



AMNESTY INTERNATIONAL SUBMISSION ON THE LEGAL DEFINITION OF RAPE IN GREECE

CRUCIAL LEGISLATIVE CHANGES MUST BE BROUGHT IN LINE WITH INTERNATIONAL STANDARDS

INTRODUCTION

On 6 March 2019, the Greek Minister of Justice, Transparency and Human Rights presented a new Draft Criminal Code for public consultation.¹ The proposed bill introduces a series of amendments to the provisions of the current Greek Criminal Code including on the legal definition of rape and related provisions.

Amnesty International has urged the Greek authorities in numerous occasions to reform the current legal definition of rape, both prior and after the ratification of the Istanbul Convention.² Following previous written communications and meetings with the Greek Minister of Justice, Amnesty International provides its analysis and recommendations to the proposed legal definition of rape as presented in the bill.³

Under international human rights law, Greece is responsible for taking the necessary legislative and other measures to exercise due diligence to prevent, investigate, prosecute, punish and provide reparations for acts of gender-based violence and violence against women, including those perpetrated by non- state actors.⁴

In 2018, Greece ratified the Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), the most far-reaching international treaty to tackle violence against women. Sparked by joint advocacy by Amnesty International and several

¹ The bill is open for public consultation until 14 April 2019.

² Amnesty International Submission to Mrs Maria Yannakaki, Secretary General of Transparency and Human Rights, Ministry of Justice, Transparency and Human Rights, "Submission on proposed bill on the ratification of the European Convention on Preventing and Combating Violence against Women and Domestic Violence", 4 December 2017, Ref: TG 25/2017.014; Also www.amnesty.gr/news/articles/article/21309/ellada-sholia-gia-proteinomeno-nomoshedio-gia-tin-epikyrosi-tis-symvasis. "Sex without consent is rape", Greek Section of Amnesty International Campaign, 22 January 2019; <https://www.amnesty.gr/action/petitions/21967/horis-synainesi-einai-viasmos> "The proposed definition is a backward step for women's rights", Press Release, Greek Section of Amnesty International, 7 March 2019, <https://www.amnesty.gr/news/press/article/22046/opisthodromisi-gia-ta-dikaiomata-ton-gynaikon-me-ton-proteinomeno-orismo>.

³ For the detailed text of the proposed bill see "Draft of the New Criminal Code", <http://www.opengov.gr/ministryofjustice/?p=9834>.

⁴ CEDAW, General Recommendation 19, para 9; and the Istanbul Convention, Article 5(2).



Greek NGOs, with the ratification, Greece repealed the “marriage as settlement” provision in Article 339 (3) of the Greek Criminal Code covering the “seduction of minors” (“indecent acts” performed on children under 15).⁵

This first, welcomed step should be followed by other crucial legislative changes to ensure that the Greek Criminal Code is brought in line with the standards set out in the Istanbul Convention and other human rights standards in the area of sexual violence.

The organisation strongly believes that amendments to the definition of rape proposed by the Government are not just hugely problematic and by no means comply with human rights obligations but are also a significant step backwards that will hamper further access to justice for victims of rape as they fail to introduce a consent-based definition and restrict further the circumstances in which the crime of rape can be established.

Amnesty International strongly urges the Ministry of Justice to take into account the concerns outlined in this submission and propose a legal definition of rape based on the set of recommendations specified at the end of this document.

KEY AREAS OF CONCERN

The Greek legislation to criminalise rape falls short of international standards in a number of ways. Amendments proposed by the Greek government do not address the shortcomings of the law. This submission raises a series of concerns: the failure to incorporate a consent-based definition of rape; the lack a comprehensive legal definition of rape; and the absence of an exhaustive list of aggravating circumstances to include situations when offences are committed against a person made vulnerable or by a current or former partner or spouse.

1. FAILURE TO INCORPORATE A CONSENT-BASED DEFINITION OF RAPE

The current legal definition of rape in the Greek Criminal Code is to be found in Article 336. It puts in its centre the “exercise of physical violence or threat of serious or immediate danger”. The definition reads as follows:

1. *Whoever with corporal violence or with threat of great and imminent danger coerces another to intercourse or to tolerance or action of another indecent act, is punished with incarceration”.*

The proposed amended Article 336 provides the following definition:

“1. Whoever with corporal violence or threat of great and imminent danger to a person’s life or bodily integrity coerces another to attempt or tolerate a sex act is punished with incarceration.

