

Cumulative Charges under International Criminal Law

Issues and Perspectives

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1 Introduction

Cumulative charges, or cumulative charging, is a process “by which an accused can be charged with a number of different crimes on the same underlying acts, with the charges being expressed cumulatively rather than alternatively.”¹ Practically, the issue of cumulative charging implies that an accused may be charged with many different crimes for the same act. Instead of charging alternatively, the prosecution prefers to charge them cumulatively as different crimes even though they are based on the same single act. For example, for the same single act of killing of one person during an armed conflict, an accused may be cumulatively charged with crimes against humanity, war crimes and genocide, if the evidence is sufficient and all the requirements of such crimes are met in that single act of killing. Cumulative charges must be distinguished from the concept of cumulative convictions, which means that an accused is convicted of multiple offenses under different legal headings for the same conduct.² Though they tend to the same point and are often used to mean the same thing, the difference between both concepts is that “cumulative charges may result in multiple convictions or a single conviction, but are not determinative”³ of each other.

1 Fiona O'Regan, “Prosecutor v. Jean-Pierre Bemba Gombo: The Cumulative Charging Principle, Gender-Based Violence, and Expressivism,” *43 Geo. J. Int'l L.* 1323 (2012).

2 Ildiko Erdei, “Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue,” *34 Suffolk Transnat'l L. Rev.* 317 (2011); Attila Bogdan, “Cumulative Charges, Convictions and Sentencing at the ad hoc International Tribunals for the former Yugoslavia and Rwanda,” *Melbourne Journal of Int'l L.* (2002).

3 Ildiko Erdei, “Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue,” *34 Suffolk Transnat'l L. Rev.* 317 (2011).

Nonetheless, cumulative charging must be distinguished from other related concepts such as cumulative sentences and alternative charges. *Cumulative sentences* is a mode of sentencing by which the judge imposes separate consecutive sentences upon an accused who has been found guilty of two or more distinct offenses. This means that the judge may sentence the accused to serve successive terms for each offense and the result will be an accumulation of years of imprisonment. For example, if the accused has been found guilty of robbery, rape and murder, the final sentence will be the sum of the sentence of each offence and the accused will serve the years of imprisonment for robbery, in addition to serving the years of imprisonment for rape, as well as the years of imprisonment for murder. *Alternative charging* is quite different as it occurs when the prosecution or the judge decides to charge the same acts by using a different set of crimes alternatively. In other words, for the same single act of killing only one person during an armed conflict, the prosecution will decide to charge it alternatively either as crime against humanity or as a war crime or as a genocide, while in cumulative charging he or she will charge it as crime against humanity, war crime and genocide.

Cumulative charging is a practice that is used both in common law and civil law systems. However, the matter is approached differently in both systems. Under the former, it is possible to charge the defendant with multiple crimes, leaving the Judge to decide in respect of which crime the accused should be found guilty. Under the latter, the prosecution charges the offender with the crime that has been committed under the law, thus precluding cumulative charging as part of prosecutorial strategy. In its trial Judgement, the International Criminal Tribunal for Rwanda (ICTR) recalled that civil law systems allow multiple charges under the principle known as *concoeurs d'infractions*.⁴ On this basis the ICTR concluded that "it is acceptable to convict [an] accused of two offences in relation to the same set of facts."⁵ The Special Tribunal for Lebanon (STL) has also stressed that Lebanese law, which is influenced by French law, also permits the practice of cumulative charging.⁶ It is also imperative to note that while the Statute establishing the Special Court for Sierra Leone does not contain a provision on cumulative charging, in the course of its functions, the Court has addressed the matter as well.⁷

4 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 467 (Sept. 2, 1998).

5 *Id.* at ¶ 468.

6 Prosecutor v. Ayyash et al., STL-11/1, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging; Appeals Chamber, ¶¶ 270–271 (Feb. 16, 2011).

7 See Taylor's case, FN 98 and Brima's case FN 32 below.