

COUNCIL OF EUROPE

**DON'T WASTE THIS
OPPORTUNITY:**

**MAKE THE RIGHT CHOICES
ON THE CONVENTION ON
VIOLENCE AGAINST
WOMEN**

**AMNESTY
INTERNATIONAL**



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DON'T WASTE THIS OPPORTUNITY: MAKE THE RIGHT CHOICES ON THE CONVENTION ON VIOLENCE AGAINST WOMEN

“It is impossible today to imagine that the slave trade could have been tolerated by the world for so long. So our duty is to deny future historians the opportunity to question how this generation allowed and participated in the abuse and suppression of girls and women.”

Gordon Brown and Ellen Sirleaf Johnson, Huffington Post, 23 August 2009

Amnesty International's campaign to Stop Violence against Women consistently showed how violence against women in all its forms remains prevalent in Europe.¹

¹ See, for example, the following Amnesty International documents, relating to violence against women in countries in Europe: *Belgium: Stop violence against women: Breaking the cycle of violence* (AI Index EUR 14/001/2004) 5 March 2004; *Turkey: Women confronting family violence* (AI Index EUR 44/013/2004) 1 June 2004; *Russian Federation: Nowhere to turn to: violence against women in the family* (AI Index EUR 46/056/2005) 14 December 2005; *France: Violence against women: A matter for the state* (AI Index EUR 21/01/2006) 6 February 2006; *Albania: Violence against women in the family "It's not her shame"* (AI Index EUR 11/002/2006) 19 April 2006; *Georgia: thousands suffering in silence: violence against women in the family* (AI Index EUR 56/009/2006) 24 September 2006; *Belarus: Domestic violence- more than a private scandal* (AI Index EUR 49/014/2006) 9 November 2006; *Ukraine: Domestic violence, blaming the victim* (AI Index EUR 50/005/2006) 21 November 2006; *Hungary: Cries Unheard: the failure to protect women from rape and sexual violence in the home* (AI Index EUR 27/002/2007) 10 May 2007; *Greece: Uphold the rights of woman and girls trafficked for sexual exploitation* (AI Index EUR 25/002/2007) 12 June

The Council of Europe drew the same conclusions in its campaign to combat violence against women including domestic violence, which culminated in the proposal to draft a European treaty on preventing violence against women.

The work on the Council of Europe *Convention on preventing and combating violence against women and domestic violence* ("the Convention" in this document) since April 2009 marked promising steps in many respects, with its focus on prevention, protection measures, services, civil and criminal law, as well public policies to combat violence against and domestic violence.

However, if this Convention is to have added value when it is finalised, and make a real difference to women's lives, the states participating in the next stages of the negotiation must incorporate progressive standards which have been recognized in international human rights law, and reflect recent jurisprudence of the European Court of Human Rights. Without incorporating such standards, the draft Convention could be a wasted opportunity, as it would have lower legal requirements than existing international law, and would not reflect the evidence gathered across Europe on how women are targeted for violence and what they need to make a full recovery from this violation of their human rights.

For this Convention to make an effective contribution to the eradication of violence against women in Europe, it must:

- Be focused on violence against women and girls;
- Ensure protection for all women and girls at risk, irrespective of migrant status;
- Include provisions on psychological violence;
- Include definitions of rape and sexual violence which ensure protection of human rights;
- Ensure that evidence relating to the victim's previous sexual history is used, only as a rare exception;
- Provide for a committee of independent experts (monitoring body). This monitoring body should be empowered to use a variety of working methods, including receiving reports on progress by the state and civil society. Civil society should be able to access the monitoring body in a variety of ways, so that a full picture of causes, manifestations and consequences of violence against women in each country is clear, and so that each state's efforts to eradicate violence against women are fully evaluated.

2007; *Albania: No pride in silence, domestic and sexual violence against women in Albania* (AI Index EUR 54/044/2008) 13 November 2008; *UK: No recourse, no safety: the government's failure to protect women from violence* (Amnesty International and Southall Black Sisters, March 2008); *Bosnia and Herzegovina: Whose justice? Bosnia and Herzegovina's women are still waiting* (AI Index EUR 63/010/2009) 30 September 2009; *Tajikistan: Violence is not just a family affair. Women face abuse in Tajikistan* (AI Index EUR 60/001/2009) 24 November 2009; *Norway, Sweden, Finland, Denmark: Case Closed: Rape and human rights in the Nordic Countries* (AI Index ACT 77/001/2010) 8 March 2010.

1. SCOPE OF THE CONVENTION

Amnesty International emphasises that the main focus of the Convention on violence against women and girls should be maintained, as women and girls are the overwhelming majority of victims of domestic violence, and that women and girls are targeted for violence overwhelmingly because of their gender. Otherwise the focus of the Convention would be diluted and its effectiveness jeopardized.²

The European Union proposed that the scope of the Convention should be defined as covering *all forms of violence against women, including domestic violence, which affects women disproportionately*, while adding that states parties should also be encouraged *to apply this convention to all victims of domestic violence*, irrespective of their gender.

This proposal by the European Union reflects the basic requirement to focus on violations of the rights of women, which is the basis of the overwhelming majority of studies and efforts by non-governmental organizations. To change this focus would lead to an entirely ineffective convention.

2. EQUALITY AND NON-DISCRIMINATION, SPECIAL ATTENTION TO MARGINALIZED GROUPS, INCLUDING MIGRANT WOMEN

According to Article 3(4) of the draft Convention, all provisions must be implemented without discrimination on any ground, such as, sex, gender, race,

² “Council of Europe: Women should be free of all gender-based violence. Summary of Amnesty International’s initial recommendations on the scope and content of a future Council of Europe Convention on action to combat violence against women.” (AI Index IOR 61/007/2008) 29 May 2008.

colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, state of health, disability, migrant or refugee status, age, or other status.

The majority of the delegations within the negotiation have been supportive of these non-discrimination protections, including ensuring protection against discrimination on the grounds of sexual orientation and gender identity (that is, lesbian, bisexual and transgender women). However, at the last meeting of the drafting group some states challenged references in the draft treaty to migrant women as a group that requires specific protection, particularly the inclusion of migrant women who do not have independent residence status, or are awaiting determination of their status.

Amnesty International notes with concern that denial of assistance and support for women on the basis of their migrant or refugee status would mean that many women who are subjected to violence are forced to remain with abusive spouses or employers, or otherwise face deportation, detention, or homelessness. A convention aimed at ending violence against women should not effectively contribute to violence by denying women the protection of the state.³ Failure to offer assistance and support to migrant women on the same grounds as other women is unacceptable. Amnesty International therefore urges member states to ensure that the draft provisions on non-discrimination and vulnerable groups be maintained without limitation.

3. PSYCHOLOGICAL VIOLENCE

International human rights standards have identified psychological violence as a very prevalent form of violence against women, including domestic violence.⁴

Psychological violence has been included in the African and American regional treaties on violence against women, and has been identified as a form of torture.

³ “*No recourse, no safety: the government’s failure to protect women from violence.*” Amnesty International UK, Southall Black Sisters, March 2008.

⁴ See for example, Declaration on the Elimination of Violence against Women (General Assembly resolution 48/104 of 20 December 1993) “For the purposes of this Declaration, the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” And Council of Europe Committee of Ministers Recommendation 5 of 2002, Article 1: “For the purposes of this recommendation, the term “violence against women” is to be understood as any act of gender-based violence, which results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life”

The World Health Organization's multi-country study on violence against women, specified a number of concrete acts of psychological violence and harms to the victims – including being insulted or made to feel bad about oneself; being humiliated or belittled in front of others; being intimidated or scared on purpose (for example by a partner yelling and smashing things); being threatened with harm (directly or indirectly in the form of a threat to hurt someone the respondent cared about).⁵ According to the UN Secretary General's in-depth study on violence against women psychological violence includes controlling or isolating the woman, humiliation, imposing authority, denigration and contempt.⁶

Amnesty International considers that it would be unacceptable if a Council of Europe convention on violence against women failed to address psychological violence and therefore calls on all states to retain the inclusion of the provision requiring the criminalization of psychological violence as included in the current draft of the Convention.

4. DEFINITION OF RAPE AND SEXUAL VIOLENCE

Due to states' failures to investigate and prosecute with due diligence, as required under international human rights law, most perpetrators of rape and sexual violence avoid prosecution. Attitudes towards victims of rape and sexual violence frequently tend to be extremely prejudicial and discriminatory; in some cases, victims are blamed for bringing such crimes on themselves through their dress and behaviour. Indeed, the belief that rape and sexual violence can only be committed where extreme physical force are used is a root cause of attitudes which excuse rape and sexual abuse against women, where coercion, pressure and taking advantage of a woman's inability to consent freely is seen as a part of 'normal' sexual behaviour.⁷

According to human rights law and standards, rape and sexual violence should be defined as sexual acts where one party is not freely and voluntarily consenting or agreeing to the act – not only where overwhelming force is used. The judgment of the European Court of Human Rights in the case of *MC v Bulgaria*, refers to the requirement that “[c]onsent must be given voluntarily, as a result of the person's free will..” International law and standards emphasise that such freely given

⁵ “WHO Multi-country study on women's health and domestic violence against women.” World Health Organization, 2005, available at <http://www.who.int/gender/violence/who_multicountry_study/en/index.html>

⁶ See the UN Secretary General's in-depth report on violence against women, UN Doc A/61/122.Add.1, 2 July 2006, paragraphs 113 and 117.

⁷ See *Case Closed, Rape and human rights in the Nordic Countries*, AI Index ACT 77/001/2010, 8 March 2010.

consent is inconsistent with use of force, threat of force, or coercion - such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power - or by taking advantage of a coercive environment, or if the invasion was committed against a person incapable of giving genuine agreement.⁸

The current draft of the Convention includes elements from a leading judgment of the European Court of Human Rights – the case of *MC v Bulgaria* – which emphasizes that the definition of the crime of rape must be based on the absence of freely-given agreement, not the perpetrator’s use of force alone. At previous meetings of the drafting group some delegations expressed criticism of such an approach, which is extremely troubling, given that this case is legally binding European jurisprudence, which applies to all Council of Europe member states.

Amnesty International therefore calls on all states to reject any definition of rape and sexual violence in the Convention which is based only on the use of physical force by the perpetrator. Such a definition neither reflects the reality of how rape and sexual violence is committed, nor conforms with human rights law and standards. The Convention’s definition of rape and sexual violence must reflect the human right to physical, mental and sexual integrity of all individuals in order to overcome existing prejudices which justify and encourage sexual violence and which deny victims of rape and sexual violence their right to a remedy, resulting in impunity for perpetrators.

5. PREVIOUS SEXUAL HISTORY EVIDENCE

Article 41 of the Convention provides for the inadmissibility of evidence relating to the sexual history of a victim of violence in civil and criminal proceedings. However, as currently phrased the provision would give judges almost unlimited discretion to admit previous sexual history evidence – no matter how irrelevant.

As with the definition of rape and sexual violence, accepting the relevance of

⁸ See also the “Viewpoint” of Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, issued on 10 January 2010: “Consent should be real. There should be a genuine freedom of choice so that the participation in the act is truly voluntary. Absence of violence is not a sufficient criterion as a proof of consent. Sexual intercourse under threat of violence or other coercive circumstances must be regarded as rape. It should not be necessary that the woman has physically resisted the attacker; she may be physically unable to do so, be paralysed by fear or in a blackmail situation... The same point was made in recent decisions taken by the Council of Europe Parliamentary Assembly. It recommended member states to define consent as ‘agreement by choice when having the freedom and capacity to make that choice’”.

previous sexual history of victims in rape prosecutions underlies much harmful stereotyping of women, and encourages beliefs which encourage violence against women, particularly the attitude that only “moral” or “respectable” women can be raped.

Evidence relating to previous sexual history of a victim of rape is often used to discredit victims, to portray them as immoral, unworthy, or unreliable. Such stereotypes undermine women’s equality before the law, giving a strong message that women are less entitled than men to have a sexual life, and that a woman is only worthy of the protection of the criminal law if she is “respectable.” The introduction of such previous sexual history evidence often leads to abusive cross-examination by defence lawyers, and discourages women from coming forward with complaints.

