

THE PRACTICE OF CUMULATIVE CHARGING AT THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
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Legal Analysis and Education Project
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COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer

The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer

A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer

Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

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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.

Bemba's role in numerous acts of rape committed against civilians in the Central African Republic. Importantly, the Pre-Trial Chamber did find sufficient evidence to establish substantial grounds to believe that these acts of rape took place, and that the accused could be held criminally responsible for the acts. Yet, it held that the Prosecution had acted inappropriately by bringing "cumulative charges" based on the acts of rape. Specifically, the Chamber determined that the Prosecution had inappropriately charged four crimes based on the same conduct: the crime against humanity of rape, the war crime of rape, the crime against humanity of torture, and the war crime of outrages upon personal dignity. Based on this finding, the Pre-Trial Chamber determined that it would only be appropriate to confirm the charges of rape as a crime against humanity and rape as a war crime, and it declined to confirm the purportedly "cumulative" charges of torture as a crime against humanity and outrages upon personal dignity as a war crime.

This report examines the *Bemba* Pre-Trial Chamber's determination that the practice of cumulative charging is not warranted in the context of the International Criminal Court as a general matter, as well as the Chamber's holding that, in the case before it, the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime were inappropriately cumulative. The report begins with a discussion of cumulative charging in international criminal bodies, where the practice is widely accepted. It then lays out the relevant jurisprudence from the *Bemba* case. Finally, the report analyzes the *Bemba* jurisprudence and offers recommendations.

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 based on the same underlying conduct. The Appeals 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 be punished more than once based on the same criminal act – can easily be avoided at the conviction or sentencing stage of proceedings.

In addition to broadly permitting cumulative *charging*, the ICTY, ICTR, and 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. The rationale for permitting cumulative convictions is that multiple convictions are necessary to fully reflect the culpability of an accused. Importantly, in determining whether cumulative convictions are permissible in a given case, these courts have looked to the *legal elements* of each offense, not the *underlying acts*. Thus, for example, an accused may be

convicted of both genocide and extermination as a crime against humanity based on the same underlying conduct because each crime contains a materially distinct legal element.

Bemba Jurisprudence regarding Cumulative Charging

Jean-Pierre Bemba-Gombo was transferred to the Hague in July 2008 based on allegations that he is responsible for crimes committed in the Central African Republic. Several months later, following a hearing, the Pre-Trial Chamber presiding over Mr. Bemba's case issued its decision confirming certain of the charges for trial and dismissing others.

With regard to the crimes against humanity charged by the Prosecution, the Chamber found that there was sufficient evidence to establish substantial grounds to believe that acts of rape constituting crimes against humanity were committed. However, it dismissed the charge of torture as a crime against humanity to the extent that charge was based on the same acts of rape,¹ based on a finding that the torture charge was inappropriately cumulative. While the Chamber acknowledged that cumulative charging is practiced by both national courts and international tribunals, it determined that such an approach is unwarranted at the ICC because, in its opinion, in this context it is for *the Chambers* to determine the most appropriate legal characterization of facts presented by the Prosecutor. Accordingly, the Chamber reasoned that, as a matter of expeditiousness and fairness to the Defense, only "distinct crimes" could justify a cumulative charging approach, meaning that each crime allegedly committed must contain a materially distinct element not contained in the other. The Chamber supported its position by noting that Regulation 55 of the ICC's Regulations of the Court permits the Trial Chamber to re-characterize charges brought to trial, and reasoning that, because of this regulation, there is no need for the Prosecution to present all possible characterizations of a crime in order to ensure conviction.

¹ To the extent the Prosecution intended to support the charge of torture as a crime against humanity based on acts *other than* the acts of violence underlying the charge of rape as a crime against humanity, the Chamber held that the Prosecution had not given the Defense sufficient notice of such other acts prior to the confirmation hearing, and thus it did not consider this evidence in support of the torture charge.

Applying its adopted framework to the Prosecution's charges against Mr. Bemba, the Pre-Trial Chamber held that "the specific material elements" of the act of torture were "also the inherent specific material elements of the act of rape," and thus 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 Prosecution's charge of outrages upon personal dignity as a war crime.

Analysis and Recommendations

Based on the foregoing, there are two broad issues that arise from the *Bemba* Pre-Trial Chamber's 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 finding that it is *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

Regulation 55 merely *authorizes* the Trial Chamber to change the legal characterization of a charge, rather than *requiring* such a re-characterization whenever warranted. It is also worth noting that, although the *Bemba* Pre-Trial Chamber argued against cumulative charging in part on the grounds that it is inefficient and burdensome to the Defense, the process by which the Trial Chamber may re-characterize charges under Regulation 55 is no more efficient or Defense-friendly.

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. However, the Chamber apparently determined that charges should be deemed inappropriately “cumulative” 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 humanity of rape clearly contains elements materially distinct from the crime against humanity of torture, the Chamber found the charges to be inappropriately cumulative because the same evidence – *i.e.*, acts of rape – was used to satisfy the elements of both crimes.

As detailed below, such an approach is unwarranted as both a matter of law and practice. In fact, permitting multiple charges based on the same conduct is critical to enabling the Trial Chamber to enter multiple convictions based on that conduct where necessary to fully reflect an accused’s criminality.

