

## CHAPTER 23: SEXUAL VIOLENCE

### Summary of subject-matter of updates:

1. ICC Definition of Rape
2. Charging: Particularity in pleading
3. Charging: *Concursus Delictorum*

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### 1. ICC Definition of Rape

Chapter 23, page 1174, add to Note 6 (“ICC Definition”):

In its confirmation decision in *Prosecutor v. Bemba*, ICC-01/05-01/08-424 (2009), PTCII identified the elements of the crime against humanity of torture in the ICC as follows:

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[Decision Confirming Charges Pursuant to Article 61]  
ICC-01/05-01/08-424 (2009) (Pre-Trial Chamber II)**

#### b) Specific elements of the act of rape as a crime against humanity (count 1)

159. In the Amended DCC, the Prosecutor alleges that:

[f]rom on or about 26 October 2002 to 15 March 2003, Jean-Pierre Bemba committed, jointly with another, Ange-Felix Pattase, 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.

160. The Chamber finds that there is sufficient evidence to establish substantial grounds to believe that acts of rape constituting crimes against humanity directed against CAR civilians were committed by MLC soldiers as part of the widespread attack against the CAR civilian population from on or about 26 October 2002 to 15 March 2003, with the knowledge of the attack by MLC soldiers. The Chamber bases this finding on the following considerations.

***(i) The law and its interpretation***

***aa) Actus reus***

161. The Elements of Crimes with regard to article 7(1)(g) of the Statute require that:

1. The perpetrator invaded<sup>211</sup> 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;
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>212</sup>

162. With regard to the term “coercion,” the Chamber notes that it does not require physical force. Rather, “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.”

***bb) Mens rea***

163. With regard to the mental element, the perpetrator must have committed the act of rape with intent and knowledge within the meaning of article 30 of the Statute.

***cc) Nexus requirement***

164. The Prosecutor must demonstrate the nexus between the acts of rape and the attack, thus proving that acts of rape were committed by MLC troops as part of a widespread or systematic attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.

***(ii) Findings of the Chamber***

165. Having reviewed the Disclosed Evidence, and in particular, the statements of direct witnesses 23, 29, 42, 68, 80, 81, 87 and 22, the Chamber finds that they consistently describe the multiple acts of rape they directly suffered from and detail the invasion of their body by the sexual organ of MLC soldiers, resulting in vaginal or anal penetration. The evidence shows that direct witnesses were raped by several MLC perpetrators in turn, that their clothes were ripped off by force, that they were pushed to the ground,

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<sup>211</sup> The Elements of Crimes clarify in fn 15 to article 7(1)(g) of the Statute that the concept of “invasion” is intended to be broad enough to be gender-neutral.

<sup>212</sup> The Elements of Crimes clarify in fn 16 to article 7(1)(a) of the Statute that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members. The element of force, threat of force or coercion was thus a prevailing factor.

166. The evidence also shows that the perpetrators of the said acts of rape were identified as MLC soldiers. All witnesses who were either victims of rape or witnessed the rape of others, indicate distinguishing features of MLC perpetrators, such as the language spoken by the MLC soldiers, Lingala, often mixed with a “little bit of French,” their inability to communicate properly with the witnesses and/or their families in Sango, and their military clothing, which allows the Chamber to conclude that the perpetrators were MLC soldiers.

### *Notes and Questions*

1. In conflict areas like the CAR and DRC where rape committed by different forces is widespread, it may be possible to prove the rape but the victims may be unable to identify which armed group, let alone which individual perpetrators, committed the crime. As indicated in paragraph 166, language may be one indicator of military affiliation.

2. For discussion, and application, of the war crimes of rape, sexual slavery, and outrages upon personal dignity” and the Crimes Against Humanity of rape, sexual slavery, and “other inhumane acts,” see Prosecutor v. Katanga, Decision on the confirmation of charges, Case No. ICC-01/04-01/07-717, paras. 339-346, 365-372, 428-465 (2008) (PTCI).

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## **2. Charging: Particularity in pleading**

Chapter 23, page 1178, add to the list of considerations at charging, the following:

Consideration at charging must be given to the selection of the correct “mode of participation” given the facts. Although the Ad Hoc Tribunals were not, at least initially, terribly stringent in demanding that the prosecution charge a particular mode of participation, the rule is otherwise in the ICC. Rule 121(c) of the Rules of Procedure and Evidence provides that the “Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of evidence which he or she intends to present at the hearing.” Regulation 52 of the Regulations of the Court further states that the document containing the charges subject to a confirmation hearing under ICC Article 61 “shall include,” *inter alia*,

(b) A Statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons

to trial, including relevant facts for the exercise of jurisdiction by the Court; [and]

(c) *A legal characterization of the facts to accord both the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.*

Regulations of the Court, Reg. 52 (emphasis added).

In some cases, the Prosecutor has charged the appropriate “mode” in the alternative and the PTC has determined the appropriate mode upon which the case would go forward. *See Prosecutor v. Bemba*, [Confirmation of charges], Case. No. ICC-01/05-01/-08-424, paras. 402-403, 444 (2009); *Prosecutor v. Katanga*, Confirmation of charges, ICC-01/04-01/07-717, paras. 468-471, 573-582 (2008).