2. A sex act is intercourse and acts of equal gravity to this.”

Amnesty International is extremely concerned that both the current wording of Article 336 and the

⁵ 10 organizations called on the Minister of Justice to repeal the ‘marriage as settlement’ provision, Joint press release, 13 February 2018, <https://www.amnesty.gr/news/articles/article/21284/10-organoseis-kaloyn-ton-ypoyrgo-dikaiosynis-na-katargisei-ti-diataxi>; Law 4531/2018 on the Ratification of the Istanbul Convention, www.e-nomothesia.gr/law-news/demosieutheke-phek-nomos-4531-2018.htm.



proposed amendment are focused on resistance and violence rather than lack of freely given consent (assessed in the context of the surrounding circumstances), as required by international law and standards.

The organization believes that the new proposed wording of Article 336 is also a significant step backwards as it reinforces the notion that physical violence or threats of violence should be kept paramount in the legal definition. In both current and proposed versions of Article 336, rape cases where physical force, its threat or proof of resistance or inability to resist are not shown are likely to fall through the cracks of the legal system and cases where physical violence or threat of it were not used will rarely make it to court. By adding that violence must pose ‘immediate danger to life or physical integrity’, the circumstances in which the crime of rape can be established by law are even more restricted than in the current definition. For example, the proposed version of Article 336 would not cover rape cases where the victim acquiesced to sex under duress by the perpetrator such as when the perpetrator blackmailed the victim or used non-violent threats.

The persistence on a definition of rape that focuses on resistance and violence rather than on consent will impact not only on reporting of rape which is generally very low but also on social awareness of sexual violence, both of which are key aspects of overcoming impunity for these crimes and preventing them from happening.

Based on the recognition that sexual violence is a violation of a person’s sexual autonomy and bodily integrity, international human rights standards have evolved into the now recognised understanding that **the notion of freely given consent** (assessed in the context of the surrounding circumstances) as opposed to the use of violence or threat thereof should be a central element to define crimes of sexual violence. In this regard, according to the Istanbul Convention, rape and all other non-consensual acts of sexual nature are violations of a person’s sexual autonomy and bodily integrity, and must be classified as criminal offences.⁶

There should be no assumption in law or in practice that a victim consented because they did not physically resist the unwanted sexual conduct.⁷ For instance, in 2003, the European Court of Human Rights made it clear that: “Member States’ positive obligations under Articles 3 and 8 of the [European] Convention [on Human Rights] must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.”⁸

As a State Party to the European Convention of Human Rights since 1974 and a State Party to the CoE Convention on preventing and combating violence against women and domestic violence since 2018, Greece should amend its legal definition of rape to be based on the lack of consent as opposed to focusing on the victim’s capacity to resist.

The notion of consent

No international or regional human rights instrument provides an exact definition of consent and Greece can decide on the specific wording of the legislation and the factors to be considered to preclude freely

⁶ See Istanbul Convention, art 36 (1). See also Committee of Ministers of the Council of Europe Recommendation No R (2002) 5 adopted by the Committee of Ministers on 30 April 2002 and Explanatory Memorandum H/Inf (2004), para 35, which urges states to punish all non-consensual acts, including where the victim doesn’t show resistance. See also PACE Resolution 1691 (2009), para 5.2.1, which calls on states to “make rape (including marital rape) an ex officio crime.”

⁷ M.C. v. Bulgaria (2003) ECHR 651.

⁸ M.C. v. Bulgaria (2003) ECHR 651, para. 166



given consent. Nevertheless, Article 36 paragraph 2 of the Istanbul Convention specifies that:

*“Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances”.*⁹

In addition, consent is a voluntary and ongoing agreement to engage in a particular sexual activity and can be rescinded at any time.¹⁰

The Explanatory Report to the Istanbul Convention further clarifies that prosecutions “will require a context-sensitive assessment of the evidence to establish on a case-by-case basis whether the victim has freely consented to the sexual act. Such an assessment must recognize the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations.”¹¹ For instance, despite the expectation that a rape victim will fight her attacker back, freezing when confronted with a sexual assault has been recognised as a common physiological response, leaving the person unable to oppose the assault, often to the point of immobility.¹²