I. THE PRACTICE OF CUMULATIVE CHARGING IN INTERNATIONAL CRIMINAL BODIES

The first bodies established to try individuals suspected of committing international crimes – the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, and the tribunals set up under Control Council Law No. 10 – each entertained charges of crimes against peace, war crimes, and crimes against humanity based on the same underlying conduct.² Indeed, the International Criminal Tribunal for the Far East described the practice of bringing charges that were “cumulative or alternative” as “common.”³ 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. Thus, for instance, in its judgment against the twenty-two major war criminals tried under the London Charter of 1945, the International Military Tribunal at Nuremberg held that “from the beginning of the war in 1939[,] war crimes were committed on a vast scale, *which were also crimes against humanity.*”⁴ Similarly, in the *Medical Case*, one of the Control Council Law No. 10 tribunals reasoned that as long as war crimes were “alleged to have been ‘committed against the civilian

² See, e.g., *United States v. Herman Goering, et al.*, reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 65 (1947) (“The prosecution will rely upon the facts pleaded under Count Three [violations of the laws and customs of war] as also constituting crimes against humanity.”); Judgment of the International Military Tribunal for the Far East (1 November 1948), at 34-35, available at <http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html> (noting, without disapproval, that the Prosecution had alleged 756 separate charges in respect to crimes against peace because a number of the charges were cumulative or alternative); *United States v. Oswald Pohl, et al.*, reprinted in V TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 204, 207 (William S. Hein ed., 1997) (charging the defendants with war crimes and crimes against humanity based on the same acts “involving the commission of atrocities and offenses against persons and property, including, but not limited to, plunder of public and private property, murder, torture, illegal imprisonment, and enslavement and deportation to slave labor of, and brutalities, atrocities, and other inhumane and criminal acts against thousands of persons”); *United States v. Karl Brandt, et al.*, reprinted in I TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 11, 16 (William S. Hein ed., 1997) (same).

³ Judgment of the International Military Tribunal for the Far East, *supra* n. 2, at 35.

⁴ See, e.g., *Goering, et al.*, *supra* n. 2, at 254 (emphasis added).

populations of occupied territories and prisoners of war,” and crimes against humanity were “alleged to have been ‘committed against German civilians and nationals of other countries,’” an accused could 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 (“A 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 war.]”) (emphasis added).

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 ICTR, a Trial Chamber held that “[c]umulative charging is acceptable only where the offences have differing elements or where laws in question protect differing social interests,” and thus rejected the Prosecution’s charges of crimes against humanity on the ground that those charges were subsumed in the charge of genocide. *The Prosecutor v. Kayishema & Ruzindanda*, Trial Judgement, ICTR-95-I, ¶¶ 625-650 (21 May 1999). However, the Tribunal has since upheld the practice of cumulative charging, even where one charge is fully subsumed within another charge that is based on the same conduct. *Rutaganda*, Trial Judgement and Sentence, *supra* this footnote, ¶ 110; *Musema*, Trial Judgement and Sentence, *supra* this footnote, ¶ 296. The practice of the Extraordinary Chambers in the Courts of Cambodia, which has

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. Delalić* explained that the practice of cumulative charging is warranted because, prior to trial, “it is not possible to determine to a certainty which of the charges brought against an accused will be proven” and because the “Trial Chamber is better poised, after the parties’ presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.”⁹ The SCSL Appeals Chamber has adopted similar reasoning, upholding the practice of cumulative charging based on the fact that, “prior to the presentation of all the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven, if any.”¹⁰ This is particularly true in the context of international criminal tribunals, as “the crimes over which the Tribunal has jurisdiction are frequently broad and yet to be clarified in the jurisprudence of the Tribunal.”¹¹ Finally, as observed by an ICTY Trial Chamber, “the fundamental 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 the same criminal act” and this can be done at the convictions or

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 *Delalić, 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 J. Int’l L.* 1, n. 123 (May 2002), available at <http://www.austlii.edu.au/au/journals/MelbJIL/2002/1.html> (quoting the *Kvočka, et al.* Trial Chamber as holding: “Issues of cumulative charging are best decided at the end of the case. So long as the proof adduced by the Prosecution could satisfy a reasonable court beyond reasonable doubt that the elements of one of the allegedly cumulative charges had been satisfied, the case continues.”).

¹⁰ *The Prosecutor v. Brima, et al.*, Appeals Chamber Judgment, SCSL-2004-16-A, n. 327 (22 February 2008).

¹¹ *The Prosecutor v. Naletilić & Martinović*, Decision on Vinko Martinovic’s Objection to the Amended Indictment and Mladen Naletilic’s Preliminary Motion to the Amended Indictment, IT-98-34 (14 February 2001) (note that this decision contains no paragraph numbers).

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 permissible... if each statutory provision has a 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 “multiple convictions serve to describe the full culpability of a 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); 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, 372 (2003) (same).

¹³ See, e.g., *The Prosecutor v. Krstić*, Appeals Chamber Judgement, IT-98-33-A, ¶ 218 (19 April 2004); *Delalić, et al.*, Appeals Chamber Judgment, *supra* n. 7, ¶ 412; *The Prosecutor v. Kunarac, et al.*, Appeals Chamber Judgment, IT-96-23 & IT-96-23/1-A, ¶ 172 (12 June 2002); *The Prosecutor v. Akayesu*, Trial Chamber Sentence, ICTR-964-S, ¶¶ 465-469 (2 September 1998); *Rutaganda*, Trial Judgement and Sentences, *supra* n. 7, ¶ 199; *Sesay et al.*, Appeals Chamber Judgment, *supra* n. 7, ¶¶ 1190-91.

¹⁴ *Krstić*, Appeals Chamber Judgement, *supra* n. 13, ¶ 218. See also *Delalić, et al.*, Appeals Chamber Judgement, *supra* n. 7, ¶ 412.

conduct.”¹⁵

Importantly, in determining whether cumulative convictions are permissible in a given case, the ICTY has held that “what must be considered are the *legal elements of each offence*, not the *acts or omissions giving rise to the offence*.”¹⁶ Thus, for example, in the *Krstić* case, the ICTY Appeals Chamber overturned the Trial Chamber’s finding that convictions for both genocide and the crime against humanity of extermination, as well as for genocide and the crime against humanity of persecution, would be improperly cumulative.¹⁷ The Appeals Chamber explained that simultaneous convictions for genocide and the crime against humanity of extermination were permissible, even if based on the exact same conduct, because each crime contained a materially distinct element (namely, genocide requires “the intent to destroy, in whole or in part,” a protected group, while extermination as a crime against humanity “requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship”).¹⁸ Similarly, the Appeals Chamber found that genocide does not subsume the crime against humanity of persecution, even where the acts constituting persecution are the same acts constituting genocide, because persecution requires that the “underlying act form a part of a widespread or systematic attack against a civilian population and that it be perpetrated with the knowledge of that connection.”¹⁹

¹⁵ *The Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34, Appeals Chamber Judgement, ¶ 585 (3 May 2006); *Brima, et al.*, Appeals Chamber Judgment, *supra* n. 10, ¶ 215 (quoting the ICTY Appeals Chamber in *Naletilić & Martinović*).

