

Jamaica

Opportunity to include the highest standards of international criminal law into national legislation to stop violence against women

Introduction

A Joint Select Committee (JSC) of the Jamaican Parliament is discussing reforms to the Offences Against the Person Act and the Incest (Punishment) Act. In this framework, the definition of rape is being revised and marital rape will explicitly be included as a criminal offence. Amnesty International welcomes this process and wishes that this time the needed reforms will be passed, after so many years of delay.

This document is a compilation of international law standards on rape and sexual offences which are considered best practices by the international community. It is aimed at encouraging the Jamaican Parliament to take advantage of the opportunity it has to include the highest standards of international criminal law into national legislation. This incorporation will represent a significant step forward towards ending Violence Against Women in Jamaica.

Jamaica, as a State Party of the Convention on the Eliminations of All forms of Discrimination Against Women (CEDAW) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belém do Pará”, has a duty under international law to take positive measures to prohibit and prevent rape and to respond to instances of rape, regardless of where it takes place and whether the perpetrator is an agent of the state, a violent husband or a total stranger. In addition, it has signed the Rome Statute of the International Criminal Court, which includes rape and crimes of sexual violence as war crimes and crimes against humanity, thereby demonstrating a commitment to ratifying it and implementing it in national law.

The reform of legislation is a significant step forward, although more needs to be done. Particularly relevant to the Jamaican Parliament is the need to develop a gender-sensitive criminal procedure for crimes of gender-based violence; to improve the treatment of victims and witnesses, to include reparations for victims of gender-based violence and to ensure gender balance and expertise of related staff.

1. The use of international law standards in local legislation

“The gender provisions [of the Rome Statute of the International Criminal Court] could help strengthen the capacity to address violence against women at the national level via the inclusion of additional crimes of sexual and gender violence, progressive definitions of existing crimes, and more gender-sensitive procedures for the trial of these crimes ... It is thus imperative that women’s

groups focusing on issues of law reform and violence against women get engaged”
Pam Spees, 2003 ¹

Over the past decade the international community has taken unprecedented steps to address crimes of violence against women in international law. Despite the small number of individuals who have been tried and convicted of these crimes in international courts and tribunals, important standards have been set that can be used as a model for national systems. New and progressive definitions of crimes of gender-based violence have been adopted and procedural rules have been modified to remove some of the discriminatory assumptions and practices that often make prosecutions traumatic for victims and reduce the chance of conviction.

International criminal courts such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have contributed significantly to defining crimes of violence against women, in particular crimes of sexual violence, and effective procedures for victims. These advances are reflected and expanded upon in the Rome Statute of the International Criminal Court (Rome Statute), which was adopted in July 1998. International courts only have the capacity to try a small number of individuals. In order to end impunity it is therefore essential to ensure that national authorities effectively investigate and prosecute crimes of violence against women before national courts. Unfortunately, recent history shows that national authorities often fail to investigate and prosecute crimes of violence against women. When they do act, the applicable laws do not define crimes adequately and sometime procedures fail to respect the dignity of the victims.

2. International Law definitions of Rape

Legal definitions of rape vary between different legal systems and there is no universally accepted international legal definition. The International Criminal Court Statute’s finalized draft text of the Elements of Crimes offers the following definition of rape:

- 1. 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.²*
- 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.³*

¹ Pam Spees, ‘Women’s advocacy in the creation of the international criminal court: Changing the landscapes of justice and power’, 28 *Signs: Journal of Women Culture and Society*, 2003, p. 1233.

² The concept of “invasion” is intended to be broad enough to be gender-neutral.

³ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.

Rape is a crime of violence, aggression and domination, which affects women disproportionately and is therefore an act of violence against women. Rape is one of the most pervasive forms of violence against women. Rape and other forms of sexual violence have been used as a deliberate tactic attempting to strip women of their dignity and destroy their sense of self, to terrorize populations, to humiliate communities and to destroy ethnic groups. These definitions and understandings depart from earlier characterization in international law of rape as a crime against a woman's "honour" or "dignity", rather than as a fundamental violation of her human right to bodily integrity and sexual autonomy.