Finally, developments in international criminal law have led to the recognition that consent can be given freely and genuinely only where the free will of one of the consenting parties is not overpowered by coercive circumstances and when the person is capable of consenting.¹³ Therefore, the definition of rape should include a broad range of coercive circumstances where consent cannot be freely given: while the burden of proof remains with the prosecution, the accused should be questioned about steps taken to ascertain whether the complainant was consenting.¹⁴

2. FAILURE TO PROVIDE A COMPREHENSIVE DEFINITION OF RAPE

The International Criminal Court regime’s definition of rape refers to the non-consensual “[invasion of] 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 to include all non-consensual vaginal, anal or oral penetration of a

⁹ See also *M.C. v Bulgaria* (2003) ECHR 651, paras 163. See also *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii); CEDAW Committee, General Recommendation 35, para 33; UN Handbook for Legislation on Violence against Women, 2012, p 24

¹⁰ This has been affirmed in national court judgments, for example, by the High Court of Justice of England and Wales in *R v. DPP and “A”* [2013] EWHC 945 (Admin) and in the USA, the Supreme Court of California, 29 Cal. 4th 756, 60 P.3d 183, 128 Cal. Rptr. 2d 783, 2003 Cal.

¹¹ Explanatory Report, para. 192

¹²A 2017 Swedish clinical study found that 70% of the 298 women rape survivors assessed experienced “involuntary paralysis” during the assault. Anna Möller, Hans Peter Söndergaard and Lotti Helström, “Tonic immobility during sexual assault – a common reaction predicting post- traumatic stress disorder and severe depression”, *Acta Obstetricia et Gynecologica Scandinavica* 96 (2017), www.obgyn.onlinelibrary.wiley.com/doi/abs/10.1111/aogs.13174

¹³ 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. See also International Criminal Court, “Rules of Procedure and Evidence”, UN Doc ICC-ASP/1/3 (2002), Rule 70(a), (b) and (c)

¹⁴ *Vertido v. The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para. 8.9(b)(ii)



sexual nature of the body of another person with any bodily part or object.”¹⁵

Similarly, Article 36 (1) of the Istanbul Convention calls on State Parties to ensure that the following intentional conducts are criminalised including engaging: in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object (Art. 36 (1) (a)); in other non-consensual acts of a sexual nature with a person (Art. 36 (1) (b)); and causing another person to engage in non-consensual acts of a sexual nature with a third person (Art. 36 (1) (c)).

The current and proposed amendment of Article 336 of the Greek Criminal Code falls short in this regard. Indeed, not all types of penetration are specified in detail in the current legislation and are not included in the proposed wording either. Amended Article 336 simply lists the types of sex acts covered by the definition without being extensive: i.e. intercourse (defined in national case-law as the physical union of male with female genitalia)¹⁶ and acts of equal gravity.¹⁷

On the basis of the above, the organization urges the Ministry of Justice to create a comprehensive legal definition of rape that explicitly includes all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.

3. PENALTIES AND AGGRAVATING CIRCUMSTANCES

Greek legislation should ensure that criminal offences of gender-based and sexual violence are punishable by “effective, proportionate and dissuasive sanctions, taking into account their seriousness.”¹⁸

Legislation must also provide for aggravating circumstances including, but not limited to, the age of the survivor, the relationship of the perpetrator and survivor, the use or threat of violence, the presence of multiple perpetrators, and grave physical or mental consequences of the attack on the victim.¹⁹

The Istanbul Convention requires situations in which the perpetrator abused their authority, as well as those where the offence was committed against a person made vulnerable by particular circumstances, to be considered as aggravating circumstances.²⁰

Amnesty International is concerned that the proposed bill fails to introduce the offence currently

¹⁵ Article 7(1)-(g)1(1): International Criminal Court, Elements of Crimes, PCNICC/2000/1/Add.2 (2000). The International Criminal Court’s Elements of Crimes further refer to such an invasion having been “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.” (Article 7(1)-(g)1(2)). See also Istanbul Convention, Article 36 (1)(a)

¹⁶ See for example Greek Supreme Court, 6th Department, Decision 291/2015, http://www.areiospagos.gr/nomologia/apofaseis_DISPLAY.asp?cd=0U7HPHGJKOUSTLCN4ZBJIQUADBN8TB&apof=291_2015&info=%D0%CF%C9%CD%C9%CA%C5%D3%20-%20%20%C6.