¹⁶ *The Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Appeals Chamber Judgement, ¶ 1033 (17 December 2004) (emphasis added). See also *Krstić*, Appeals Chamber Judgement, *supra* n. 13, ¶ 223 (“As the Appeals Chamber explained, the inquiry into whether two offences are impermissibly cumulative is a question of law. The fact that, in practical application, the same conduct will often support a finding that the perpetrator intended to commit both genocide and extermination does not make the two intents identical as a matter of law.”).

¹⁷ *Krstić*, Appeals Chamber Judgement, *supra* n. 13, ¶¶ 227, 229.

¹⁸ *Id.* ¶¶ 223-26.

¹⁹ *Id.* ¶ 229.

II. *BEMBA* JURISPRUDENCE REGARDING CUMULATIVE CHARGING

A. BACKGROUND

In 2005, the ICC received a referral from the Central African Republic (CAR) to investigate and prosecute all crimes that occurred in the territory of the CAR falling under the ICC's jurisdiction since 2002.²⁰ To date, the Prosecution has opened one case in this situation, against Jean-Pierre Bemba Gombo. Specifically, on 9 May 2008, the Prosecution submitted to Pre-Trial Chamber III²¹ an application for a warrant of arrest against Mr. Bemba, a national of the Democratic Republic of Congo alleged to be responsible for crimes committed on the territory of the Central African Republic.²² According to Article 58(1) of the Rome Statute, the Pre-Trial Chamber "shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) [t]he arrest of the person appears necessary" to securing the person's appearance at trial, preventing interference with the administration of justice, or preventing the ongoing commission of the suspected crime.²³

After examining the Prosecution's application,²⁴ the Chamber found

²⁰ *The Situation in the Central African Republic*, Decision Assigning the Situation in Central African Republic to Pre-Trial Chamber III, ICC-01/05, ¶ 4 (19 January 2005).

²¹ Note that on 19 March 2009, the Presidency of the ICC decided to merge Pre-Trial Chamber III with Pre-Trial Chamber II and to assign the situation in the Central African Republic, including the *Bemba* case, to Pre-Trial Chamber II. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 16 (Pre-Trial Chamber II, 15 June 2009).

²² *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, ¶¶ 4, 26 (Pre-Trial Chamber III, 10 June 2008).

²³ Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *adopted on* 17 July 1998, *entered into force* 1 July 2002, Art. 58(1)(a) – (c).

²⁴ While the application for the arrest warrant was pending, the Prosecution received information regarding a likely attempt by Mr. Bemba to flee the Kingdom of

reasonable grounds to believe that Mr. Bemba is responsible for a series of crimes – including the crimes against humanity of rape and torture and the war crimes of rape and outrages upon personal dignity – and therefore issued the requested warrant.²⁵ Notably, however, the Chamber included the following language in its decision:

The Chamber... recalls that in his Application the Prosecutor appears on occasion to have presented the same facts under different legal characterisations. It wishes to make it clear that the Prosecutor should choose the most appropriate characterisation. The Chamber considers that the Prosecutor is risking subjecting the Defence to the burden of responding to multiple charges for the same facts and at the same time delaying the proceedings. It is for the Chamber to characterise the facts put forward by the Prosecutor. The Chamber will revisit this issue in light of the evidence submitted to it by the Prosecutor during the period prior to the confirmation of charges, having regard to the rights of the Defence and to the need to ensure the fair and expeditious conduct of the proceedings.²⁶

Importantly, the Chamber cited no authority to support its assertion that the Prosecution should choose the most appropriate characterization for a given set of facts, or that the Chamber is responsible for characterizing the facts put forward by the Prosecutor.

B. *BEMBA* DECISION ON THE CONFIRMATION OF CHARGES

Mr. Bemba was transferred to the Hague in July 2008.²⁷ Subsequently, the parties began to prepare for the confirmation of

Belgium, where he was residing, and therefore the Chamber issued a request for the provisional arrest of Mr. Bemba pursuant to Article 95 of the Rome Statute on 23 May 2008. *See Bemba*, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo, *supra* n. 22, ¶¶ 6-8.

²⁵ *Id.* ¶ 90(a)(i) – (vii).

²⁶ *Id.* ¶ 25.

²⁷ *Id.* ¶ 4.

charges hearing, by which the Pre-Trial Chamber must determine whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”²⁸ On 1 October 2008, the Prosecution filed its Document Containing the Charges (DCC)²⁹ pursuant to Rule 121(3) of the ICC’s Rules of Procedure and Evidence, which requires that the Prosecution provide the accused and the Pre-Trial Chamber, “no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.”³⁰ Soon afterwards, the Prosecution submitted an Amended DCC, adding an additional witness and some supplementary sources for the Amended List of Evidence.³¹ In its Amended DCC, the Prosecution charged Mr. Bemba, *inter alia*, with the following allegations:

From on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed... crimes against humanity through acts of rape upon civilian men, women and children in the Central African Republic, in violation of [Article] 7(1)(g)... of the Rome Statute,³² [f]rom on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed... [torture as a crime against humanity] by inflicting severe physical or mental pain or suffering through acts of rape or other forms of sexual violence, upon civilian men, women

²⁸ Rome Statute, *supra* n. 23, Art. 61(7).

²⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Document With Under Seal, Ex parte Prosecution Only Annexes 1A, IB, 1C AND ID And Confidential Prosecution and Defence Only Annexes 2A, 2B, 2C AND 2D Prosecution’s Submission of the Document Containing the Charges and List of Evidence, ICC-01/05-01/08-129 (Office of the Prosecutor, 1 October 2008).

³⁰ International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 121(3) (2000).

³¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Submission of Amended Document Containing the Charges and Amended List of Evidence, ICC-01/05-01/08-169, ¶ 1 (17 October 2008).

³² *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version, Amended Document Containing the Charges, ICC-01/05-01/08-169-Anx3A, at 38 (17 October 2008), *annexed to* Prosecution’s Submission of Amended Document Containing the Charges and Amended List of Evidence, ICC-01/05-01/08-169 (17 October 2008).

and children in the Central African Republic, in violation of [Article] 7(l)(f)... of the Rome Statute;³³ [f]rom on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed... war crimes through acts of rape upon civilian men, women and children in the Central African Republic, in violation of [Article] 8(2)(e)(vi)... of the Rome Statute;³⁴ and [f]rom on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed... war crimes by humiliating, degrading or otherwise violating the dignity of civilian men, women and children in the Central African Republic, in violation of [Article] 8(2)(c)(ii)... of the Rome Statute.³⁵

The confirmation of charges hearing took place in January 2009 and, six months later, the Chamber issued its decision regarding the charges.³⁶ With regard to the crimes against humanity charged by the Prosecution, the Chamber found that there was “sufficient evidence to establish substantial grounds to believe that acts of murder and rape constituting crimes against humanity... were committed as part of a

³³ *Id.* at 39.

³⁴ *Id.* at 38.

³⁵ *Id.* at 40.

³⁶ See *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, ¶ 16. Note that, approximately two months after the close of the confirmation hearing, the Pre-Trial Chamber issued a decision adjourning the confirmation process pursuant to Article 61(7)(c)(ii), the provision of the Rome Statute authorizing the Pre-Trial Chamber to “request the Prosecutor to consider... [a]mending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.” *Id.* ¶ 15. Specifically, the Chamber requested that the Prosecution consider amending the mode of responsibility under which it had charged Mr. Bemba to include allegations that the accused was responsible for the alleged crimes under a theory of superior responsibility. *Id.* In line with the Chamber’s request, the Prosecution filed an Amended Document Containing the Charges on 30 March 2009, including allegations involving Mr. Bemba’s liability as a superior pursuant to Article 28 of the Rome Statute as an alternative to his individual responsibility pursuant to Article 25 of the Rome Statute. See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence, ICC-01/05-01/08-395 (Office of the Prosecutor, 30 March 2009).

widespread attack directed against the civilian population” of the Central African Republic during the relevant time period.³⁷ However, the Chamber went on to say that it “reject[ed] the cumulative charging approach of the Prosecutor” and thus declined to confirm the charge of torture as a crime against humanity.³⁸

Explaining its position, the Chamber stated that the Prosecution “used a cumulative charging approach by characterizing [the crime against humanity of torture] as “[torture] through acts of rape or other forms of sexual violence” and by “aver[ring] 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 instrument of torture.”³⁹ It then “acknowledge[d] that the cumulative charging approach is followed by national courts and international tribunals under certain conditions,”⁴⁰ 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 Nevertheless, the Chamber went on to “recall” the language cited above from its decision granting the Prosecution’s request for an arrest warrant, in which the Pre-Trial Chamber had stated that it was for “the Chamber to characterise the facts put forward by the Prosecutor.”⁴² The Chamber then stated that it had “intended to make it clear that the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence.”⁴³ In light of this position, the Chamber held that, “as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges,” and that this is “only possible if each statutory

³⁷ *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, ¶ 72.

³⁸ *Id.*

³⁹ *Id.* ¶ 199.

⁴⁰ *Id.* ¶ 200 (internal citations omitted).

⁴¹ *Id.*

⁴² *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.

⁴³ *Id.* ¶ 202.

provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other.”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’s charges against Mr. Bemba, the Pre-Trial Chamber held that “the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape.”⁴⁷ However, because the act of rape “requires the additional specific material element of penetration,” the Chamber held that rape was “the most appropriate legal characterisation in this particular case.”⁴⁸

⁴⁴ *Id.* ¶ 202, n. 277.

⁴⁵ Regulation 55, which provides that, under certain circumstances, a Trial Chamber may “change the legal characterisation of facts... without exceeding the facts and circumstances described in the charges and any amendments to the charges,” is 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 allegedly amount to torture, but also “material facts other than acts of rape which he legally characterised as acts of torture.” *Id.* ¶ 197. However, the Chamber found that the Prosecutor’s DCC failed to “specify” which acts of torture, other than acts of rape, the Prosecutor planned to rely upon to support his charge of torture as a crime against humanity and held that “that the presentation of partially relevant material facts at the Hearing to support the submission that some acts of torture are different from acts of rape [did] not cure the deficiencies and imprecision of the [DCC].” *Id.* ¶¶ 206-08. Hence, the Chamber declined to confirm the charge of torture as a crime