The Elements of Crimes above marks significant progress in the conception of the crime in international law. National definition of rape will be improved and will be in compliance of international standards by following this definition in the following ways:

- **The definition is gender-neutral.** Rape can be committed or otherwise facilitated by a female or a male perpetrator, and the victim can be either female or male.
- **The definition includes acts of penetration by objects or other body parts, not just the penis** (as in many national definitions of rape). It also includes forced oral and anal penetration.
- **The definition focuses on the actions of the perpetrator rather than the victim.** This is achieved by focusing on the force, threat of force or coercive circumstances used by the perpetrator, rather than the consent or lack of consent of the victim.
- **The definition covers non-physical coercive circumstances.** Therefore, it is not necessary to show that the perpetrator employed overwhelming physical force to establish that rape occurred.

3. Other forms of sexual violence

Along with criminalizing rape, it is important that Parliament includes forms of sexual violence not amounting to rape as crimes under Jamaican law. Under the Rome Statute, the elements of this crime for times of non-armed conflict are:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature 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 persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

4. Rape as Torture

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, for purposes such as obtaining information, punishment, intimidation or coercion, or for any reason based on discrimination of any kind, by or with the consent or acquiescence of a public official. Rape causes severe physical or mental suffering, is a deliberate act by the perpetrator and is carried out with the intention to intimidate, degrade or humiliate the victim.

International and regional human rights bodies have ruled that rape by officials always amounts to torture, and cannot be considered a “personal” or “private” act and therefore a common criminal act.

In Amnesty International’s view, rape of women by private individuals (non-state actors) who are not public officials constitutes torture for which the state is responsible if the state has not acted with due diligence to prevent, punish or redress the crime. For example, laws governing rape are often inadequate and many countries do not recognize and prohibit marital rape. In some countries a woman who alleges rape may herself be prosecuted for illicit sexual relations. Frequently, the rules of evidence make it very difficult for a woman to win a court case as the rules specify that the testimony of a woman who alleges she has been raped is inherently unreliable. In many parts of the world, the police routinely fail to investigate abuses reported by women and the courts appear biased against women victims. Some of these shortcomings are present in Jamaican legislation as noted in Amnesty International’s report *Sexual violence against women and girls in Jamaica: ‘Just a little sex’* (AI Index: AMR 38/002/2006) and by the CEDAW Committee in its Concluding comments on Jamaica⁴.

5. Gender-sensitive criminal procedure for crimes of gender-based violence

In addition to enacting laws to incorporate crimes of violence against women, it would be equally important that Jamaica review and amend its procedural and evidentiary rules to ensure that victims are treated with respect and dignity during the judicial process, while ensuring the rights of the accused to a fair trial. In Jamaica as in many national justice systems rules of procedure and evidence in cases of sexual violence have the effect that the victim is put on trial rather than the accused. Structural rules reflect a deep suspicion of the victim⁵. One example of this is the “warning” judges are required to issue in cases of uncorroborated sexual assault. This warning states:

“Madam foreman and members of the jury as this is a case of rape (sexual violence) the law requires me to give you a warning in such cases. The law says that in these types of cases it is desirable that there should be corroboration...This warning is necessary because experience has shown that women and young girls often tell lies and for that reason the law requires this independent evidence. However, if there is no corroboration and you believe that the complainant is telling the truth and bearing the warning in mind you can proceed to act on her evidence if there is no corroboration”⁶

The Rome Statute tackles some of the most common problems with procedural and evidentiary rules that have traditionally made trials traumatic experiences for victims of gender-based violence. The Rules of Procedure and Evidence of the International Criminal Court Statute’s build on the advances made in recent years in a few national justice systems,

⁴ Concluding comments of the Committee on the Elimination of Discrimination against Women: Jamaica, Thirty-six session, 7-25 August 2006, CEDAW/C/JAM/CO/5.