¹⁷ Proposed Article 336 (2) provides: “A sex act is intercourse and acts of equal gravity to this”.

¹⁸ Istanbul Convention, Article 45 (1).

¹⁹ UN Handbook for Legislation on Violence against Women, 2012, p 24.

²⁰ Istanbul Convention, Articles 46(a) and (c).



punished by Article 338 (1) of the Criminal Code as an aggravating circumstance to the legal definition of rape.

Current Article 338 (1) (“abuse to indecent acts”) and the proposed Article 338 (1) (“abuse of a person with no capacity to resist”) criminalize sexual intercourse in situations where a person exploits another person’s physical or mental disability or their incapacity.

Article 338 (1) defines the offence of “abuse to indecent acts” as a person having intercourse or committing an indecent act on another person by abusing that person’s unsound mind or incapacity to resist. This incapacity can be the result of any cause. The offence attracts a maximum sentence of ten year’s incarceration. Proposed Article 338 (1) provides: “Whoever abuses the mental or physical disability of a person or incapacity to resist caused by any cause and conducts a sex act with that person is punished with up to ten years’ incarceration”.

The offence as it stands is not defined as rape and carries lower criminal sanctions.²¹ Indeed the fact that offences covered in Article 338 (1) carry lower sanctions than rape as defined in Article 336 indicates that they are in fact considered mitigating factors.

In Amnesty International’s view, as required by the Istanbul Convention, the offence covered by Article 338 (1) should be considered an aggravating circumstance of a rape, reflecting the seriousness of the offence.

The organization also believes that the new proposal should be revised to make sexual violence against a current or former spouse or partner an aggravating circumstance in line with the standards set out in the Istanbul Convention and the recommendations by its monitoring body GREVIO.²² At the moment, both current and proposed version of Article 336 cover and punish as rape sexual violence committed against a current or former spouse, as per the Greek law to prevent and punish domestic violence, but this is not considered an aggravating circumstance.²³

RECOMMENDATIONS

Inadequate and ineffective legislation criminalizing rape remains a problem in many European states. In 2018, Amnesty International published an analysis of legislation on rape throughout the European Economic Area (including 28 Member States of the European Union as well as Iceland and Norway) and Switzerland.²⁴ Of the 31 states considered only eight define rape in their legislation based on lack of

²¹ The so-called temporary Incarceration is one of the most serious sentences and is applied for felonies. The minimum is five years and the maximum twenty (Article 52 of the Criminal Code). Both, current Article 338 (1) of the Greek Criminal Code and the government proposal establish penalties of incarceration up to ten years while Article 336 does not have this limitation.

²² Istanbul Convention, Article 46 (a). GREVIO’s (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Denmark, GREVIO/Inf(2017)14, November 2017, available at: <https://rm.coe.int/grevio-first-baseline-report-on-denmark/16807688ae>

²³ Law 3500/2006 “*For combating domestic violence*” amended Article 336 of the Greek Criminal Code and punishes marital rape.

²⁴ “Right To Be Free From Rape - Overview Of Legislation And State Of Play In Europe And International Human Rights Standards”, Amnesty International, 2018, available at <https://www.amnesty.org/en/documents/eur01/9452/2018/en/>.



consent.²⁵

Greece has now the opportunity to become the ninth country to criminalise rape in line with international law and standards and be at the forefront of States that takes sexual violence seriously.

Amnesty International urges the Minister of Justice to:

- Amend the definition of rape in the Criminal Code (Article 336) so that it is based on the absence of consent, bringing it in line with international human rights standards, such as the Istanbul Convention.
- Amend the Art. 336 of the Criminal Code to ensure that all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object are included explicitly in the definition of rape.
- Amend Article 336 of the Criminal Code in order to comprehensively include a range of aggravating circumstances as per Article 46 of the Istanbul Convention, including sexual violence committed against a current or former partner; by perpetrators abusing their authority over the victim; and when the offence was committed against a person made vulnerable by particular circumstances;
- Take appropriate measures to ensure the understanding and application of all types of aggravating factors listed in Article 46 of the Istanbul Convention in the legal process by improving the awareness of law enforcement officials, prosecutors and the judiciary.

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²⁵ The countries are Ireland, the United Kingdom, Belgium, Cyprus, Germany, Luxembourg, Iceland and Sweden.