The Chamber made similar findings with regard to the Prosecution's charge of outrages upon personal dignity as a war crime.⁴⁹ As an initial matter, the Chamber noted that the Prosecution failed to specify in the DCC "the facts upon which [it] bases the charge of outrages upon personal dignity."⁵⁰ The Chamber then explained that, in its opinion, "most of the facts presented by the Prosecutor at the [Confirmation] Hearing reflect in essence the constitutive elements of force or coercion in the crime of rape, characterizing this conduct, in the first place, as an act of rape."⁵¹ With regard to the facts that did not "reflect in essence the constitutive elements of force or coercion in the crime of rape," such as "the powerlessness of the family members and the impact on the family members and the CAR population," the Chamber determined that these facts were not clearly set out in the DCC and thus could not be considered by the Chamber in support of the outrages charge.⁵² Looking only at the acts of rape, the Chamber concluded that the "essence of the violation of the law underlying [the relevant] facts is fully encompassed in the count of rape" and confirmed the charge of rape as a war crime, but not outrages upon personal dignity as a war crime.⁵³

C. THE PROSECUTION'S UNSUCCESSFUL REQUEST FOR LEAVE TO APPEAL

The Prosecution sought leave to appeal the confirmation of charges decision pursuant to Article 82(1)(d) of the Rome Statute, which provides that a party may appeal a decision of the Pre-Trial Chamber where the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial..., an

against humanity based on acts of torture other than acts of rape. *Id.* ¶ 209.

⁴⁹ *Id.* ¶¶ 301-02. Note that the Chamber also declined to confirm the charge of torture as a war crime, although it based this decision on a finding that the Prosecutor failed to properly allege the perpetrator's specific intent to inflict pain or suffering for a prohibited purpose, as required for the war crime of torture under the Rome Statute. *See id.* ¶¶ 293-300.

⁵⁰ *Id.* ¶ 307.

⁵¹ *Id.* ¶ 310.

⁵² *Id.*

⁵³ *Id.* ¶¶ 310-11.

immediate resolution by the Appeals Chamber may materially advance the proceedings.”⁵⁴ In support of its request, the Prosecution argued that the decision raised, *inter alia*, the issue whether “the Pre-Trial Chamber has the authority to decline to confirm two charges... on the 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 subsumed within rape charges.”⁵⁵ The Pre-Trial Chamber, in analyzing the Prosecution’s application, divided this issue into two sub-issues, namely: (i) whether the Pre-Trial Chamber has the authority under the Court’s legal texts to “deny charges on considerations of cumulative charging;” and (ii) whether “the Chamber erred in assuming that the crimes of torture and outrages upon personal dignity were not ‘distinct crimes’ separate from the crime of rape.”⁵⁶

With regard to the first sub-issue, the Prosecution argued that the Pre-Trial Chamber has no authority to “deny confirmation of proven charges because [the Chamber] considers [the charges] are unnecessary, cumulative, or burdensome to the Defence.”⁵⁷ In support of this argument, the Prosecution relied on Article 61(7) of the Rome Statute, which governs the authority of the Pre-Trial Chamber in the context of the confirmation of charges process.⁵⁸ Specifically, Article 61(7) provides as follows:

The Pre-Trial Chamber shall, on the basis of the [confirmation] hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes

⁵⁴ Rome Statute, *supra* n. 23, Art. 82(1)(d).

⁵⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, ICC/01/05-01/08-427 (22 June 2009).

⁵⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” ICC-01/05-01/08-532, ¶¶ 33-35 (18 September 2009).

⁵⁷ *Id.* ¶ 1.

⁵⁸ *Id.* ¶ 14.

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 particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.⁵⁹

Thus, the Prosecution argued,

[t]he Pre-Trial Chamber is not entitled to choose the counts that it believes best reflect the harm suffered by victims and the criminality engaged in by the Accused, and to reject others as cumulative. When the charges are supported by the evidence, as here, the choice of counts to prosecute at trial is a right granted to the Prosecutor, not to the Pre-Trial Chamber.⁶⁰

This argument was supported by the Office of Public Counsel for Victims (OPCV), which submitted a brief in favor of the Prosecution's request for leave to appeal.⁶¹ Specifically, the OPCV argued that, under the Rome Statute, it is "within the discretionary competence of

⁵⁹ Rome Statute, *supra* n. 23, Art. 61(7) (emphasis added).

⁶⁰ *Bemba*, Prosecution's Application for Leave to Appeal the Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo, *supra* n. 55, ¶ 20.

⁶¹ *Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the "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. 56, ¶ 42 (translating and paraphrasing the OPCV submission on 26 June 2009 ICC-01/05-01/08-427).

the Prosecutor, and not the Pre-Trial Chamber, to choose the charges and for the Trial Chamber to pronounce on them.”⁶²

With regard to the second sub-issue, the Prosecution argued that the Chamber “erred in assuming that the charges of torture and outrages were not ‘distinct crimes’ separate from the crime of rape.”⁶³ Specifically, the Prosecution asserted that the Chamber erred because, “[i]nstead of analyzing whether the offences *per se* each require a material legal element not contained in the other[,] the Chamber based its determination on whether the evidence presented [in this particular instance] reflects the same conduct which underlies the count of rape.”⁶⁴

On 18 September 2009, the Pre-Trial Chamber issued a decision rejecting the Prosecution’s request for leave to appeal the confirmation of charges decision.⁶⁵ First, the Chamber emphasized that, notwithstanding the language of Article 61(7), “the Chamber’s role cannot be that of merely accepting whatever charge is presented to it.”⁶⁶ It continued:

To restrict the competences of the Pre-Trial Chamber to a literal understanding of article 61(7) of the Statute, to merely confirm or decline to confirm the charges, does not correspond to the inherent powers of any judicial body vested with the task to conduct fair and expeditious proceedings while at the same time paying due regard to the rights of the Defence. In this regard, it is the view of the Chamber that article 61(7) of the Statute does not bar the Chamber from rulings which it considers necessary to ensure the protection of the rights of the Defence pursuant to article 67 of the Statute.⁶⁷

⁶² *Id.*

⁶³ *Id.* ¶ 16.

⁶⁴ *Id.* ¶ 17.

⁶⁵ *Id.* ¶ 52.