⁵ Special Rapporteur on violence against women, its causes and consequences, *Integration of the human rights of women and the gender perspective: violence against women*, E/CN.4/2003/75 (2003)

⁶ See Amnesty International’s report *Sexual violence against women and girls in Jamaica: ‘Just a little sex’* (AI Index: AMR 38/002/2006); page 25.

as well as at the Yugoslav and Rwandan Tribunals. They also reflect input from numerous non-governmental organizations working for the rights of women, including Amnesty International⁷. Therefore, the rules outlined below represent current international best practice that could significantly help states improve their prosecution record on crimes of sexual violence.

(a) Fair trial in cases involving crimes of sexual violence

The Rome Statute strikes the appropriate balance in ensuring that trials involving crimes of sexual violence fully respect the right to fair trial of the accused and the rights of victims and witnesses and should therefore be a model for national criminal proceedings in such cases. Article 64 (2) of the Rome Statute requires the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

(b) Evidence of consent

The International Criminal Court Statute’s Rules of Evidence and Procedure regulates the admission of evidence of consent of the victim in a crime of sexual violence. In particular, this evidence should not be admissible in the circumstances outlined below. A closed hearing to consider the admissibility or relevance of such evidence should be available as of right, outside the presence of the jury in jurisdictions with jury trials. These rules should apply to all crimes of sexual violence.

Rule 70: Principles of evidence in crimes of sexual violence

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or by taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent.

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent.

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.

Rule 72: In camera procedure to consider relevance or admissibility of evidence

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in .. [rule 70 above] notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the case.

2. In deciding whether the evidence ... is relevant or admissible, a Chamber shall hear in camera views of the Prosecutor, the defence, the witness and victim or his or her legal representative, if any, and shall take into account whether the evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause ...

3. Where the Chamber determines that the evidence ... is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible ...

⁷ See, for example, Amnesty International, *The International Criminal Court: Ensuring an effective role for victims – Memorandum for the Paris seminar, April 1999*, AI Index: IOR 40/06/99, 1 April 1999.

In many national justice systems, the key issue in a trial for rape and other forms of sexual violence will be whether the victim consented to the act alleged. Evidence seeking to prove consent is often used in ways that potentially draw on the decision-maker's gendered assumptions about women's ability to consent to a sexual act, and can lead to the admission of irrelevant evidence that reinforces such assumptions in a manner that seriously prejudices the impartial consideration of victims' claims. For example, evidence of what the victim said can be taken out of context to imply consent, despite evidence of the use of force or coercion by the perpetrator. In addition, the fact that the victim did not struggle or fight with the perpetrator is often used as evidence of consent, regardless of the circumstances. Some jurisdictions require proof of physical resistance by the victim in order to prove rape⁸.

The Assembly of States Parties of the International Criminal Court Statute's has adopted rules on the issue of consent that are very similar to those adopted by the International Tribunal for the Former Yugoslavia. These rules recognize that certain types of evidence cannot be used to imply consent. For example, **silence or lack of resistance** cannot be used to imply consent. This rule has been applied in the European Court of Human Rights judgment in *MC v. Bulgaria*, where the respondent state was held to have failed its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms because national rape laws required physical evidence of resistance to prove rape.

Consent also cannot be inferred from **words or conduct** of the victim where the victim was subjected to force, threat of force or a coercive environment (which could include detention) or there were other circumstances that would make the act non-consensual, such as mental incapacity or the youth of the victim. This rule is very important because it means that words or actions of the victim cannot be taken out of context when, for example, the victim is being threatened, forced or coerced. The rules also state that if the defence wishes to introduce evidence of consent, this evidence must be considered by the judges in an ***in camera* (closed) hearing**. This means that the evidence cannot be heard by the public unless the judges decide that it is admissible and that it should be made public.

(c) Evidence of prior sexual conduct

Especially important is to ban courts from inferring the credibility, character or predisposition to sexual availability of a victim by reasons of the prior or subsequent sexual conduct of the victim. In determining whether such evidence might be relevant to some other issue, courts should conduct a closed (*in camera*) hearing.

