

CRIMINALIZATION AND PROSECUTION OF RAPE IN EUROPE

SUBMISSION TO THE UN SPECIAL RAPPOREUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES

Amnesty International presents the attached submissions on Bosnia and Herzegovina, Denmark, Finland, Italy, the Netherlands, Sweden and Switzerland to the United Nations (UN) Special Rapporteur on violence against women, its causes and consequences, as contributions to her thematic report on rape as a grave and systematic human rights violation and gender-based violence against women.¹

Amnesty International has been working on access to justice for rape since at least 2004.² In November 2018, Amnesty International published a regional report focusing on national legislation on rape, in particular its legal definitions, throughout the European Economic Area (encompassing 28 European Union Member States, as well as Iceland and Norway) and Switzerland. Amnesty International also analysed available comparative data on attrition rates and provided broad preliminary findings regarding practical barriers women face in accessing justice for rape in the region.³

The specific country submissions provided also refer to Amnesty International's in-depth research published in recent years on Bosnia and Herzegovina, on justice for war-time rape, as well as on Denmark, Finland, Norway and Sweden.⁴

OVERVIEW OF RAPE LEGISLATION IN EUROPE

According to international human rights law and standards, a comprehensive definition of rape should include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part

¹ See also the joint memorandum for consideration submitted by CREA, Amnesty International, RESURJ, IWRAP-Asia Pacific and the Global Health Justice Partnership of Yale Law School and the Yale School of Public Health on 21 May 2020, *Joint Submission to UN Special Rapporteur on Violence against Women Thematic report on "Rape as a Grave and Systematic Human Rights Violation and Gender-based Violence Against Women"* (Index: IOR 40/2390/2020) <https://www.amnesty.org/en/documents/ior40/2390/2020/en/>.

² For details of Amnesty International's past campaigns and reports on sexual violence, see Amnesty International, *Right to Be Free from Rape. Overview of Legislation and State of Play in Europe and International Human Rights Standards* (Index: EUR 01/9452/2018), p 5, www.amnesty.org/download/Documents/EURO194522018ENGLISH.PDF.

³ See also, Amnesty International, *Sex without consent is rape. So why do only nine European countries recognise this?*, 23 April 2018, www.amnesty.org/en/latest/campaigns/2018/04/eu-sex-without-consent-is-rape/.

⁴ Amnesty International, *We need support, not pity: Last chance for justice for Bosnia's wartime rape survivors reveals* (Index: EUR 63/6679/2017), www.amnesty.org/en/documents/eur63/6679/2017/en/, Amnesty International, *"Give us respect and justice!" Overcoming barriers for women rape survivors in Denmark* (Index: EUR 18/9784/2019), www.amnesty.org/en/documents/eur18/9784/2019/en/, Amnesty International: *Time for Change, Justice for Rape Survivors in the Nordic Countries* (Index: EUR 01/0089/2019), www.amnesty.org/en/documents/eur01/0089/2019/en/.

or object.⁵ The Istanbul Convention requires criminalization of rape and all other non-consensual acts of sexual nature.⁶

However, only nine countries in Europe out of the 31 analysed by Amnesty International have a definition of rape based on the absence of consent (Belgium, Cyprus, Germany, Ireland, Luxembourg, and the United Kingdom, with Iceland and Sweden changing their definitions in 2018, after many years of campaigning by activists and survivors, and Greece, in 2019).⁷

The vast majority (22) of European countries investigated still define rape on the basis of force, threat of force or coercion.⁸ Some of the definitions in these countries do refer to sexual acts against the person's will but require these to be accompanied by force or, for example, "taking advantage of the situation" (Estonia).⁹ In others, force or threat-based definitions of rape also include circumstances when the victim is "deprived of the possibility of self-defence" (Bulgaria),¹⁰ "unable to express his [sic] will" (Hungary)¹¹ or "incapable of resisting the act" (Denmark).¹²

OTHER BARRIERS TO ACCESS TO JUSTICE: KEY FINDINGS

Despite European states' obligations under the Istanbul Convention, which entered into force in 2014 and which the majority of them have ratified, as well as other international and regional human rights law and standards on sexual violence, the predominant trend in the region has been an increase in the number of reported rapes alongside static or falling prosecution and conviction rates.¹³ Widespread attrition levels suggest that European states are failing their due diligence obligations, both in protecting women and girls from sexual violence and in providing access to justice and effective remedies.

According to the most recent EU-wide prevalence survey by the Fundamental Rights Agency (FRA) in 2014, one in ten women in the EU (11%) has experienced some form of sexual violence from the age of 15 and one in 20 women in the EU (5%) has been raped post-age 15. The FRA assesses that this corresponds to over 9 million women in the EU who have been raped since they were 15 years old.¹⁴

Amnesty International's research has revealed that across the region, women face multiple barriers in accessing justice for rape and preventing them from reporting it, for instance, insufficient quality of investigations, re-traumatization during the legal process, as well as pervasive rape myths and gender stereotypes, which are combined with and reinforced by gaps in training of police, prosecutors, judges and shortcomings in sexuality and relationships education.¹⁵

RECENT DEVELOPMENTS

⁵ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) was adopted by the Council of Europe in 2011 and came into force on 1 August 2014, art 36(1)(a); See also International Criminal Court, "Elements of Crimes" (2011), Elements 1 and 2 of the Elements of Crimes relating to the crime against humanity of rape under Article 7(1)(g)-1, p 8, and the war crime of rape in international and non-international armed conflicts under Article 8(2)(b)(xxii)-1, p 28, and Article 8(2)(e)(vi)-1, pp 36-37.

⁶ Istanbul Convention, art 36.

⁷ See, for instance, Amnesty International, *Sweden: New rape law is historic victory for campaigners*, 23 May 2018, www.amnesty.org/en/latest/news/2018/05/sweden-new-rape-law-is-historic-victory-for-metoo-campaigners/; Amnesty International, *Greece: Newly amended rape law is a historic victory for women*, 6 June 2019, www.amnesty.org/en/latest/news/2019/06/greece-newly-amended-rape-law-is-a-historic-victory-for-women/.

⁸ These are Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Hungary, Italy, Latvia, Lithuania, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Switzerland.

⁹ Criminal Code (Estonia) as amended in 2017, art 141, available at: www.legislationline.org/documents/section/criminal-codes.

¹⁰ Criminal Code (Bulgaria) as amended in 2015, art 152(1)(1), available at: <https://pravatami.bg/zakoni/nakazatelen-kodek>

¹¹ Criminal Code (Hungary), Act C of 2012, Article 197(1)(b), available at: www.refworld.org/docid/4c358dd22.html.

¹² Criminal Code (Denmark) 2016, *Bekendtgørelse af straffeloven 2016*, Chapter 24, Section 216(2), available at: www.retsinformation.dk/Forms/RO710.aspx?id=192080.

¹³ See, for instance, Kelly, L. and Lovett, J. "Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe" 2009, available at: www.cwasu.org/resource/different-systems-similar-outcomes-tracking-attrition-in-reported-rape-cases-in-11-european-countries/, p 25.

¹⁴ European Union Agency for Fundamental Rights (FRA), "Violence against women: an EU-wide survey. Main results" (FRA survey) 2014.

¹⁵ Amnesty International, *Right to Be Free from Rape. Overview of Legislation and State of Play in Europe and International Human Rights Standards* (Index: EUR 01/9452/2018) www.amnesty.org/download/Documents/EUR0194522018ENGLISH.PDF.

Evidently, most European countries are not living up to their obligations under international and regional human rights law and standards. However, powerful women's rights movements and survivor-led initiatives continue to prompt governments to reconsider their positions and review their laws on sexual violence, cautiously indicating a positive trend.

In Spain, following the change in rape law in Sweden in May 2018, as well as widespread discussions and protests related to the Manada case, amending the rape legislation became one of the vital topics in the 2019 parliamentary election debates in the country, with the authorities committing to changing the legislation to recognize that sex without consent is rape.¹⁶ Similar developments are anticipated in Denmark and Finland.¹⁷

While legislation that is compliant with human rights standards will not by itself prevent rape and deliver justice, it is an important step towards changing attitudes and norms, as laws guide people's attitudes and behaviours.

Legislative change needs to be accompanied and complemented by robust policies to ensure proper implementation and practice by state actors and justice officials, as well as capacity building among the police and judiciary. Awareness-raising and comprehensive sexuality and relationships education (including education about consent, bodily integrity and sexual autonomy) across all layers of society are also paramount in eradicating rape culture and preventing rape and other sexual violence.

AMNESTY INTERNATIONAL'S KEY RECOMMENDATIONS TO EUROPEAN STATES (AS APPROPRIATE):

Concerning legislation:

1. Ratify and fully implement the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) without delay;
2. Bring domestic legal definitions of rape in line with international human rights standards, so that they are based on the absence of consent;
3. Ensure that rape and other forms of sexual violence are defined as crimes against bodily integrity and sexual autonomy as opposed to crimes against morality, public decency, "honour" or the family and society;

Concerning policies and practices:

1. Ensure effective victim protection during the legal process, including through free legal aid, especially in criminal proceedings;
2. Provide appropriate, continuous training for the relevant professionals working with survivors or perpetrators in prevention and detection of sexual violence, and ensure continuous training on spotting signs of sexual and domestic violence for first responders (such as GPs and other medical professionals);
3. Provide mandatory, comprehensive, age-appropriate, gender-sensitive, evidence-based and unbiased sexuality and relationships education to students of all genders, including education about consent, and the right to bodily integrity and sexual autonomy.

¹⁶ Statement by Irene Montero, Spain's Equality Minister, 3 March 2020, <https://english.elpais.com/society/2020-03-03/spanish-cabinet-takes-first-step-toward-major-overhaul-of-sexual-assault-laws.html>; see also: www.amnesty.org/en/latest/news/2020/03/europe-spain-yes-means-yes/.

¹⁷ See, for instance, Amnesty International, *Denmark: Government commitment to amend rape law is a hard-won victory*, 26 June 2019, www.amnesty.org/en/latest/news/2019/06/denmark-government-commitment-to-amend-rape-law-is-a-hard-won-victory/.