⁶⁶ *Id.*

⁶⁷ *Id.*

In support of this position, the Chamber cited its duty “to safeguard the rights of the Defence at any time of the proceedings,” saying that this duty “entails that, when circumstances so warrant, the Chamber may not confirm all charges as such, in case the essence of the violation of the law underlying these charges is fully subsumed by one charge.”⁶⁸ At the same time, however, the Chamber rejected the argument that the “declined charges would not go to trial,” stressing that the “Trial Chamber may invoke [R]egulation 55 of the Regulations and re-characterise a crime to give it its most appropriate characterisation.”⁶⁹ Hence, while it held that the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime should not be part of the trial against Mr. Bemba because those charges were burdensome to the Defense, the Pre-Trial Chamber seemed to allow for the possibility that those charges might nevertheless be added back into the case at a later stage by the Trial Chamber if necessary.

With regard to the issue of whether the Chamber erred in assuming that the crimes of torture and outrages upon personal dignity were not “distinct crimes” separate from the crime of rape, the Chamber merely stated that the Prosecution’s argument “seem[ed] to rest on a misrepresentation of the Chamber’s findings” in the confirmation decision.⁷⁰ In this context, it reiterated that where the Prosecution “relied on the same evidence pertaining to acts of rape to substantiate two or more legal characterisations, the specific elements of the crime of torture and outrages upon personal dignity were congruent with those of the crime of rape and, therefore, fully subsumed by the count of rape.”⁷¹ However, the Chamber did not directly address whether the Prosecution had raised an appealable issue through its allegation that the Chamber “erred in assuming that the charges of torture and outrages were not ‘distinct crimes’ separate from the crime of rape.”

⁶⁸ *Id.* ¶ 53.

⁶⁹ *Id.* ¶ 56.

⁷⁰ *Id.* ¶ 51.

⁷¹ *Id.* ¶ 54.

III. ANALYSIS AND RECOMMENDATIONS

Based on the foregoing, there are two broad issues that arise from the *Bemba* Pre-Trial Chamber's 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.

A. 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 International Criminal Court – the Rome Statute, the ICC Rules of Procedure and Evidence, and the Regulations of the Court – 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. Moreover, in some circumstances, it may be unrealistic to expect the Prosecution to determine prior to trial which charges will be proven, and the existence of Regulation 55 does not necessarily alter this reality.

1. *Under the Documents Governing the ICC, the Prosecution is Given Broad Discretion to Select the Charges against the Accused*

The Rome Statute governing the ICC makes clear that it is the Prosecution that bears responsibility “for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.”⁷² Furthermore, it is the Prosecution that proposes the charges to be included in a warrant of arrest,⁷³ as

⁷² Rome Statute, *supra* n. 23, Art. 42(1).

⁷³ *Id.* Art. 58(2) (“The application of the Prosecutor [for a warrant of arrest] shall

well as any amendments to the arrest warrant,⁷⁴ and it is the Prosecution that prepares the Document Containing the Charges by which the accused is informed of the charges “on which the Prosecutor intends to bring the person to trial.”⁷⁵

At the same time, the Rome Statute limits the authority of the Pre-Trial Chamber. As discussed above, Article 61(7) *requires* that the Pre-Trial Chamber take one of three actions upon the close of the confirmation of charges hearing.⁷⁶ First, the Pre-Trial Chamber is directed to “[c]onfirm 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.”⁷⁷ Second, the Chamber is to “[d]ecline to confirm those charges in relation to which it has determined that there is insufficient evidence.”⁷⁸ Lastly, if the Pre-Trial Chamber is not persuaded of the sufficiency of evidence, or considers that the charges do not appropriately reflect the evidence presented, Article 61(7)(c) allows the Pre-Trial Chamber to adjourn the hearing and *request that the Prosecutor* present more evidence or amend the charges.⁷⁹ Notably, this language differs from the rules of the International Criminal Tribunal for the former Yugoslavia, which expressly permit the Trial Chamber, “having heard the parties and in the interest of a fair and expeditious trial, [*to direct the Prosecutor to select the counts in the indictment on which to proceed.*”⁸⁰

contain: ... (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) A concise statement of the facts which are alleged to constitute those crimes; [and] (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes...”).

⁷⁴ *Id.* Art. 58(6) (“The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein.”).

⁷⁵ *Id.* Art. 61(3) (emphasis added).

⁷⁶ *Id.* Art. 61(7).

⁷⁷ *Id.* Art. 61(7)(a).

⁷⁸ *Id.* Art. 61(7)(b).

⁷⁹ *Id.* Art. 61(7)(c) (emphasis added).

⁸⁰ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.43 (2009), entered into force 14 March 1994, amendments adopted 24 July 2009, Rule 73*bis*(E) (emphasis added). It is worth

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-Trial Chamber be given the authority to amend the charges *or to change the legal characterization of the facts* brought by the Prosecutor, and ultimately rejected those proposals.⁸¹

Given the plain language of Article 61(7), it is difficult to understand the *Bemba* Pre-Trial Chamber's finding that it is "for the Chamber to characterise the facts put forward by the Prosecutor," as well as its finding that it is free to dismiss charges for which there is sufficient evidence to establish substantial grounds to believe the accused is responsible.⁸² Rather, the role of the Pre-Trial Chamber at the conclusion of the confirmation process is to confirm each of the charges for which the Prosecution has presented sufficient evidence to establish substantial grounds to believe the accused is responsible for the crime, and deny those for which insufficient evidence exists.

noting that this language was adopted in the unique context of discussions relating to the "completion strategy" for the International Criminal Tribunal for the former Yugoslavia. *See* Letter dated 15 November 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, U.N. Doc. S/2006/898, at 3-4, 16 November 2006 (discussing Rule 73bis(E) in the context of "Measures taken to implement the [ICTY's] completion strategy").

