

AMNESTY INTERNATIONAL

Media Briefing

AI Index: IOR 53/001/2009

13 January 2009

International Criminal Court: Clarifying the scope of the crime of rape

After a hearing in the International Criminal Court (ICC) to decide whether to confirm charges of rape as a crime against humanity and as a war crime, Amnesty International hopes that the Pre-Trial Chamber will confirm in its judgments a strong definition of rape which will help ensure prosecutions for this crime which pervades so many current conflicts.

On Monday, 12 January 2009, Pre-Trial Chamber III began a four-day hearing in the case of Jean-Pierre Bemba Gombo, who is the leader and president of the *Mouvement de libération du Congo* (MLC) political opposition party and a Senator. He was Commander in Chief of the MLC when this was an armed political group. He is a former vice-President of the Democratic Republic of Congo

The Chamber is sitting to decide whether to confirm charges of rape allegedly committed on the territory of the Central African Republic from 25 October 2002 to 15 March 2003¹. Amnesty International believes that if the charges are confirmed and the case goes to trial, there will be significant developments in clarifying the understanding of the realities of the crime of rape, and its profound human rights implications.

Over the last two decades international human rights law and international criminal law has brought new understandings of the sexual assault, which replaced outdated ideas about rape being a normal if regrettable aspect of conflict:

- Rape constitutes a crime against the physical and mental integrity of the victim, a major advance over the antiquated concept found in the 1977 Additional Protocols to the 1949 Geneva Conventions that rape of women and girls in conflict was merely a crime against “honour” “dignity” or property rights of male relatives;
- According to the factual situation in which the crime took place, rape can constitute a war crime or a crime against humanity (Rome Statute of the International Criminal Court), an act of genocide (*Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, 1998), or an act of torture (*Mejia v. Peru*, Inter-American Commission on Human Rights, 1996; *Aydin v. Turkey*, European Court of Human Rights, 1997);
- An act of oral penetration can constitute rape (*Prosecutor v. Furundzija*, International Criminal Tribunal for the former Yugoslavia, 1998);
- Even slight penetration of any part of the body of the victim with a sexual organ, or of the anal or genital opening of the victim with an object or other body part, such as fingers or hands, can constitute rape (Rome Statute, Elements of Crimes, 2002)
- Rape is not solely perpetrated through the use of physical force (*M.C v. Bulgaria*, European Court of Human Rights, 2003). Rape is any penetration committed by the perpetrator through coercion or through taking advantage of a coercive environment (*Prosecutor v Akayesu*, International Criminal Tribunal for Rwanda, 1998); Rome Statute, Elements of Crimes, 2002).

¹ See Amnesty International report entitled, Five months of war against women, AI Index: AFR 19/001/2004, published on 10 November 2004.

Amnesty International considers that the ICC's consideration of charges of rape in this case presents an important opportunity to confirm the definition in the Elements of Crime, and through consideration of the evidence, to build on understandings of how perpetrators use coercion.

This definition accurately reflects the brutality of rape, which frequently is perpetrated with sticks, guns, bottles or other objects to injure victims. This definition is gender-neutral, recognizing that men and women, boys and girls alike are raped. While rape of women and girls has been most often documented, often in shockingly high numbers, men and boys are also frequently raped, but shame and stigma stops them from reporting this or seeking medical assistance.

The Elements of Crimes definition recognizes that the crime is frequently committed, not only by force, but also by threat of force or other 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.”

This comprehensive and detailed definition of the crime recognizes that physical force alone is not the only method of securing control of a person in order to commit rape and other forms of sexual violence. Amnesty International and other human rights advocates have documented rape in detention, during armed conflict, and in abusive family or intimate relationships, situations where inequality of power between victim and perpetrator can be abused so that unwanted sexual contact occurs. Amnesty International believes that this particular definition in the Elements of Crimes, an instrument which is designed under Article 9 (1) of the Rome Statute to “assist the Court in the interpretation and application” of Article 7 (Crimes against humanity), should be endorsed by the Pre-Trial Chamber.

Although the Elements of Crimes definition alone is a significant development in international law, there is scope within the rules of the International Criminal Court for even deeper and more accurate definition of the crime of rape. Article 21(3) of the Rome Statute requires that:

“[T]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender... age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

This crucial provision, which governs the interpretation of every other provision of the Rome Statute, invites the ICC to take note of and integrate human rights law into its jurisprudence. The ICC's use of human rights principles in its law and practice should be a catalyst for change in domestic criminal law systems. This rights-respecting example is sorely required for the treatment of rape cases in national laws across the world. Report after report by Amnesty International, other human rights organizations and women's rights advocates show how female rape victims are routinely denied the opportunity to report the rape, ill-treated by forensic medical examiners, interrogated about their sexual history, subjected to abusive questioning by police, prosecutors, defence attorneys and judges and generally blamed for their victimization. Male victims of rape are so concerned about the associated stigmatization that they rarely even try to seek justice.

If the ICC continues the development and application of this strong, inclusive definition of rape as well as applying rules of evidence and procedure in accordance with international standards of fair trial, it can set an example of vigorous prosecution of crimes of sexual violence that ensure justice for victims and does not replicate the re-victimization that complainants often face.

Amnesty International also welcomes the recent appointment of a Special Adviser to the Prosecutor on Gender Crimes as a strong new development on the road to staffing the Court fully with professionals able to develop and implement justice for women and girls.

Background:

Although Amnesty International welcomes these charges of rape as a sign of the political will to prosecute such crimes, as well as an opportunity for developing the law, the organization takes no position on the guilt or innocence of Jean-Pierre Bemba Gombo, who has the right to be presumed innocent of all of the charges unless he is proved guilty beyond a reasonable doubt.

The confirmation hearing is a public hearing held in the presence of the Prosecutor, the person charged, as well as his or her counsel, and the legal representatives of the victims. It is one stage of the criminal procedure before the ICC which aims at ensuring that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged.

Following this hearing, Pre-Trial Chamber III will decide whether or not to confirm the charges brought by the Prosecutor against Mr Jean-Pierre Bemba Gombo and commit him to trial. The date for such a trial would then be determined by a Trial Chamber.

Note to editors:

Amnesty International's experts are available to comments on the case. For more information, please call the press office on +44 207 413 5566, or the press officer on duty on +44 777 847 2126.

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