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### ***3. Charging: Concursum Delictorum***

Chapter 23, page 1189, add the following:

*Confusion in the ICC?*

In its confirmation decision in *Prosecutor v. Bemba*, ICC-01/05-01/08-424 (2009), PTCII determined that the prosecutor could not proceed concurrently with charges of the CAH of Rape and the CAH of Torture based on the same rapes. In so doing, what “test” did it use? Did it correctly identify what the consensus was in the ICTY and ICTR?

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#### **c) Specific elements of the act of torture as a crime against humanity (count 3)**

189. In the Amended DCC, the Prosecutor alleges that:

From on or about 26 October 2002 to 15 March 2003, Jean-Pierre BEMBA committed, jointly with another, Ange-Felix Patasse, crimes 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 Articles 7(1)(f) (...) of the Rome Statute” (emphasis added).

190. The Chamber rejects the cumulative charging approach of the Prosecutor and therefore declines to confirm count 3 of torture as a crime against humanity within the

meaning of article 7(1)(f) of the Statute. The Chamber bases this finding on the following considerations. ...

**(ii) Findings of the Chamber**

197. The Chamber recalls that the Prosecutor framed count 3 of the Amended DCC as torture “through acts of rape or other forms of sexual violence.” At the Hearing, the Prosecutor presented evidence showing not only (aa) acts of rape that would allegedly amount to torture, but also (bb) material facts other than acts of rape which he legally characterised as acts of torture. In his closing statement, the Prosecutor highlighted that “[t]he main physical acts underpinning the charges of rape, torture and outrages upon personal dignity is rape in this case.”

198. The Chamber, in particular, draws the attention to the following events and the evidence related thereto:

**aa) Alleged acts of torture through acts of rape or other forms of sexual violence**

199. The Prosecutor used a cumulative charging approach by characterising count 3 of the Amended DCC as “[torture] *through acts of rape or other forms of sexual violence*” (emphasis added). He avers 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.

200. The Chamber acknowledges that the cumulative charging approach is followed by national courts,<sup>275</sup> and international tribunals under certain conditions.<sup>276</sup>

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<sup>275</sup> See in civil law systems: “*Arret de la grenade*,” C. Cass. 3 March 1960, B.crim.no 138, confirmed in the arret Laurent, C. Cass. 19 May 1983, B. n° 149, infra n° 910 (Examples of real occurrence of facts where cumulative charging was allowed because the different protected interests at stake were on the one hand, the protection of persons and the protection of goods on the other.); see in common law system: *Blockburger v. United States*, 284 U.S. 299, 304 (1931) (Blockburger test).

<sup>276</sup> For example, ICTY, *Prosecutor v. Delalie et al.*, Case No. IT-96-21-A, “Appeals Chamber Judgment,” 20 February 2001; ICTY, *Prosecutor v. Kupregkie et al.*, Case No. IT-95-16-T, “Decision on the Defence Challenges to Form of Indictment,” 15 May 1998: “the Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others.” See the inconsistencies in jurisprudence. ICTR, *The Prosecutor v. Kayishema and Ruzindanda*, Case No. ICTR-95- I, “Trial Judgment,” 21 May 1999, paras 625-650 (where crime against humanity was subsumed in the crime of genocide and cumulative charges were rejected. Cumulative charging is acceptable only where the offences have differing elements or where laws in question protect differing social interests); For a different approach where cumulative charges were accepted, see ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, “Decision on the Defence Challenges to Form of Indictment,” 15 May 1998 (“the Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others”); For a different test applied the “Kupreškić test.” See ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-40-T, “Trial Judgment,” 2 September 1998 (case establishing a test where cumulative charging is accepted). This approach was followed in the ICTR, *The Prosecutor v. Rutaganda*, Case No. ICTR-96-3, “Judgment,” 6 December 1999; ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, “Judgment and

201. The Chamber deems it necessary to recall paragraph 25 of the Decision of 10 June 2008 in which the following was clearly stated:

(...) the Prosecutor appears on occasion to have presented the same facts under different legal characterizations. [The Chamber] wishes to make it clear that the Prosecutor should choose the most appropriate characterization. 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 characterize 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.

202. By its decision, the Chamber 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. The Chamber considers 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. 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.

203. In addition, the Chamber further recalls that the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, 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.

204. The Chamber considers that in this particular case, the specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person,<sup>279</sup> are also the inherent specific material elements of the act of rape. However, the act of rape requires the additional specific material element of penetration, which makes it the most appropriate legal characterisation in this particular case.<sup>280</sup>

205. The Chamber, after having carefully reviewed the factual circumstances submitted by the Prosecutor, concludes that the evidence he presented reflects the same conduct which underlies the count of rape, as identified in the statements of witnesses 22, 23, 29, 68, 80, 81, 87 and Unidentified Victims 1 to 35. The Chamber therefore considers that the act of torture is fully subsumed by the count of rape.

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Sentence,” 27 January 2000, as well as in the dissenting opinion of Judge T. H. Khan in ICTR, *The Prosecutor v. Kaytshema and Ruzindanda*, Case No. ICTR-95-I, “Trial Judgment,” 21 May 1999.

<sup>279</sup> Article 7(1)(f) of the Statute, paras 1 and 2 of the Elements of Crimes.

<sup>280</sup> Article 7(1)(g) of the Statute, paras 1 and 2 of the Elements of Crimes.

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