⁸¹ *See, e.g.*, Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. II, at 96 (1996) (reflecting a proposal, ultimately rejected by the drafters, under which the Pre-Trial Chamber would be given the power to "confirm only part of the indictment [and amend it], giving a different qualification to the facts") (brackets in original). For more on the creation of the Pre-Trial Chamber and its authority under the Rome Statute, *see* War Crimes Research Office, *Defining the Case Against an Accused Before the International Criminal Court: Whose Responsibility Is It?* (November 2009), available at http://www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_Defining_Case_Nov2009.pdf?rd=1.

⁸² *See supra* n. 26 *et seq.* and accompanying text.

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 *Delalić*, before the trial begins, it may not be “possible to determine to a certainty which of the charges brought against an accused will be proven.”⁸³ Only after all the evidence is presented can the Trial Chamber “evaluate which of the charges may be retained based upon sufficiency of the evidence.”⁸⁴ As stated above, this is particularly true in the context of international criminal bodies, as “the crimes over which the [bodies have] jurisdiction are frequently broad and yet to be clarified in the jurisprudence.”⁸⁵ Thus, if the evidence ultimately proves a charge other than the one(s) retained by the Court, barring cumulative charging would result in the wrongful dismissal of criminal conduct. Notably, under the principle of *ne bis in idem* as articulated in the Rome Statute, no accused shall be tried before the ICC or before another court “with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.”⁸⁶ Thus, if an accused is acquitted on a charge of extermination as a crime against humanity because the Trial Chamber determines, for instance, that the Prosecution failed to establish that the underlying killings were collective in nature, as opposed to directed toward

⁸³ *Delalić, et al.*, Appeals Chamber Judgement, *supra* n. 7, ¶ 400. See also Guénaél Mettraux, *Crimes Against Humanity In The Jurisprudence Of The International Criminal Tribunals For The Former Yugoslavia And For Rwanda*, 43 Harv. Int'l L.J. 237, n. 348 (Winter 2002) (“The primary reason [that the ICTY/ICTR permit cumulative charging is] that it is impossible or very difficult for the prosecution to determine a priori, before the presentation of all the evidence, which of the charges brought against the accused will be proven.”).

⁸⁴ *Delalić, et al.*, Appeals Chamber Judgement, *supra* n. 7, ¶ 400; see also *Prosecutor v. Delalić, et al.*, Appeals Chamber Judgement Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, IT-96-21-A, ¶ 12 (20 February 2001); Bogdan, *supra* n. 9, n. 123 (quoting *The Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic & Dragoljub Prcac*, Trial Chamber “Decision on Defence Motions for Acquittal,” IT-98-30/1-T (15 December 2000)).

⁸⁵ *Naletilić & Martinović*, Decision on Vinko Martinovic’s Objection to the Amended Indictment and Mladen Naletilic’s Preliminary Motion to the Amended Indictment, *supra* n. 11 (note that this decision contains no paragraph numbers).

⁸⁶ Rome Statute, *supra* n. 23, Art. 20.

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 *Bemba* Pre-Trial Chamber expressly recognized that it was deviating from the practices both of other international criminal bodies and many national jurisdictions in disallowing cumulative charging,⁸⁷ but justified that departure on a finding that Regulation 55 of the ICC's Regulations of the Court allows "the Trial Chamber [to] re-characterise a crime to give it the most appropriate legal characterization."⁸⁸ Yet, there is nothing in Regulation 55 *requiring* that the Trial Chamber re-characterize the facts where warranted. Rather, the provision states that the Trial Chamber "*may* change the legal characterisation" of facts under certain circumstances.⁸⁹ Thus, the regulation leaves it to the discretion of the judges presiding over a particular case whether to re-characterize facts, and those judges could decide not to use Regulation 55 even in a circumstance where an accused might otherwise be acquitted. For instance, it is possible that a particular panel of judges will determine that it is the Prosecutor's job to prove his case and if he fails to do so, then the accused should go free. In such a scenario, Regulation 55 does not protect against acquittals of a guilty individual and thus the Prosecution may be right to be fearful of a wrongful acquittal if it does not put forward all possible charges.

Furthermore, the Pre-Trial Chamber's reliance on Regulation 55 and the Trial Chamber's potential ability and willingness to re-characterize the charges against the accused at some point in the middle of trial seems inconsistent with the Chamber's repeated pronouncement that it was dismissing the so-called "cumulative charges" in order to reduce

⁸⁷ See *supra* n. 41 *et seq.* and accompanying text.

⁸⁸ *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.

⁸⁹ Regulations of the Court, ICC-BD/01-01-04, R. 55(1), *adopted* 26 May 2004 (emphasis added).

the burden on the defense. As stated in both its decision on the confirmation of charges and its decision denying the Prosecution's request for leave to appeal, the *Bemba* Pre-Trial Chamber stressed that it was declining the charges it deemed to be "cumulative" based on 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 guarantees not only the accused's right to "be informed promptly and in detail of the nature, cause and content of the charge[s]," but also the right to "have adequate time and facilities for the preparation of the defense."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*, Decision on the Prosecutor's Application for Leave to Appeal the "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. 56, ¶ 52.

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) (stating that, if the Prosecution is permitted to "burden the Chambers of the Court with an overload of alternative or cumulative charges in order to avoid the risk of acquittal," such "[l]ong and excessive charges [will] prolong the length of the trial and may compromise the right of the accused 'to be tried without undue delay' (Article 67 (1) (c) and the duty of the Trial Chamber to ensure fairness and expeditiousness of the trial (Article 64(2))."); Hans-Peter Kaul, *Construction Site For More Justice: The International Criminal Court after Two Years*, 99 *Am. J. Int'l L.* 370, 377 (April 2005) (stating that Regulation 55 was adopted "to avoid lengthy indictments with cumulative and alternative charges," as the "judges want to conduct focused trials on clearly delineated charges, in the interest both of judicial economy and of the defense.").

