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The Practice of Cumulative Charging before International Criminal Bodies

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I. INTRODUCTION

1. The War Crimes Research Office at the American University Washington College of Law submits this *amicus curiae* brief pursuant to Rule 131 of the Rules of Procedure and Evidence (RPE) of the Special Tribunal for Lebanon (STL), and pursuant to a general invitation issued by President Cassese on 7 February 2011, in which he invited, *inter alia*, non-governmental organizations and academic institutions to submit briefs on specific issues related to the fifteen preliminary questions addressed to the judges of the Appeals Chamber pursuant to Rule 68(G) of the RPE. The brief addresses the specific question of whether cumulative charging is an accepted practice before international criminal bodies.

II. SUMMARY OF ARGUMENTS

2. **Cumulative charging is a widely accepted practice in international criminal bodies, even where one charge is fully subsumed in another charge.** 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. Subsequent international tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers for the Courts of Cambodia (ECCC) 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. Furthermore, 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, at least with respect to charges that contain materially distinct elements. Notably, the post-World War II tribunals, the ICTY, the ICTR, the SCSL, and the ECCC have each permitted multiple convictions based on the same conduct, so long as each offense contains a materially distinct element, recognizing that multiple convictions are often necessary to fully reflect the culpability of the accused.

3. **The decision of Pre-Trial Chamber II of the International Criminal Court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* on the subject of cumulative charging does not affect the general acceptance of the practice of cumulative charging before international criminal bodies**. A single Pre-Trial Chamber of the International Criminal Court (ICC) held in one case – the *Bemba* case – that only "distinct crimes" could justify a cumulative charging approach, meaning that each crime charged must contain a materially distinct element not contained in the other. Notably, however, another Pre-Trial Chamber of the ICC permitted the practice of cumulative charging in the context of the case against Sudanese President Omar al-Bashir, even where one charge was fully subsumed in another charge. Furthermore, the *Bemba* Pre-Trial Chamber itself expressly acknowledged that cumulative charging is practiced by both national courts and international tribunals, and it declined to apply the test applied by these other bodies based on *the unique context of the ICC*. Specifically, in the opinion of the *Bemba* Pre-Trial Chamber, the ICC is different from other international criminal bodies in that it allows for the Chambers, rather than the Prosecutor, to determine the most appropriate legal characterization of the relevant facts. 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. Because the Trial Chamber of the STL lacks the power to amend the legal characterization of charges during trial, the *Bemba* decision on cumulative charging should not be applied in the context of the STL.

4. **In the event that the STL applies the *Bemba* approach to cumulative charging,**

the Tribunal 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. Importantly, under the test articulated by the *Bemba* Pre-Trial Chamber, cumulative charging is appropriate so long as each crime allegedly committed contains a materially distinct element not contained in the other. Nevertheless, in applying its stated test to the facts of the case before it, 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, the Chamber determined that the charges of rape as a crime against humanity and torture as a crime against humanity were inappropriately cumulative because the same evidence – *i.e.*, acts of rape – was used to satisfy the elements of both crimes, even though each of the crimes contains materially distinct elements. As detailed below, such an approach is unwarranted as both a matter of law and practice. In fact, as stated above, 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.

III. ARGUMENTS

A. Cumulative Charging is a Widely Accepted Practice before International Criminal Bodies, Even Where One Charge is Fully Subsumed in Another Charge

5. 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 (IMTFE), 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.[1] Indeed, the IMTFE

[1] *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."); Judgement of the International Military Tribunal for the Far East (1 November 1948), at 34-35,

described the practice of bringing charges that were "cumulative or alternative" as "common."[2] Furthermore, although that same tribunal declined to enter *convictions* on multiple charges where certain charges were fully subsumed within other charges, it stressed that the multiple *charges* were valid even where one or more charges lacked a distinct material element.[3]

6. Subsequent international criminal tribunals, including the ICTY, the ICTR, the SCSL, and the ECCC have each similarly entertained multiple charges against an accused based on the same underlying acts.[4] Importantly, as seen with the IMTFE, these

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available at http://www.jbiblio.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).

[2] Judgement of the International Military Tribunal for the Far East, *supra* n. 1, at 35.

[3] *Id.* 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).

[4] *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 Judgement, SCSCL-04-15-A, ¶ 1192 (26 October 2009); *The Prosecutor v. Nuon Chea, et al.*, Closing Order, Case File No.: 002/19-09-2007-ECCC-OCIJ, ¶¶ 1373-1390 (15 September 2010). Note that in an early decision by the ICTR, a Trial Chamber held that "[c]umulative charging is acceptable only where the offences have differing elements or where laws in

subsequent international criminal bodies have permitted cumulative charging 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,[5] even though each element of murder as a crime against humanity is subsumed in the crime of extermination as a crime against humanity.[6] This is in fact exactly what has occurred in the context of Case 002 before the ECCC, in which the accused have been charged with the crimes against humanity of murder and extermination based on the same set of facts relating to persons killed at particular execution sites and worksites, as well as those killed during the forced transfer of populations.[7] In addition, as discussed

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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. *See Rutaganda*, Trial Judgement and Sentence, *supra* this footnote, ¶ 110; *Musema*, Trial Judgement and Sentence, *supra* this footnote, ¶ 296.

[5] *See, e.g., Sesay, et al.*, Appeals Chamber Judgement, *supra* n. 4, ¶ 1192.

[6] *See, e.g., The Prosecutor v. Kamuhanda*, Trial Judgement, Case No. ICTR-95-54A-T, ¶ 686 (22 January 2004) ("[A]part from the question of scale, the essence of the crimes of murder as a Crime against Humanity and extermination as a Crime against Humanity is the same.").

[7] *Nuon Chea, et al.*, Closing Order, *supra* n. 4, ¶¶ 1373-1390. In the first case before the ECCC, Case 001, the Pre-Trial Chamber seemed to articulate a test for cumulative charging that would only permit multiple charges where each charge contained a distinct material element *See 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) (reversing a holding by the Co-Investigating Judges that certain acts could not be charged as both international and domestic crimes based on a finding that the domestic crimes were not fully subsumed in the international crimes). However, in that case, the issue was whether the same conduct could be charged as both an international and a domestic crime, and the fact was that the relevant charges under examination each contained materially distinct elements. *Id.* Thus, the Pre-Trial Chamber did not directly address the issue whether two charges could be brought simultaneously if one of charges was fully subsumed in the other. Furthermore, in determining that both international and domestic charges would be allowed based on the same conduct, the Chamber cited favorably to the "jurisprudence of the *ad hoc* international tribunals hold[ing] that it is permissible in international criminal proceedings to include in indictments different legal offences in relation to the same acts," suggesting it was adopting the practice of the ICTY and ICTR with respect to cumulative charging as its own. *Id.* ¶ 87. This suggestion seems to be

further below, Pre-Trial Chamber I of the ICC has issued an arrest warrant for Sudanese President Omar al-Bashir containing charges of both murder and extermination as crimes against humanity based on the same underlying acts.[8]

7. 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]

8. Furthermore, permitting multiple charges based on the same conduct is critical because the multiple *charges* will enable the Trial Chamber, where appropriate, to

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confirmed by the approach of the Co-Investigating Judges in Case 002, although the judges do not expressly acknowledge that they are adopting an approach to cumulative charging that allows multiple charges not containing materially distinct elements.

[8] *See infra* n. 43 *et seq.* and accompanying text.

[9] *Delalić, et al.*, Appeals Chamber Judgement, *supra* n. 4, ¶ 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 *Kvocka, 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 Judgement, 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).

enter multiple *convictions* based on that conduct, at least with respect to charges that contain materially distinct elements. Notably, the post-World War II tribunals,[12] the ICTY,[13] the ICTR,[14] the SCSL,[15] and the ECCC[16] have each permitted multiple convictions based on the same conduct, so long as each offense contains a materially distinct element. 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 conduct."[17] 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

[12] *See, e.g.*, *Goering, et al.*, *supra* n. 1, at 254 (holding that, "from the beginning of the war in 1939[,] war crimes were committed on a vast scale, *which were also crimes against humanity*") (emphasis added); *Brandt, et al.*, *supra* n. 1, at 174 (reasoning that, as long as war crimes were "alleged to have been 'committed against the civilian 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).

[13] *See, e.g.*, *The Prosecutor v. Krstić*, Appeals Chamber Judgement, IT-98-33-A, ¶ 218 (19 April 2004) (explaining that, under the "established jurisprudence" of the ICTY, "multiple convictions entered under different statutory provision, but based on the same conduct, are permissible" where "each statutory provision has a materially distinct element not contained within the other").

[14] *The Prosecutor v. Akayesu*, Trial Chamber Sentence, ICTR-964-S, ¶ 468 (2 September 1998) (concluding, "[o]n the basis of national and international law and jurisprudence," that "it is acceptable to convict the accused of two offences in relation to the same set of facts... where the offences have different elements").

[15] *Sesay et al.*, Appeals Chamber Judgment, *supra* n. 4, ¶ 1191 (holding "[i]t is permissible to enter cumulative convictions under different statutory provisions for the same criminal act if each statutory provision has a 'materially distinct element' that is not contained in the other statutory provision").

[16] *The Prosecutor v Kaing Guek Eav "Duch,"* Trial Judgement, Case File/Dossier No. 001/18-07-2007/ECCC/TC, ¶ 560 (26 July 2010) (citing the ICTY Appeals Chamber for the proposition that "multiple convictions entered under different statutory provision, but based on the same conduct, are permissible" where "each statutory provision has a materially distinct element not contained within the other").

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

extent of the criminal conduct of the accused."[18]

9. 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 sentencing stage.[19]

B. The Cumulative Charging Decision of Pre-Trial Chamber II of the International Criminal Court in the *Bemba* Case Does Not Affect the General Acceptance of the Practice of Cumulative Charging before International Criminal Bodies

1. The Bemba *Decision on the Confirmation of Charges*

10. Jean-Pierre Bemba Gombo was transferred to the custody of the ICC in the Hague in July 2008.[20] Subsequently, the parties began to prepare for the confirmation of 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."[21] Among the charges put forward by the Prosecution against Bemba were the following:

> [f]rom 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;[22]

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

[19] *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).

[20] *Id.* ¶ 4.

[21] 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. 61(7).

[22] *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

> [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 and children in the Central African Republic, in violation of [Article] 7(1)(f)... of the Rome Statute;[23]
>
> [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;[24] and
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> [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.[25]

11. The confirmation of charges hearing took place in January 2009 and, six months later, the Chamber issued its decision regarding the charges.[26] With regard to the crimes

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2008).

[23] *Id.* at 39.

[24] *Id.* at 38.

[25] *Id.* at 40.

[26] *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 (15 June 2009). 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

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 widespread attack directed against the civilian population" of the Central African Republic during the relevant time period.[27] 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.[28]

12. 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."[29] It then "acknowledge[d] that the cumulative charging approach is followed by national courts and international tribunals under certain conditions,"[30] 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.[31] Nevertheless, the Chamber went on to hold that, in its opinion, the ICC is unique because it allows for "the Chamber to characterise the facts put forward by the Prosecutor,"[32] rather than leaving it to the Prosecutor to determine the legal characterization of charges. The Chamber explained:

> [T]he ICC legal framework differs from that of the *ad hoc* tribunals, since under [R]egulation 55 of the Regulations [of the

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Prosecutor, 30 March 2009).

[27] *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. 26, ¶ 72.

[28] *Id.*

[29] *Id.* ¶ 199.

[30] *Id.* ¶ 200 (internal citations omitted).

[31] *Id.*

[32] *Id.* ¶ 201.

> Court[33]], 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.[34]

13. 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 provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other."[35]

14. 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."[36] 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."[37]

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[33] 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.

[34] *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. 26, ¶ 203.

[35] *Id.* ¶ 202, n. 277.

[36] *Id.* ¶ 204.

[37] *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 Document Containing the Charges 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 Document Containing the Charges." *Id.* ¶¶ 206-08. Hence, the Chamber declined to confirm

15. The Chamber made similar findings with regard to the Prosecution's charge of outrages upon personal dignity as a war crime.[38] As an initial matter, the Chamber noted that the Prosecution failed to specify in its Document Containing the Charges (DCC) "the facts upon which [it] bases the charge of outrages upon personal dignity."[39] 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."[40] 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.[41] 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.[42]

2. The Bashir *Arrest Warrant*

16. In contrast to the approach taken by Pre-Trial Chamber II in the *Bemba* case, Pre-Trial Chamber I of the ICC permitted the practice of cumulative charging in the context of the case against Sudanese President Omar al-Bashir, even where one charge was fully subsumed in another charge. Specifically, in its first decision issuing a warrant of arrest for President Bashir,[43] Pre-Trial Chamber I found reasonable

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the charge of torture as a crime against humanity based on acts of torture other than acts of rape. *Id.* ¶ 209.

[38] *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.

[39] *Id.* ¶ 307.

[40] *Id.* ¶ 310.

[41] *Id.*

[42] *Id.* ¶¶ 310-11.

[43] The ICC has issued two separate arrest warrants for President Bashir. In the first arrest warrant, Pre-Trial

grounds to believe that the accused committed both the crime against humanity of murder and the crime against humanity of extermination, even though the Prosecution relied on the same underlying acts in support of each charge.[44] Hence, the Pre-Trial Chamber included both charges in its initial arrest warrant for President Bashir,[45] even though the crime against humanity of murder is fully subsumed within the crime against humanity of extermination where the two crimes are based on the same underlying acts.

3. *The Effect of the* Bemba *Jurisprudence on the General Acceptance of the Practice of Cumulative Charging before International Criminal Bodies*

17. The *Bemba* decision on cumulative charging does not affect the general acceptance of the practice of cumulative charging before international criminal bodies for two reasons. First, as explained above, the *Bemba* decision was issued by a single Pre-Trial Chamber in a single case. Notably, although the Prosecutor sought leave to obtain interlocutory review of Pre-Trial Chamber II's decision before the Appeals Chamber, the Pre-Trial Chamber denied the Prosecutor's request.[46] Thus, the decision of the *Bemba* Chamber has in no way been sanctioned by the ICC Appeals Chamber. Furthermore, Pre-Trial Chamber I permitted the practice of cumulative charging in the context of the *Bashir* case, suggesting that the *Bemba* decision is far from settled law in the context of the ICC.

Chamber I found there were reasonable grounds to believe that the accused had committed various war crimes and crimes against humanity, but declined to include charges of genocide. *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (4 March 2010). Following an appeal by the Prosecutor, however, the Pre-Trial Chamber applied a different standard to the genocide charges and found reasonable grounds to believe the accused had also committed acts of genocide. *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95 (12 July 2010). Hence, the Pre-Trial Chamber issued a second arrest warrant that included the genocide charges. *Id*

[44] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, ¶¶ 95-96 (4 March 2009).

[45] *Id.* at 92.

[46] *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).

18. Second, even if the approach of the *Bemba* Pre-Trial Chamber towards cumulative charging is ultimately adopted by the ICC as a whole, this fact would not affect the finding that cumulative charging is a widely accepted practice before international criminal bodies. As noted 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,[47] and it 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."[48] The validity of this conclusion is itself questionable, as 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.[49] 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 pronouncement that it was dismissing the so-called "cumulative charges" in order to reduce the burden on the defense. Most importantly, however, the fact that there is no equivalent to the ICC's Regulation 55 under the rules and regulations governing the Special Tribunal for Lebanon means that it would be inappropriate for the STL to adopt the reasoning of the *Bemba* Pre-

[47] *See supra* n. 30 *et seq.* and accompanying text.

[48] *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. 26, ¶ 203.

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

Trial Chamber.

C. In the Event that the STL Applies the *Bemba* Approach to Cumulative Charging, the Tribunal 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

19. While the primary recommendation in this brief is that the STL should broadly permit cumulative charging, we recommend that, at a minimum, the Tribunal 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.[50] 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"[51]) 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"[52]), 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.[53]

20. Such an approach is unwarranted as both a matter of law and practice. As an initial matter, nothing in the documents governing the International Criminal Court – or in

[50] *See supra* n. 35 *et seq.* and accompanying text.

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

[52] *Id.* Art. 7(1)(f).

[53] *See supra* n. 37 *et seq.* and accompanying text.

the documents governing the Special Tribunal for Lebanon – prohibits the Prosecution from bringing multiple charges against an accused based on the same underlying conduct. Furthermore, as explained above,[54] 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. The ICTY Appeals Chamber described the practice with respect to cumulative convictions as follows:

> multiple 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.[55]

21. The ICTY has also made clear that, in determining whether cumulative convictions are permissible in a given case, "what must be considered are *the legal elements of each offence, not the acts or omissions giving rise to the offence.*"[56] 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.[57] The Appeals Chamber explained that

[54] *See supra* n. 12 *et seq.* and accompanying text.

[55] *Krstić*, Appeals Chamber Judgement, *supra* n. 13, ¶ 218. *See also Delalić, et al.*, Appeals Chamber Judgement, *supra* n. 4, ¶ 412.

[56] *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.").

[57] *Krstić*, Appeals Chamber Judgement, *supra* n. 13, ¶¶ 227, 229.

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").[58] 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."[59]

22. As explained above, the rationale for permitting cumulative convictions is that "multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct."[60] In light of this rationale, at the very least, cumulative charges should be permitted before the STL where each charge contains a materially distinct element, even if the same evidence is used to satisfy the elements of each charge.

IV. CONCLUSION

23. For the reasons set out above, the War Crimes Research Office respectfully submits that the practice of cumulative charging has been widely accepted by international criminal bodies, even where one charge is fully subsumed in another, on the ground that, prior to trial, it may not be possible to determine exactly which charges will be proven beyond a reasonable doubt, and because multiple charges are necessary to ensure multiple convictions may be entered where warranted to reflect the full

[58] *Id.* ¶¶ 223-26.

[59] *Id.* ¶ 229.

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

criminality of the accused. To the extent that the Appeals Chamber nevertheless chooses to limit the Prosecution to bringing multiple charges based on the same underlying acts only where each charge contains a distinct legal element, it is respectfully submitted that the Chambers 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.

Respectfully submitted,

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