Previous sexual history evidence should be irrelevant, except in the very unusual circumstances in which it demonstrates that the complainant has lied about the nature of her relationship with the alleged perpetrator - for example, claiming that the alleged perpetrator was a complete stranger, when in fact they had had a previous sexual relationship.

Agreement to sexual contact must be present for each and every sexual act. A woman should not be assumed to be willing to have sex, just because there is a previous relationship with the perpetrator, whether marital or otherwise. It has been recognized by the European Court of Human Rights⁹ (and in the draft of this Convention, that marital rape (rape within marriage) is a crime, and there should be no assumption that marriage constitutes a lifelong agreement to sexual contact. Similarly, a pre-existing relationship or history of sexual contact should not be assumed to apply always, or be used by perpetrators to argue that their belief that the victim consented was reasonable, when other facts of the case, such as coercion are present. Also, because a woman has had sexual contact with a number of people, or is considered to be promiscuous, or a sex worker, does not mean that she can be assumed to agree to sex with anyone under any circumstances, or that “she cannot be raped” or that rape of a person who has had sexual experiences before is not a serious offence.

⁹ *C.R v U.K.*, Application number 20190/92, judgment, 22 November 1995, paragraph 42: “The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

Amnesty International therefore calls on states to ensure that the Convention guarantees the absolute inadmissibility of sexual history evidence in civil or criminal proceedings which is used to discredit victims or witnesses. The introduction of previous sexual history evidence in trials relating to rape and sexual violence must be absolutely exceptional, with a specific rationale for being introduced, that does not relate to undermining a witness' credit, because of her sexual history.¹⁰

6. MONITORING MECHANISM

Independent and effective monitoring of state parties' implementation of the Convention will be critical for the treaty to make a difference. However, some state delegations have raised concerns in the drafting group about the costs of a monitoring mechanism.

While respect for women's human rights cannot be subject to a cost-benefit analysis, it is worth noting that the overall social costs of violence against women are much higher than the relatively small costs of establishing and running an effective treaty monitoring mechanism which could be a catalyst for real change. According to the UN Secretary General's in depth study on all forms of violence against women "[t]he costs of violence against women are enormous. They impoverish not only individuals, families, communities and Governments, but also reduce the economic development of each nation."¹¹

Amnesty International considers that an issue as complex as violence against women – where laws, policies, public attitudes, protection and prevention methods, are all relevant and influential – requires a strong monitoring mechanism with a flexible mandate. Members of the body tasked with monitoring implementation of the Convention must be independent, with strong professional expertise in gender and women's rights, violence against women, as well as human rights.

Amnesty International supports proposals that the monitoring body be mandated to carry out on-site visits, prepare general recommendations on the implementation of the convention, and ensure appropriate follow-up to its recommendations in the states parties including in cooperation with national parliaments.

Amnesty International also recommends that the Convention should provide for a collective complaints procedure to supplement a system of regular, periodic

¹⁰ For a detailed overview of the issues, see "Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials" Liz Kelly, Jennifer Temkin, Sue Griffiths, UK Home Office on-line report 20/06, available at <<http://rds.homeoffice.gov.uk/rds/pdfs06/rdsolr2006.pdf>>

¹¹ UN Secretary General's in-depth report on violence against women, UN Doc A/61/122.Add.1, 2 July 2006, paragraph 181 gives some indication of costs in various European countries, with analysis of how costs are calculated.

reporting by state parties to the monitoring body. A collective complaints mechanism would offer substantial added value because it would allow civil society to bring – independently of a given reporting schedule – structural shortcomings concerning states' laws and practices, which affect a large number of women, directly before the monitoring body. It would also give civil society the opportunity to react promptly to new developments and emerging problems - before individual women suffer irreparable harm and without putting pressure on individual women to bring fruitless cases through the domestic justice system, when it is clear that the remedies that are necessary to women are not available, or not effective.

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