⁹² *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*, Decision on the Prosecutor's Application for Leave to Appeal the "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. 56, ¶ 52; Kaul, *supra* n. 91, at 377.

⁹³ Rome Statute, *supra* n. 23, Art. 67(1)(a) and (b).

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-Trial Chamber's rationale calls into 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 deemed inappropriately “cumulative” *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 humanity of rape (which requires that the “perpetrator 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 body” and that the “invasion was committed by force, or by threat of force or coercion”⁹⁵) clearly contains elements materially distinct from the crime against humanity of torture (which requires that the “perpetrator inflicted severe physical or mental pain or suffering upon one or more persons” and that “[s]uch person or persons were in the custody or under control of the perpetrator”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.* and accompanying text.

⁹⁵ International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Art. 7(1)(g)-1.

⁹⁶ *Id.* Art. 7(1)(f).

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 materially distinct element, even if the same underlying evidence is used to support each charge.¹⁰⁰ Notably, in that context, the Co-Investigating Judges had initially taken the approach taken by the Pre-Trial Chamber in the *Bemba* case, namely, that the same acts could not be used to satisfy more than one charge.¹⁰¹ Specifically, in the first case tried before the ECCC, the Co-Investigating Judges, who are responsible for preparing the Closing Order upon which an accused person is sent to trial,¹⁰² had made the following finding:

Certain acts characterised by the judicial investigation also constitute the domestic offences of homicide and torture pursuant to [various articles] of the Cambodian Penal Code [which fall within the jurisdiction of the ECCC]. However, these acts must be accorded the highest available legal classification, in this case: Crimes against Humanity or Grave Breaches of the

⁹⁷ See *supra* n. 47 *et seq.* and accompanying text.

⁹⁸ See *supra* n. 7 *et seq.* and accompanying text.

⁹⁹ See *supra* n. 13 *et seq.* and accompanying text.

¹⁰⁰ *The Prosecutor v. Kaing Guek Eav "Duch,"* Decision on Appeal Against Closing Order Indicating Kaing Guek Eav Alias "Duch," 001/18-07-2007-ECCC/OCIJ (PTC 02), ¶¶ 51-107 (5 December 2008).

¹⁰¹ *Id.* ¶ 55.

¹⁰² See Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4), *as revised on* 11 September 2009, R. 67.

Geneva Conventions of 1949.¹⁰³

Yet, this holding was overturned on appeal, as the Pre-Trial Chamber – which is the body authorized to hear appeals from decisions of the Co-Investigating Judges of the ECCC¹⁰⁴ – held that “the domestic crimes of premeditated murder and torture were not subsumed by the international crimes,” as the domestic crimes and international crimes each contained distinct material elements.¹⁰⁵ Thus, the Closing Order was amended to include charges relating to torture and murder under both Cambodian law and international law, even though the domestic crimes were “based on the same facts as the international offences.”¹⁰⁶

Permitting multiple charges based on the same conduct is critical because the multiple charges will enable the Trial Chamber, where appropriate, to enter multiple convictions based on that conduct. As described above, multiple convictions are warranted in many cases, as they serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct.¹⁰⁷ Indeed, as Judge Mohammed Shahabudden once observed: “To convict of one offence only is to leave unnoticed the injury to the other interest of international society and to fail to describe the true extent of the criminal conduct of the accused.”¹⁰⁸

¹⁰³ “*Duch*,” Decision on Appeal Against Closing Order Indicating Kaing Guek Eav Alias “Duch,” *supra* n. 100, ¶ 55.

¹⁰⁴ See Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4), as revised on 11 September 2009, R. 73.

¹⁰⁵ “*Duch*,” Decision on Appeal Against Closing Order Indicating Kaing Guek Eav Alias “Duch,” *supra* n. 100, ¶ 85.

¹⁰⁶ *Id.*

¹⁰⁷ *Brima, et al.*, Appeals Chamber Judgment, *supra* n. 10, ¶ 215.

¹⁰⁸ *The Prosecutor v. Jelusic*, Case No. IT-95-10-T, Appeals Chamber Judgement, Partial Dissenting Opinion of Judge Shahabudden, ¶ 41 (14 December 1999).

IV. 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 discretion to “re-characterize” the facts of a case at trial, this authority 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 legal element, the judges should consider the legal elements of each charge, not the conduct giving rise to the charge. Such an approach will help ensure that the final judgment against an accused fully reflects his or her culpability for the gravest crimes known to humankind.

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THE PRACTICE OF CUMULATIVE CHARGING AT THE INTERNATIONAL CRIMINAL COURT

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. Bemba's role in numerous acts of rape committed against civilians in the Central African Republic. Importantly, the Pre-Trial Chamber did find sufficient evidence to establish substantial grounds to believe that these acts of rape took place, and that the accused could be held criminally responsible for the acts. Yet, it held that the prosecution had acted inappropriately by bringing "cumulative charges" based on the acts of rape, and thus only confirmed the charges of rape as a crime against humanity and rape as a war crime, while dismissing the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime.

This report examines the *Bemba* Pre-Trial Chamber's determination that the practice of cumulative charging is not warranted in the context of the International Criminal Court as a general matter, as well as the Chamber's holding that, in the case before it, the charges of torture as a crime against humanity and outrages upon personal dignity as a war crime were inappropriately cumulative. The report begins with a discussion of cumulative charging in international criminal bodies, where the practice is widely accepted. It then lays out the relevant jurisprudence from the *Bemba* case. Finally, the report analyzes the *Bemba* jurisprudence and offers recommendations. In particular, the report concludes that nothing prohibits the practice of cumulative charging at the ICC, and persuasive reasons exist to permit the practice. On this basis, it recommends that the ICC broadly permit cumulative charging, or, at a minimum, that it permit multiple charges based on the same evidence where each charge contains a materially distinct element.



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