cannot be tried in any court for murder based on the same underlying conduct. Therefore, the consequences of a bar on cumulative charging are far-reaching in the context of the ICC.

3. *Regulation 55 Does Not Necessarily Obviate the Need for Cumulative Charging*

As explained above, the

the burden on the defense. As stated in both its decision on the confirmation of charges and its decision denying the Prosecution request for leave to appeal, the *Bemba* Pre-Trial Chamber stressed that

considerations of fairness and the expeditiousness of proceedings.⁹⁰ This notion that cumulative charging is burdensome to the defense has also been raised in commentary.⁹¹ However, both the *Bemba* Pre-Trial Chamber and the relevant commentary simultaneously suggest that Regulation 55 may be used to add new charges against an accused in the midst of an ongoing trial, which seems to be *at least* as burdensome to the defense and *at least* as detrimental to the efficient conduct of proceedings as the practice of cumulative charging may be.⁹² Indeed, in terms of the interests of the defense, the Rome Statute

⁹³ Surely these rights would be more meaningful if the

⁹⁰ *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 21, ¶ 201; *Bemba*,

Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-

supra n. 56, ¶ 33(a)(7)(nd,)] TJETBT/F3 10.02 Tf1 0

⁹¹ See, e.g., Carsten Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A portrayal of Regulation 55*, 16 *Crim. Law Forum* 1, at 3(2005)

with an overload of alternative or cumulative charges in order to avoid the risk of

accused was given some certainty regarding the charges on which he or she will be tried as early in the process as possible. As for the efficiency argument, the Pre-question the very purpose of having a confirmation of charges process, if it is not to finalize the charges prior to trial.

- B. AT A MINIMUM, THE COURT SHOULD ALLOW MULTIPLE CHARGES BASED ON THE SAME EVIDENCE WHERE EACH CHARGE CONTAINS A MATERIALLY DISTINCT ELEMENT, EVEN IF THE SAME EVIDENCE IS USED TO SATISFY EACH CHARGE

While the primary recommendation in this report is that the ICC should broadly permit cumulative charging, we recommend that, at a minimum, the Court permit multiple charges based on the same evidence where each charge contains a materially distinct element. Interestingly, this is the test that the *Bemba* Pre-Trial Chamber purported to apply in its decision on the confirmation of charges.⁹⁴ However, the Chamber apparently determined that charges should be de *even if* each charge contains an element materially distinct from the other if the same evidence is put forth to establish those elements. Thus, although the crime against tor invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the ⁹⁵⁾ clearly contains elements materially distinct from the crime against humanity of torture (which requires that n ⁹⁶⁾, the Chamber found the charges to be inappropriately cumulative because the same evidence *i.e.*, acts of rape was used to satisfy the elements

⁹⁴ See *supra* n. 44 *et seq.*

of both crimes.⁹⁷

Such an approach is unwarranted as both a matter of law and practice. Indeed, as stated above, nothing in the documents governing the International Criminal Court prohibits the Prosecution from bringing multiple charges against an accused based on the same underlying conduct. Furthermore, the ICTY, ICTR, and SCSL each permit multiple charges based on the same evidence,⁹⁸ and each permits multiple convictions based on the same conduct, so long as each offense contains a materially distinct element.⁹⁹ In addition, the Extraordinary Chamber in the Court of Cambodia (ECCC), which is based on the Romano-Germanic, as opposed to common law, tradition, has permitted cumulative charging so long as each charge contains a materia

Geneva Conventions of 1949.¹⁰³

Yet,

CONCLUSION

As explained in this report, the practice of cumulative charging has been widely accepted by international criminal bodies on the grounds that, prior to trial, it may not be possible to determine exactly which charges will be proven beyond a reasonable doubt. While the judges of the ICC, unlike the judges of the ICTY, ICTR, or SCSL, are given

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does not warrant a bar against the practice of cumulative charging at the ICC. To the extent that the judges of the ICC nevertheless choose to limit the Prosecution to bringing multiple charges based on the same underlying acts only where each charge contains a distinct

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