Rule 70: Principles of evidence in cases of sexual violence

(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Rule 71: Evidence of other sexual conduct

⁸For further discussion of the issue of the requirement of resistance and physical struggle in various national rape laws see: Interights, *Amicus Curiae in the case of MC v Bulgaria, European Court of Human Rights*, 2003, available at: <http://www.interights.org/news/MCvBulgariaamicus.htm>.

In light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4,⁹ a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

Evidence of the prior or subsequent sexual conduct of the victim is admissible in many national justice systems during a trial for crimes of sexual violence, including Jamaica. This evidence is often used in attempts to demonstrate that the victim is not credible, of poor character or predisposed to sexual availability because of that conduct. The assumption behind the admission of evidence of prior sexual activity is either that because the woman has consented to sex on a previous occasion she therefore did so on the occasion in question, or that because the woman has a sexual history she is an unreliable witness¹⁰. The admission of evidence of the prior or subsequent sexual conduct of the victim also increases the trauma of testifying, as women may be humiliated and forced to expose aspects of their private lives that are completely unrelated to the crime being tried.

(d) Corroboration

It would be of great importance that Jamaica expressly provide in legislation or court rules that corroboration of the victim's testimony is not required for any crime, particularly crimes of sexual violence.

Rule 63: General provisions relating to evidence

(4) Without prejudice to article 66, paragraph 3, Article 66 (3) of the Rome Statute provides: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt".¹¹

Corroboration of a victim's story of sexual violence has traditionally been required in many national justice systems, particularly in common law jurisdictions. Amnesty International was informed that in the Jamaican criminal justice system, judges are required to issue a "warning" in cases of uncorroborated sexual assault, a compulsory practice derived from common law¹², a practice that was only abolished in 1994 in the United Kingdom¹³. No other crime, such as assault or theft, generally requires corroboration in criminal law. The requirement of corroboration entrenches in law an inherent mistrust of women's testimony, and is based on the assumption that women lie about having been sexually assaulted¹⁴.

(e) Giving evidence in closed court, or via audio or video-link

⁹ Article 69(4): The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

¹⁰ Fionnuala Ni Aolain, 'Radical rules: the effects of evidential and procedural rules on the regulation of sexual violence in war' 60 *Albany Law Review* 1997, p. 883.

¹¹ A Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

¹² See Amnesty International's report *Sexual violence against women and girls in Jamaica: 'Just a little sex'* (AI Index: AMR 38/002/2006); page 25.

¹³ Criminal Justice and Public Order Act 1994, sec. 32 (1).

¹⁴ Aolain, *supra*, n. 107, at p. 883.

Legislation or a court rule that permits victims of sexual violence to give their evidence *in camera* (closed proceedings), or via video or audio-link in a manner that fully respects the right of the accused to a fair trial is also highly recommended.

Article 68: Protection of the victims and witnesses and their participation in the proceedings

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Rule 67: Live testimony by means of audio or video-link technology

1. In accordance with article 69, paragraph 2, Article 69 (2) of the Rome Statute provides: “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.” a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permit’s the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

....

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

The Rome Statute and the ICC Rules of Procedure and Evidence permit a victim to give evidence in closed court, or via video or audio-link. This provision is very important not only to ensure the psychological well being of victims, but also to encourage more women to come forward and give evidence in crimes of sexual violence. Testifying about such crimes is a traumatic event for most victims, and, therefore, all states should provide the option of a closed court, video-link or audio-link for the presentation of this type of evidence, especially to minimize the stress caused to the victim by being faced with the accused and being exposed to the public in the court room. A closed court for this type of case should not, however, be mandatory, as some women may want to testify in public about their experience.

(f) Support for victims and witnesses

Finally, it would be recommended that Jamaica enact legislation or adopt court rules permitting victims and witnesses to be accompanied by a person of their choice while they give evidence, particularly in cases involving crimes of sexual violence. This rule is important in reducing the trauma and fear that victims and witnesses may have about testifying, by making the environment slightly less intimidating. This step should be supplementary to other measures to support victims and witnesses, specially to protect them from reprisals.

Rule 88: Special measures

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness