

# RIGHT TO BE FREE FROM RAPE

OVERVIEW OF LEGISLATION AND STATE OF PLAY IN EUROPE  
AND INTERNATIONAL HUMAN RIGHTS STANDARDS

Issued 19 January 2018  
Updated 7 November 2018

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Amnesty International  
Index No: EUR 01/7757/2018

**AMNESTY**  
INTERNATIONAL 

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# 1. INTRODUCTION

Sexual violence is widespread and systemic worldwide. There are no countries where people live free from its threat, and no gender or group of people are exempt from its destructive effects. While acknowledging that all sexual violence, regardless of the sex, gender or gender identity of the victim, is important as a human rights issue, this overview focuses on one form of sexual violence, namely rape of women and girls, as they are disproportionately affected by this violation.

According to the most recent EU-wide prevalence survey, the 2014 Fundamental Rights Agency (FRA) survey on violence against women, one in ten women in the EU (11%) has experienced some form of sexual violence from the age of 15.<sup>1</sup> One in 20 women in the EU (5%) has been raped post-age 15.<sup>2</sup> The FRA assesses that this corresponds to over 9 million women in the EU who have been raped since they were 15 years old.<sup>3</sup>

Rape and other sexual crimes are a grave attack on the physical and mental integrity and sexual autonomy of the victim. They are violations of human rights in themselves and they also impair the victim's enjoyment of a range of other human rights, such as the right to life, physical and mental health, personal security, freedom, equality within the family and before the law regardless of gender and gender identity, the right to be free from discrimination and torture and other ill treatment, amongst others. Victims often do not know their rights and face multiple barriers in accessing justice and redress, including harmful gender stereotypes, misconceptions of what sexual violence is, victim-blaming, credibility questioning, inadequate support and ineffective legislation. Women and girls who may face particular challenges asserting their claims in rape and sexual violence investigations include, for instance, sex workers, those living in rural areas, women who are homeless, in the asylum process or in immigration detention, women with irregular immigration status, and those suffering from substance abuse or mental illness.

International and regional human rights law requires states to take action to prevent and protect women and girls from gender-based violence, to investigate and punish all acts of such violence, and to provide transformative reparation to victims. This means that remedies must go beyond individual victims and should instead seek to transform laws, policies and attitudes that are the root causes of sexual violence crimes.<sup>4</sup>

In 2011, the Council of Europe adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), which entered into force in 2014.<sup>5</sup> It is the third regional treaty on violence against women after the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) adopted in 1994,<sup>6</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), adopted in 2003 by the African Union.<sup>7</sup> The Istanbul Convention is the most far-reaching international treaty to tackle violence against women. It provides a comprehensive framework to address gender-based violence based on an in-depth analysis of challenges and good practices throughout the Council of Europe Member States.<sup>8</sup>

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<sup>1</sup> European Union Agency for Fundamental Rights (FRA), "Violence against women: an EU-wide survey. Main results" (FRA survey) 2014.

<sup>2</sup> FRA survey 2014, p 21.

<sup>3</sup> FRA survey 2014, p 41.

<sup>4</sup> Special Rapporteur on violence against women 2010 report, UN Doc A/HRC/14/22, 23 April 2010.

<sup>5</sup> 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.

<sup>6</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) (adopted 9 June 1994, entered into force 5 March 1995) [1994] ILM 1534.

<sup>7</sup> Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) (adopted 11 July 2003, entered into force 25 November 2005) CA/LEG/66.6.

<sup>8</sup> "Safe from fear - Safe from violence. Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention)", 2014, available at: [www.edoc.coe.int/en/violence-against-women/6138-leaflet-safe-from-fear-istanbul-convention.html](http://www.edoc.coe.int/en/violence-against-women/6138-leaflet-safe-from-fear-istanbul-convention.html).

The Istanbul Convention is progressive and transformative in nature. It is a tool for systemic change, and for gender and social justice. It is intended to ensure governments guarantee the rights of all women and girls to a private and public life free from violence and it is intersectional in its design. For example, it is the first treaty that has explicitly prohibited discrimination on grounds of sexual orientation and gender identity. It also explicitly includes refugee and migrant women.

Despite states' obligations under international and regional human rights law with regard to sexual violence, the predominant trend in Europe has been an increase in the number of reported rapes alongside static or falling prosecution and conviction rates.<sup>9</sup> Offences often do not come to the attention of the criminal justice system at all as women and girls do not report them. When they do, they only have a small chance of having their case tried by a court of law as cases are often dropped at various stages of the legal process, with alleged perpetrators never being prosecuted or convicted and never held to account for their crimes. This problem is known as attrition.<sup>10</sup> The widespread levels of attrition in Europe suggest that states are failing the due diligence obligations they have under international and regional human rights law, both in protecting women and girls from sexual violence and providing access to justice and full reparation.

This regional overview provides an insight into legislation on rape throughout the European Economic Area (encompassing 28 European Union Member States, as well as Iceland and Norway) and Switzerland,<sup>11</sup> available comparative information on attrition rates, broad preliminary findings regarding practical barriers in accessing justice for rape, as well as information on anticipated national developments, where available. It also presents relevant international and regional human rights standards on sexual and other gender-based violence.<sup>12</sup>

While it is paramount that legislation meets international human rights standards, even the best legislation and guidance will not prevent or address rape on its own. It needs to be accompanied by robust policies and practices to ensure full implementation. Widespread prejudice, victim blaming and stereotypes and myths around rape, often amongst those tasked with preventing it and enabling victims' access to justice, must also be adequately addressed.<sup>13</sup>

## 2. METHODOLOGY

This paper is primarily based on desk research, drawing on existing literature and overview studies, primary legislative sources as available, relevant regional level jurisprudence, and consultations with Amnesty International's sections in Europe. It also takes into account preliminary scoping interviews with 17 external stakeholders (NGOs, rape crisis centres, legal practitioners and other experts) carried out in six countries (England, Finland, Ireland, the Netherlands, Northern Ireland and Sweden), in person and over the telephone, between May and September 2017, as well as two interviews with organisations operating on the regional level, based in Brussels.<sup>14</sup>

<sup>9</sup> 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/](http://www.cwasu.org/resource/different-systems-similar-outcomes-tracking-attrition-in-reported-rape-cases-in-11-european-countries/), p 25.

<sup>10</sup> For instance, Liz Kelly and Jo Lovett refer to attrition as "the process by which rape cases fail to proceed through the justice system", Kelly, L and Lovett, J., "Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe" 2009, p 5.

<sup>11</sup> The overview does not cover Andorra, Liechtenstein, Monaco, San Marino or the Vatican.

<sup>12</sup> 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/](http://www.amnesty.org/en/latest/campaigns/2018/04/eu-sex-without-consent-is-rape/).

<sup>13</sup> See, for instance, Rape Crisis Scotland's assessment of the Scottish Inspectorate of Prosecution's findings on the legal process, practice and implementation in a context where legislation and guidance are good overall, demonstrating that even the best legislation and guidance are not in themselves sufficient: "Rape Crisis Scotland calls for radical reform of legal responses to rape" 15 November 2017, available at: [www.rapecrisisscotland.org.uk/news/news/rape-crisis-scotland-calls-for-radical-reform-of-legal-responses-to-rape/](http://www.rapecrisisscotland.org.uk/news/news/rape-crisis-scotland-calls-for-radical-reform-of-legal-responses-to-rape/). Inspectorate of Prosecution in Scotland, "Thematic Review of the Investigation and Prosecution of Sexual Crimes" November 2017, available at: [www.gov.scot/Resource/0052/00527738.pdf](http://www.gov.scot/Resource/0052/00527738.pdf).

<sup>14</sup> Amnesty International interviewed 2 lawyers and 1 academic and NGO expert in the Netherlands, 2 NGO representatives in Sweden, 2 NGO representatives and 1 lawyer in Finland, 6 NGO representatives (including lawyers and rape crisis centre staff)

There are not many comprehensive overviews of legislation or practice around sexual violence against women and girls in Europe and none that would include all countries within the EU. The most exhaustive report, focusing specifically on attrition rates in selected countries of the region, was compiled by Professor Liz Kelly and Jo Lovett in 2009; their findings are referred to at Section 5 of this report. In 2011, the European Women's Lobby (EWL) undertook a study on behalf of the European Institute for Gender Equality (EIGE), mapping existing data and resources on sexual violence against women in EU Member States and Croatia (not a Member State at the time) between 2007 and 2010. Their findings were collected into a database.<sup>15</sup> The EWL also compiled a "Barometer on rape" in 2013, analysing compatibility of rape legislation in 32 European countries with the Istanbul Convention and the quality and availability of their data on women rape survivors.<sup>16</sup> Another study from 2013, the "Overview of the worldwide best practices for rape prevention and for assisting women victims of rape," undertaken by the European Parliament's Directorate General for Internal Policies, provides a broad outline of practices on the global level.<sup>17</sup> In March 2014, the European Union Agency for Fundamental Rights (FRA) published a survey on violence against women in EU Member States, including data on sexual violence and its prevalence.<sup>18</sup> A second EU-wide survey is being planned under the umbrella of the Eurostat task force for the coming years.<sup>19</sup> The 2017 Equality Now report titled "The World's Shame. The Global Rape Epidemic" provides limited information on legislation in 18 European countries, obtained primarily via a survey of legal practitioners.<sup>20</sup>

Amnesty International's own research on sexual violence was primarily undertaken during its past Stop Violence against Women global campaign (2004-2010). In 2007, Amnesty International Hungary produced a report on sexual violence in intimate relationships in the country.<sup>21</sup> Amnesty International's sections in Denmark, Finland, Norway and Sweden undertook research into sexual violence in their own countries in 2008. The joint report, entitled "Case Closed. Rape and human rights in the Nordic countries" was followed by a summary report in 2010.<sup>22</sup> Several sections (Amnesty International Belgium, the Nordic sections, Amnesty International UK) have also conducted attitudes' surveys in their countries over the years.<sup>23</sup> Beyond the EEA, Amnesty International has investigated access to justice for wartime sexual violence survivors in Bosnia and Herzegovina<sup>24</sup> and Kosovo<sup>25</sup> in 2017.

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in Ireland, 1 Independent Sexual Violence Advocate and 5 NGO representatives in Northern Ireland, 1 rape crisis network representative in England and 2 regional level organisations' representatives in Brussels.

<sup>15</sup> European Institute for Gender Equality, "Study to identify and map existing data and resources on sexual violence against women in the EU" 2013, available at: <http://eige.europa.eu/rdc/eige-publications/study-identify-and-map-existing-data-and-resources-sexual-violence-against-women-eu-report>.

<sup>16</sup> European Women's Lobby, "Barometer on Rape" 2013, available at: [www.womenlobby.org/2013-EWL-Barometer-on-Rape-Report](http://www.womenlobby.org/2013-EWL-Barometer-on-Rape-Report).

<sup>17</sup> European Parliament, Directorate General for Internal Policies (Policy Department C: Citizens' Rights and Constitutional Affairs) Gender Equality, "Overview of the worldwide best practices for rape prevention and for assisting women victims of rape" 2013, available at: [www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493025/IPOL-FEMM\\_ET\(2013\)493025\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493025/IPOL-FEMM_ET(2013)493025_EN.pdf).

<sup>18</sup> European Union Agency for Fundamental Rights (FRA), "Violence against women: an EU-wide survey. Main results" (FRA survey) 2014, available at: [www.fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report](http://www.fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report).

<sup>19</sup> [www.fra.europa.eu/en/news/2017/building-fras-survey-violence-against-women-second-eu-survey](http://www.fra.europa.eu/en/news/2017/building-fras-survey-violence-against-women-second-eu-survey), 30 June 2017.

<sup>20</sup> Equality Now, "The World's Shame. The Global Rape Epidemic. How Laws around the World are Failing to Protect Women and Girls from Sexual Violence", 2017, available at: [www.equalitynow.org/campaigns/rape-laws-report](http://www.equalitynow.org/campaigns/rape-laws-report).

<sup>21</sup> Amnesty International, "Hungary. Cries unheard. The failure to protect women from rape and sexual violence in the home" 2007, available at: [www.amnesty.org/en/documents/eur27/002/2007/en/](http://www.amnesty.org/en/documents/eur27/002/2007/en/).

<sup>22</sup> Amnesty International, "Case Closed. Rape and Human Rights in the Nordic Countries. Summary Report" 2010, available at: [www.amnesty.org/en/documents/ACT77/001/2010/en/](http://www.amnesty.org/en/documents/ACT77/001/2010/en/). The full 2008 report is available on request.

<sup>23</sup> See, for instance: Amnesty International Belgium and SOS Viol, "Etude des opinions et des comportements de la population belge en matière de violences sexuelles" 2014, available at: [www.amnesty.be/IMG/pdf/enquete\\_synthese\\_final.pdf](http://www.amnesty.be/IMG/pdf/enquete_synthese_final.pdf); Amnesty International Denmark: [www.amnesty.dk/nyhedsliste/2015/kan-en-kvindes-paaklaedning-goere-hende-ansvarlig-for-at-blive-voldtaget](http://www.amnesty.dk/nyhedsliste/2015/kan-en-kvindes-paaklaedning-goere-hende-ansvarlig-for-at-blive-voldtaget); Amnesty International Finland, "Asenne Esiin! Mieliäpidäksely seksuaalisesta väkivallasta" 2010, available at: [www.amnesty.fi/asenne-esiin-mieliapidekysely/](http://www.amnesty.fi/asenne-esiin-mieliapidekysely/); Amnesty International Norway, "Undersøkelse om voldtekt Laget for Amnesty International Norge" 2013, available at: [www.amnesty.no/aktuelt/flere-nyheter/skolen-svikter-i-kampen-mot-voldtekt-0](http://www.amnesty.no/aktuelt/flere-nyheter/skolen-svikter-i-kampen-mot-voldtekt-0); Amnesty International Sweden, "Var går gränsen? En attitydundersökning om våldtäkt" 2008, available at: [www.amnesty.se/upload/files/2011/05/04/Valdtakt-Var%20gar%20gransen-En%20attitydundersokning%20om%20valdtakt-Amnesty.pdf](http://www.amnesty.se/upload/files/2011/05/04/Valdtakt-Var%20gar%20gransen-En%20attitydundersokning%20om%20valdtakt-Amnesty.pdf); UK: New poll finds a third of people believe women who flirt partially responsible for being raped, 2005. [www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being](http://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being).

<sup>24</sup> Amnesty International, "We need support, not pity: Last chance for justice for Bosnia's wartime rape survivors reveals" 2017, available at: [www.amnesty.org/en/documents/eur63/6679/2017/en/](http://www.amnesty.org/en/documents/eur63/6679/2017/en/).

<sup>25</sup> Amnesty International, "'Wounds that burn our souls': Compensation for wartime rape survivors, but still no justice" 2017, available at: <https://www.amnesty.org/en/documents/eur70/7558/2017/en/>.

### 3. LEGISLATION AND ANTICIPATED DEVELOPMENTS IN THE REGION

Inadequate and ineffective legislation criminalizing rape remains a problem in many European states. 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 or object.<sup>26</sup> The Istanbul Convention requires criminalization of rape and all other non-consensual acts of sexual nature.<sup>27</sup>

Human rights standards-compliant legislation itself is not the solution to addressing and preventing the ever-present prevalence of rape, rather a starting point. Implementation and practice by state actors and justice officials are crucial in ensuring access to justice for rape and are explored, to the extent that this paper's scope and methodology allow, at Section 4 below.

There should be no assumption in law or in practice that a victim gives her consent because she has not physically resisted the unwanted sexual conduct regardless of whether or not the perpetrator threatened to use or used physical violence. The definition of rape in the International Criminal Court regime 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."<sup>28</sup>

Consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances.<sup>29</sup> As a voluntary and ongoing agreement to engage in a particular sexual activity, consent can be rescinded at any time.<sup>30</sup> 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 the consenting parties is not overpowered by coercive circumstances, and when the person is capable of consenting.<sup>31</sup> Therefore, the definition of rape should include a broad range of coercive circumstances where consent cannot be freely given, while outside such circumstances, it should require proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting.<sup>32</sup>

The Explanatory Report to the Istanbul Convention further specifies that prosecutions "will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognize the wide

<sup>26</sup> Istanbul Convention, 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.

<sup>27</sup> 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."

<sup>28</sup> 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)).

<sup>29</sup> *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). See also Istanbul Convention, art 36 (2); CEDAW Committee, General Recommendation 35, para 33; UN Handbook for Legislation on Violence against Women, 2012, p 24.

<sup>30</sup> This has been affirmed in national courts' judgments, for example, by the High Court of Justice of England and Wales in *R v DPP and "A"* [2013] EWHC 945 (Admin), available at: [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf); Supreme Court of California, 29 Cal. 4th 756, 60 P.3d 183, 128 Cal. Rptr. 2d 783, 2003 Cal., available at: <http://caselaw.findlaw.com/ca-supreme-court/1330844.html>.

<sup>31</sup> See 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 art 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).

<sup>32</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii).

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. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality.”<sup>33</sup>

Criminal law should identify rape and other sexual violence as crimes against the physical and mental integrity, and sexual autonomy of the victim, rather than as crimes against morality, public decency or honour.<sup>34</sup> The law criminalizing the conduct should be gender-neutral, that is, reflect crimes committed against all individuals, irrespective of their gender or gender identity, without being gender-blind, however.<sup>35</sup> Criminal law should enable the effective prosecution of any perpetrator for acts of sexual violence, and there should be no exemptions for certain perpetrators (such as a marital rape exemption which assumes that married women automatically consent to sexual contact with their husbands at all times and under all circumstances).<sup>36</sup>

Effective remedies should also be available through civil and administrative law (for example, barring, protection and safety orders).<sup>37</sup> All victims should be equally protected by law from violence without any discrimination on the basis of age, race, ethnicity, religion, marital status, social status, caste or descent, migration status, employment (including sex work), sexual orientation, gender, gender identity or appearance (for example, the way a woman is dressed).<sup>38</sup>

The Istanbul Convention clearly sets out that parties “shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.<sup>39</sup> Similarly, CEDAW Committee’s General Recommendation 35 states that “failure to investigate, prosecute and punish and to provide reparation to victims/survivors of such acts [gender-based violence against women] provides tacit permission or encouragement to acts of gender-based violence against women. These failures constitute human rights violations.”<sup>40</sup>

#### ***M.C. v Bulgaria: A landmark ruling that established that lack of violence does not mean consent***

In 2004, the European Court on Human Rights (hereinafter: the Court) established that the decisive factor to establish the crime of rape was the lack of consent rather than proof of force and resistance of the survivor.<sup>41</sup>

The case concerned a Bulgarian adolescent, M.C., who alleged that two men had raped her separately on 31 July and 1 August 1995 when she was 14 years old. The events happened at night after the three of them went to a disco bar. She had met one of the men during a previous night out. The other man was the brother of a classmate. The girl reported the rapes to the police. In November 1995 a public prosecutor opened a criminal investigation into the alleged rapes and referred the case to an investigator. In her statement to the investigators, the girl said

<sup>33</sup> Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 2011, para 192.

<sup>34</sup> See CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 33; See also, Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24, available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women).

<sup>35</sup> UN Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 12, available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women).

<sup>36</sup> See Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24, available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women); See also: *SW v United Kingdom*, Decision on merits, App No. 20166/92, A/355-B, IHRL 2596 (ECHR 1995), 22 November 1995, European Court of Human Rights, para 44. See also PACE Resolution 1691 (2009), para 5.4, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17784&lang=en>.

<sup>37</sup> CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, paras 46 and 47; Istanbul Convention, art 5.2.

<sup>38</sup> CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, paras 11, 12, 23 and 38 (b). See also Istanbul Convention, art 3.

<sup>39</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 May 2011, Article 5.2.

<sup>40</sup> CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 24(b).

<sup>41</sup> *M.C. v Bulgaria*, No. 39279/98, ECHR 2203XII.

that she had not had the strength to resist violently, while the two men argued that sexual intercourse happened with her full consent.

On 17 March 1997 the prosecutor ordered the closure of the criminal investigation because the use of force or threats against M.C. had not been established beyond reasonable doubt. He stated that no resistance on her part or attempts to seek help from others had been established. The girl appealed the decision before a regional prosecutor's office and the Chief Public Prosecutor's Office. But the appeals were both dismissed on similar grounds. For instance, in response to the second appeal, the prosecutor said that there were no traces of physical force such as bruises or torn clothing. He mentioned that while he found that it is unusual for a girl who is under age and a virgin to have sexual intercourse twice within a short space of time with two different people, this fact alone was not sufficient to establish that a criminal act took place in the absence of other evidence and in view of the impossibility of collecting further evidence.<sup>42</sup>

In December 1997 the woman took the case to the European Court of Human Rights arguing that the legal framework and practice that required proof of physical resistance by the victim, and thus left unpunished certain acts of rape, were inadequate. The Court, without expressing an opinion on the guilt of the alleged perpetrators, established that "any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy". Hence, the Bulgarian authorities "failed to explore the available possibilities for establishing all the surrounding circumstances and did not assess sufficiently the credibility of the conflicting statements made".<sup>43</sup>

Ultimately, the Court found that the investigation of the case fell short of the requirements in the State's positive obligations under Articles 3 (prohibition of torture and inhuman and degrading treatment) and 8 (right to respect of private and family life) of the European Convention on Human Rights.

### 3.1 CONSENT IN RAPE LAW IN EUROPE

The United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) has in the past five years urged several European states to bring their legislation on rape in line with international standards, including the Istanbul Convention, and to define rape on the basis of the absence of consent (for example, Romania,<sup>44</sup> Sweden,<sup>45</sup> Portugal,<sup>46</sup> Croatia,<sup>47</sup> Finland,<sup>48</sup> Hungary<sup>49</sup> and Norway<sup>50</sup>).

23 countries amongst those covered in this regional overview have so far ratified the Istanbul Convention (Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Sweden and Switzerland) and 8 have signed but not yet ratified it (Bulgaria, the Czech Republic, Hungary, Ireland,

<sup>42</sup> *M.C. v Bulgaria*, No. 39279/98, ECHR 2203XII, para 65.

<sup>43</sup> *M.C. v Bulgaria*, No. 39279/98, ECHR 2203XII, paras 169-187.

<sup>44</sup> United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee), Concluding Observations, Romania, July 2017, CEDAW/C/ROU/CO/7-8, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fROU%2fCO%2f7-8&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fROU%2fCO%2f7-8&Lang=en), para 19(b).

<sup>45</sup> CEDAW Committee, Concluding Observations, Sweden, March 2016, CEDAW/C/SWE/CO/8-9, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fSWE%2fCO%2f8-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fSWE%2fCO%2f8-9&Lang=en), para 15.

<sup>46</sup> CEDAW Committee, Concluding Observations, Portugal, November 2015, CEDAW/C/PRT/CO/8-9, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fPRT%2fCO%2f8-9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fPRT%2fCO%2f8-9&Lang=en), para 25(a).

<sup>47</sup> CEDAW Committee, Concluding Observations, Croatia, July 2015, CEDAW/C/HRV/CO/4-5, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fHRV%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fHRV%2fCO%2f4-5&Lang=en), para 19(h).

<sup>48</sup> CEDAW Committee, Concluding Observations, Finland, March 2014, CEDAW/C/FIN/CO/7 available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fFIN%2fCO%2f7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fFIN%2fCO%2f7&Lang=en), para 19(e).

<sup>49</sup> CEDAW Committee, Concluding Observations, Hungary, March 2013, CEDAW/C/HUN/CO/7-8, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fHUN%2fCO%2f7-8&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fHUN%2fCO%2f7-8&Lang=en), para 20(g).

<sup>50</sup> CEDAW Committee, Concluding Observations, Norway, March 2012, CEDAW/C/NOR/CO/8, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fNOR%2fCO%2f8&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fNOR%2fCO%2f8&Lang=en), para 24(b).

Latvia, Lithuania, Slovakia, the United Kingdom). The European Union also signed the Convention in 2017.<sup>51</sup>

Status of ratifications for states covered in this regional overview

Ratified	Signed but not ratified yet
1. Austria	1. Bulgaria
2. Belgium	2. Czech Republic
3. Croatia	3. Hungary
4. Cyprus	4. Ireland
5. Denmark	5. Latvia
6. Estonia	6. Lithuania
7. Finland	7. Slovakia
8. France	8. United Kingdom
9. Germany	
10. Greece	
11. Iceland	
12. Italy	
13. Luxembourg	
14. Malta	
15. Netherlands	
16. Norway	
17. Poland	
18. Portugal	
19. Romania	
20. Slovenia	
21. Spain	
22. Sweden	
23. Switzerland	

Strikingly, in all of the countries covered in this overview that ratified the Istanbul Convention **except for six** (Belgium, which has had a consent-based definition since 1989, Cyprus, Germany, Iceland Luxembourg and Sweden) the legal definition of rape is not in line with the Istanbul Convention’s consent-based standard. For example, in Denmark, which ratified it in 2014, the Parliament rejected a bill by the Red-Green Alliance proposing to amend the definition accordingly in April 2017, citing lack of evidence that a consent-based definition is needed. This is despite the fact that it is a recognized international human rights standard and that effecting this legislative change is indeed Denmark’s obligation under the Convention. Several NGOs, including Amnesty, are currently advocating for the law to be changed accordingly. In Iceland and Sweden, the definitions of rape were amended in March and May 2018, respectively.<sup>52</sup> The reform in Sweden was sparked by several years of activism by women’s rights groups. In Finland, a coalition of NGOs are currently collecting signatures in support of a citizens’ proposal amending the definition of rape, to be put before Parliament.<sup>53</sup>

In Spain and Portugal, the governments separately announced in 2018 that they intend to change the legislation to recognize sex without consent as rape, both acting in response to widespread protests in the aftermath of high-profile gang rape cases in which the justice system failed the victims. In the case of Spain, five men accused of rape were found guilty of the lesser offence of sexual abuse, while in Portugal, the court gave a suspended sentence to two men for “sexual abuse of a person incapable of resistance”. An additional source of outrage in both cases was the fact that the judges drew on negative

<sup>51</sup> For updates on the status of signatures and ratifications, Council of Europe’s website should be consulted regularly [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures).

<sup>52</sup> Criminal Code (Sweden) *Brottsbalk* (1962: 700) as amended in 2018, chapter 6, [www.lagen.nu/1962:700#K6](http://www.lagen.nu/1962:700#K6); Amnesty International, “Sweden: New rape law is historic victory for #MeToo campaigners,” 2018, [www.amnesty.org/en/latest/news/2018/05/sweden-new-rape-law-is-historic-victory-for-metoo-campaigners/](http://www.amnesty.org/en/latest/news/2018/05/sweden-new-rape-law-is-historic-victory-for-metoo-campaigners/). Criminal Code (Iceland), art 194, available at: [www.althingi.is/lagas/nuna/1940019.html](http://www.althingi.is/lagas/nuna/1940019.html).

<sup>53</sup> [www.suostumus2018.fi/](http://www.suostumus2018.fi/).

stereotypes and retrogressive language, which in the case of Portugal was harmful to the victim in the text of their judgement.<sup>54</sup>

Interestingly, Ireland and the countries comprising the United Kingdom (England and Wales, Scotland and Northern Ireland), all common law jurisdictions, all have consent-based definitions despite having only signed but not yet ratified the Istanbul Convention to date. Only six other EEA Member States – Belgium, Cyprus (whose laws are heavily based on English common law), Germany, Iceland, Luxembourg and Sweden – have consent-based definitions; however, issues with regard to some of these laws remain, as outlined below.

To summarize, out of the 31 European states covered in this overview (33 if counting the three jurisdictions within the United Kingdom), only **ten** define rape on the basis of absence of consent in their legislation: Ireland, England and Wales (one jurisdiction), Scotland, Northern Ireland, Belgium, Cyprus, Germany, Iceland, Luxembourg and Sweden. Considering that three of these jurisdictions are part of the United Kingdom, these could be counted as **eight** states in total.

In Germany, the legal definition of rape was changed to a consent-based one in November 2016. The requirement for the victim to physically resist in order for rape to be proven was also repealed.<sup>55</sup> Indeed, as noted, for instance in the 2017 Equality Now report, “law should never interpret a woman’s lack of physical resistance to sexual violence as acquiescence in that violence.”<sup>56</sup> The change has been dubbed a “no means no” law and now provides that both physical and verbal responses from the victim could lead to proving the lack of consent. The amended legislation, however, does not focus on the absence of consent as such but on the victim’s expression of their refusal to engage in the sexual act. The “no means no” model is problematic as it implies the existence of consent by default, in every situation where there is no express refusal to engage in a sexual act, as opposed to interpreting consent as active participation and/or affirmative expression. According to this model, women consent to sex perpetually, unless they state otherwise.

In its 2017 Evaluation of Austria, when discussing the new offence of “violation of sexual integrity” (which covers sexual intercourse “against the will of a person” but is not classified as rape), the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) responsible for monitoring the implementation of the Istanbul Convention, noted that “there is – however slight – a difference between sexual acts committed against the will of the victim (Austrian legislation), and non-consensual sexual acts (the Convention). This means, for example, that the former may not allow for prosecution in cases where the victim remains passive but does not consent. For the act to be punishable under Austrian legislation, the victim must express her opposing will verbally or otherwise.”<sup>57</sup> This observation can be extended to the new definition of rape under German law as well, so doubts remain whether the new German definition fully complies with Convention obligations.

### 3.1.1 DEFINITION OF CONSENT IN LAW

No international or regional human rights instruments or standards provide a definition of consent and State Parties to, for instance, the Istanbul Convention, enjoy a margin of appreciation in this regard. The Explanatory Report to the Convention provides, at paragraph 193, that “... it is, however, left to the Parties to decide on the specific wording of the legislation and the factors that they consider to preclude

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<sup>54</sup> [www.elpais.com/politica/2018/07/10/actualidad/1531217547\\_930023.html](http://www.elpais.com/politica/2018/07/10/actualidad/1531217547_930023.html); Amnesty International Portugal, Amnesty International Portugal concerned about gender stereotypes in the ruling of Porto Court of Appeal” 2018, [www.amnistia.pt/amnistia-internacional-portugal-preocupada-com-acordao-que-contem-estereotipos-de-genero-com-mensagem-prejudicial-as-vitimas-de-violencia-sexual/](http://www.amnistia.pt/amnistia-internacional-portugal-preocupada-com-acordao-que-contem-estereotipos-de-genero-com-mensagem-prejudicial-as-vitimas-de-violencia-sexual/); [www.publico.pt/2018/10/04/sociedade/noticia/governo-quer-alterar-leis-sobre-crimes-sexuais-1846186](http://www.publico.pt/2018/10/04/sociedade/noticia/governo-quer-alterar-leis-sobre-crimes-sexuais-1846186).

<sup>55</sup> Criminal Code (Germany), *Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 1 des Gesetzes vom 30. September 2017 (BGBl. I S. 3532) geändert worden ist*, art 177, available at: [www.gesetze-im-internet.de/stgb/](http://www.gesetze-im-internet.de/stgb/).

<sup>56</sup> Equality Now, “The World’s Shame. The Global Rape Epidemic. How Laws around the World are Failing to Protect Women and Girls from Sexual Violence”, 2017, p 13.

<sup>57</sup> Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), “Baseline Evaluation Report Austria” 2017, para 141, available at: [www.rm.coe.int/grevio-report-austria-1st-evaluation/1680759619](http://www.rm.coe.int/grevio-report-austria-1st-evaluation/1680759619).

freely given consent. Paragraph 2 [of Article 36 of the Convention] only specifies that consent must be given voluntarily as the result of the person's free will, as assessed in the context of the surrounding circumstances."<sup>58</sup>

Some guidance on how to infer consent or lack thereof can be found at Rule 70 (Principles of evidence in cases of sexual violence) of the Rules of Procedure and Evidence of the International Criminal Court (whose mandate covers crimes committed during international armed conflict). It provides that:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or 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;
- (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.<sup>59</sup>

The 2010 CEDAW Committee decision in *Karen Tayag Vertido v The Philippines* also provides some guidance around assessing whether consent was given. The Committee recommended, citing the DESA Handbook for legislation on violence against women, that the respondent State enact a definition of sexual assault that either:

- requires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting; or
- requires that the act takes place in "coercive circumstances" and includes a broad range of coercive circumstances.<sup>60</sup>

All of the common law jurisdictions in Europe (England and Wales, Scotland, Northern Ireland and Ireland) have definitions of consent embedded in the legislation.<sup>61</sup> In the Republic of Ireland, where rape has been defined as "sexual intercourse without consent" in legislation since 1981, a statutory definition of consent was introduced into law in February 2017. Section 48(9) of the Criminal Law (Sexual Offences) Act 2017 provides that: "(1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act" and provides a non-exhaustive list of circumstances in which it may be established that consent was not given. It also specifies that "(4) Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place" and that "(5) Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act".<sup>62</sup>

In England and Wales, where consent has been defined in law since 2003, new guidance and toolkits for prosecutors and police were introduced by the Director of Public Prosecutions in January 2015.<sup>63</sup> The new guidance was intended as a clarification of the law and a reminder to prosecuting counsel that the 2003 law required them to ask defendants to explain how they obtained consent. It also stressed

<sup>58</sup> Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 2011, para 193.

<sup>59</sup> International Criminal Court Rules of Procedure and Evidence, Second edition 2013, The Hague, available at: [www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf](http://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf).

<sup>60</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii).

<sup>61</sup> Section 74 Sexual Offences Act 2003 (England and Wales), available at: [www.legislation.gov.uk/ukpga/2003/42/contents](http://www.legislation.gov.uk/ukpga/2003/42/contents); Part 2: Consent and reasonable belief, Sexual Offences (Scotland) Act 2009, [www.legislation.gov.uk/asp/2009/9/contents](http://www.legislation.gov.uk/asp/2009/9/contents); Section 3 Sexual Offences (Northern Ireland) Order 2008, [www.legislation.gov.uk/nisi/2008/1769/contents](http://www.legislation.gov.uk/nisi/2008/1769/contents); Section 48(9) of the Criminal Law (Sexual Offences) Act 2017 (Ireland), [www.irishstatutebook.ie/eli/2017/act/2/enacted/en/print.html](http://www.irishstatutebook.ie/eli/2017/act/2/enacted/en/print.html).

<sup>62</sup> Criminal Law (Sexual Offences) Act 2017, entered into force 27 March 2017.

<sup>63</sup> Crown Prosecution Service, "What is consent?" available at:

[www.cps.gov.uk/publications/equality/vaw/what\\_is\\_consent\\_v2.pdf](http://www.cps.gov.uk/publications/equality/vaw/what_is_consent_v2.pdf); See also, "Rape and Sexual Offences Legal Guidance", [www.cps.gov.uk/legal/p\\_to\\_r/rape\\_and\\_sexual\\_offences/](http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/). Related media coverage: [www.telegraph.co.uk/news/uknews/law-and-order/11375667/Men-must-prove-a-woman-said-Yes-under-tough-new-rape-rules.html?\\_sm\\_au\\_=iVVPDZjVnnHQfH66](http://www.telegraph.co.uk/news/uknews/law-and-order/11375667/Men-must-prove-a-woman-said-Yes-under-tough-new-rape-rules.html?_sm_au_=iVVPDZjVnnHQfH66); [www.independent.co.uk/news/uk/crime/the-ddps-tough-new-rape-guidelines-what-are-they-and-why-are-they-so-important-10011603.html?\\_sm\\_au\\_=iVVPDZjVnnHQfH66](http://www.independent.co.uk/news/uk/crime/the-ddps-tough-new-rape-guidelines-what-are-they-and-why-are-they-so-important-10011603.html?_sm_au_=iVVPDZjVnnHQfH66).

the need for questioning the person's ability to consent in specific circumstances, for instance, if there was a possibility of mental health problems or learning difficulties, if the person was asleep, unconscious or incapacitated due to alcohol or drugs, or if there was financial or other dependency in the context of domestic violence or another relationship of power. The Director of Public Prosecutions for England and Wales Alison Saunders said at the time:

“These tools take us well beyond the old saying “no means no” - it is now well established that many rape victims freeze rather than fight as a protective and coping mechanism. We want police and prosecutors to make sure they ask in every case where consent is the issue - how did the suspect know the complainant was saying “yes” and doing so freely and knowingly?”<sup>64</sup>

However, despite the law and policies being good on paper, the lack of understanding of consent, also among legal professionals, persists, and training and awareness-raising are vital for proper implementation, as shown by the 2018 investigation by the Guardian which revealed widespread shortcomings in rape prosecutions in England and Wales.<sup>65</sup>

## 3.2 FORCE-BASED DEFINITIONS IN EUROPE

The vast majority (23) of European countries investigated in the course of this scoping research have legal definitions of rape based on force, threat of force or coercion and not on lack of consent. These are: Austria, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Switzerland.

The 2013 EWL “Barometer on rape” notes some arguments frequently put forward in opposition to defining rape on the basis of lack of consent, for instance, that “it has sometimes also been denounced as difficult to prove and ... may, in practice, result in the secondary victimization of the complainant/survivor by forcing the prosecution to prove beyond reasonable doubt that the complainant/survivor did not consent. In an attempt to avoid such secondary victimization, some countries have developed definitions of rape which rely on the existence of certain circumstances, rather than demonstrating a lack of consent.”<sup>66</sup>

Some of the definitions found in the above-listed 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).<sup>67</sup> In others, force or threat-based definitions of rape also include circumstances when the victim is “deprived of the possibility of self-defence” (Bulgaria),<sup>68</sup> “unable to express his [*sic*] will” (Hungary)<sup>69</sup> or “incapable of resisting the act” (Denmark).<sup>70</sup>

### 3.2.1 “IT'S NOT RAPE”

In Finland, offences committed against persons between the ages of 16 and 18 by persons in charge in schools or institutions who use their position in planning or committing the offence are classified as sexual abuse and not as rape and carry lesser sentences (a fine or a maximum of four years' imprisonment).<sup>71</sup> Similarly, if the sexual act takes place in a hospital or a similar institution, when advantage is taken of the person's illness or disability or where there is a relationship of dependency,

<sup>64</sup> “CPS and police focus on consent at first joint National Rape Conference”, 28 January 2015, available at: [http://www.cps.gov.uk/news/latest\\_news/cps\\_and\\_police\\_focus\\_on\\_consent\\_at\\_first\\_joint\\_national\\_rape\\_conference/](http://www.cps.gov.uk/news/latest_news/cps_and_police_focus_on_consent_at_first_joint_national_rape_conference/).

<sup>65</sup> [www.theguardian.com/law/2018/sep/26/rape-prosecutions-plummet-crown-prosecution-service-police](http://www.theguardian.com/law/2018/sep/26/rape-prosecutions-plummet-crown-prosecution-service-police).

<sup>66</sup> EWL “Barometer on Rape”, 2013, p 7.

<sup>67</sup> Criminal Code (Estonia) as amended in 2017, art 141, available at: [www.legislationline.org/documents/section/criminal-codes](http://www.legislationline.org/documents/section/criminal-codes).

<sup>68</sup> Criminal Code (Bulgaria) as amended in 2015, art 152(1)(1), available at: <https://pravatami.bg/zakoni/nakazatelen-kodeks>.

<sup>69</sup> Criminal Code (Hungary), Act C of 2012, Article 197(1)(b), available at: [www.refworld.org/docid/4c358dd22.html](http://www.refworld.org/docid/4c358dd22.html).

<sup>70</sup> Criminal Code (Denmark) 2016, *Bekendtgørelse af straffeloven 2016*, Chapter 24, Section 216(2), available at: [www.retsinformation.dk/Forms/R0710.aspx?id=192080](http://www.retsinformation.dk/Forms/R0710.aspx?id=192080).

<sup>71</sup> Criminal Code (Finland) as amended in 2015, Section 5, available at: [www.legislationline.org/documents/section/criminal-codes/country/32](http://www.legislationline.org/documents/section/criminal-codes/country/32).

the act is classified as sexual abuse. Through long-term, targeted advocacy, Amnesty Finland has succeeded in changing certain other problematic legislative provisions. For instance, the classification as “sexual abuse” of sexual violence when the victim was unable to express consent (due to disability, intoxication or sleep) was repealed in 2011. In 2014 provisions on “lesser degree rape” or “coercion into sexual intercourse” were repealed.

While the definition of rape requires lack of consent to be accompanied by force in Croatia,<sup>72</sup> since the entry into force of certain amendments to its Criminal Code in 2013, the country also distinguishes another offence of “sexual intercourse without consent”. This is highly problematic as it classifies sex without consent not as rape but as a lesser offence, carrying a lower maximum penalty of five years (as opposed to 10 years for rape).<sup>73</sup> The provisions were criticized by the CEDAW Committee in 2015.<sup>74</sup> In their shadow report to the Committee, women’s rights organizations BaBe and Ženska Soba (Women’s Room - Centre for Sexual Rights), referred to a 2013 case illustrating how damaging to access to justice this differentiation is. In the case described in the report, the gang rape of a minor was qualified as “sexual intercourse without consent” due to the victim being unconscious and under the influence of alcohol and thus unable to consent. The NGOs reported that following public outrage and pressure from institutions and organizations, the classification of the offence was changed to rape.<sup>75</sup> In Austria, a similar differentiation was introduced into law, with effect from January 2016. While rape is still defined based on force, threat, or deprivation of liberty and punishable by imprisonment of between one and 10 years and more, if there are aggravating circumstances,<sup>76</sup> the legislative amendment introduced the lesser offence of “sexual intercourse against the person’s will”, punishable by imprisonment of up to two years.<sup>77</sup>

### 3.3 MARRIAGE EXEMPTION

Under the Istanbul Convention, parties are obliged to “take the necessary legislative or other measures to ensure that the provisions of paragraph 1 [*criminalization of sexual violence, Article 36*] also apply to acts committed against former or current spouses or partners as recognized by internal law.”<sup>78</sup>

In Denmark, the provision whereby if the perpetrator and the victim got married, the perpetrator was eligible for a lesser sentence or acquittal was repealed as late as 2013, following advocacy efforts, including Amnesty’s. In Bulgaria, a similar provision (Art 158) was repealed even more recently, in 2015. In March 2018, the Greek Parliament adopted legislation ratifying the Istanbul Convention and harmonizing certain parts of national legislation with it. Sparked by joint advocacy by Amnesty International and nine Greek NGOs, the Parliament repealed the “marriage as settlement” provision.<sup>79</sup> The repealed article 339(3) of the Greek Criminal Code provided (in relation to “seduction of minors” and “indecent acts” performed on children under 15) that: “If a wedding was performed between the perpetrator and the victim, no criminal prosecution will be exercised and if such has been instituted, it is declared inadmissible.”<sup>80</sup>

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<sup>72</sup> Criminal Code (Croatia) as amended in 2012, *Kazneni zakon*, art 153, available at: [www.wipo.int/wipolex/en/text.jsp?file\\_id=421367](http://www.wipo.int/wipolex/en/text.jsp?file_id=421367).

<sup>73</sup> Criminal Code (Croatia) as amended in 2012, *Kazneni zakon*, art 152(1).

<sup>74</sup> CEDAW, Concluding Observations, Croatia, July 2015, CEDAW/C/HRV/CO/4-5, available at: [<sup>75</sup> Croatia: Submission to the Committee on the Elimination of Discrimination against Women for the 61st Session \(July 6th - July 24th 2015\). Shadow report by BaBe and Ženska Soba, p 7, available at:](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2fC%2fHRV%2fCO%2f4-5&Lang=en, para 18(h)</a>.</p></div><div data-bbox=)

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=INT%2fCEDAW%2fNGO%2fCRO%2f20854&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=INT%2fCEDAW%2fNGO%2fCRO%2f20854&Lang=en).

<sup>76</sup> Criminal Code (Austria) 1974 as amended, art. 201, available at: [www.legislationline.org/documents/section/criminal-codes](http://www.legislationline.org/documents/section/criminal-codes).

<sup>77</sup> Criminal Code (Austria) 1974 as amended, art. 205a.

<sup>78</sup> Istanbul Convention, art 36(3).

<sup>79</sup> Amnesty International Greece, “10 organizations request the Minister of Justice to remove the ‘marriage as settlement’ provision”, 2018: [www.amnesty.gr/news/articles/article/21284/10-organoseis-kaloyn-ton-ytoyrgo-dikaiosynis-na-katargisei-ti-diataxi](http://www.amnesty.gr/news/articles/article/21284/10-organoseis-kaloyn-ton-ytoyrgo-dikaiosynis-na-katargisei-ti-diataxi); Amnesty International made a submission on the bill before it was tabled to Parliament, see:

[www.amnesty.gr/news/articles/article/21309/ellada-sholia-gia-proteinomeno-nomoshedio-gia-tin-epikyrosi-tis-symvasis](http://www.amnesty.gr/news/articles/article/21309/ellada-sholia-gia-proteinomeno-nomoshedio-gia-tin-epikyrosi-tis-symvasis); Law 4531/2018 on the Ratification of the Istanbul Convention, [www.e-nomothesia.gr/law-news/demosieutheke-phek-nomos-4531-2018.html](http://www.e-nomothesia.gr/law-news/demosieutheke-phek-nomos-4531-2018.html).

### 3.4 CRIMES AGAINST “HONOUR” AND “MORALITY”

Under international human rights law, rape and other non-consensual acts of sexual nature should be criminalized and defined as crimes against a person’s bodily integrity and sexual autonomy<sup>81</sup> as opposed to crimes against morality, public decency, honour or the family and society.<sup>82</sup>

In several European countries, rape and sexual violence laws are still framed in terms of crimes related to “honour” or “morality” as opposed to bodily integrity or sexual autonomy. In Malta, for example, sexual offences fall under the chapter of “Crimes affecting the good order of families”. However, the previously used subtitle of “Crimes against the peace and honour of families, and against morals” was changed to “sexual offences”.<sup>83</sup> Rape falls under “crimes against the order of families and public morals” in Belgium<sup>84</sup> and Luxembourg,<sup>85</sup> offences against “public morals” in the Netherlands<sup>86</sup> and “decency” in Poland (where, however, the title of the relevant chapter also refers to “sexual freedom”).<sup>87</sup>

The 2017 Equality Now report points out that through using “honour” or “morality” framing of sexual offences, such laws:

- Risk denial of justice to the complainant;
- Risk creating a hierarchy of more or less “worthy” survivors;
- Foster an environment supporting the control of women’s bodies and women’s lives;
- Foster an environment which exonerates perpetrators of sexual and other violence against women and transfer the blame onto the complainant;
- Perpetuate the notion of women as bearers of the “morality” of a society.<sup>88</sup>

## 4. BARRIERS TO ACCESS TO JUSTICE. PRELIMINARY FINDINGS ON PRACTICE

### 4.1 QUALITY OF INVESTIGATIONS

International law and standards require states to ensure that the responsible law enforcement agencies respond to all forms of violence promptly and appropriately<sup>89</sup> and engage adequately in the prevention

<sup>81</sup> See Istanbul Convention, art 36 (1), CEDAW Committee, General Recommendation 35, para 33; *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii); See also Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24; available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women).

<sup>82</sup> UN Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 12, available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women).

<sup>83</sup> Criminal Code (Malta) 2016, Title VII, available at: [www.legislationline.org/documents/section/criminal-codes](http://www.legislationline.org/documents/section/criminal-codes).

<sup>84</sup> *Code Pénal (Belgique), 8 juin 1867, Titre VII*, available at: [www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi&tri=dd+as+rank#LNKR0127](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi&tri=dd+as+rank#LNKR0127).

<sup>85</sup> *Code Pénal (en vigueur dans le Grand-Duché de Luxembourg) Titre VII*, available at: [www.legislationline.org/documents/section/criminal-codes](http://www.legislationline.org/documents/section/criminal-codes).

<sup>86</sup> Criminal Code (The Netherlands), Act of 3 March 1881, Part XIV, available at: [www.legislationline.org/documents/section/criminal-codes](http://www.legislationline.org/documents/section/criminal-codes).

<sup>87</sup> Criminal Code (Poland) 1997, *Kodeks karny*, Dz.U. 1997 Nr 88 poz. 553, Chapter XXV, available at: [www.legislationline.org/documents/section/criminal-codes/country/10](http://www.legislationline.org/documents/section/criminal-codes/country/10).

<sup>88</sup> Equality Now, “The World’s Shame. The Global Rape Epidemic. How Laws around the World are Failing to Protect Women and Girls from Sexual Violence”, 2017, p 22.

<sup>89</sup> UN Handbook for Legislation on Violence against Women, 2012, p 34-36; See also Istanbul Convention, art 50(1); CEDAW General Recommendation, para 38 (b).

and protection against all forms of violence, including the employment of preventive operational measures and the collection of evidence.<sup>90</sup>

The quality of police investigations can be a significant barrier to access to justice for rape survivors. In Norway, investigative failings at the police investigation stage were recently identified as one of the most serious challenges in rape prosecutions following a 2016 review of 275 nationally reported rape cases by the Director of Public Prosecutions. The review pointed especially to weaknesses in the initial phase of police investigations in the country, where the necessary steps to secure evidence are not always taken. In 20% of cases reviewed, relevant evidence from mobile phones was not secured; in 21% of the cases, photos from the crime scene were not taken; and in 20% additional witnesses should have been questioned. Additionally, the use of coercive measures was rarely considered, even though it was a relevant factor in 63% of the cases.<sup>91</sup>

## 4.2 LENGTH OF PROCEEDINGS

The Istanbul Convention requires that “investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out **without undue delay** while taking into consideration the rights of the victim during all stages of the criminal proceedings”.<sup>92</sup> In *P.M. v Bulgaria*, a case in which it took the authorities 15 years to investigate a teenager’s rape, the European Court of Human Rights has ruled that the ineffectiveness of the investigation constituted a violation of Article 3 of the European Convention on Human Rights (prohibition of inhuman and degrading treatment) under its procedural limb.<sup>93</sup>

In England, Ireland, Northern Ireland and the Netherlands, experts working directly with sexual violence survivors - interviewed by Amnesty International during the scoping research - indicated that the length of proceedings (estimated at around two years in Ireland and England and between one and a half and three years in Northern Ireland) was extremely frustrating for those affected.<sup>94</sup> Victims often decide not to pursue legal routes as they are aware of the length of the legal process and unwilling to put themselves through years of uncertainty and secondary traumatisation. The knowledge that one has to remember the minute details of their assault for years to come for a day in court in several years’ time (if they are “lucky” enough to get one at all), while trying to heal and move on, can be a significant barrier for victims.<sup>95</sup>

## 4.3 VICTIM PROTECTION DURING THE LEGAL PROCESS

The United Nations Handbook for Legislation on Violence against Women provides useful recommendations with respect to victim protection during legal proceedings related to sexual violence.<sup>96</sup> These include, for example, free legal aid especially in criminal proceedings; support in court, including being accompanied and represented by a specialized survivors’ service, as well as measures such as not having to meet the defendant when appearing in court, *in camera* proceedings or testifying through video link.<sup>97</sup> The Handbook also recommends that evidence of survivors’ past sexual history should never be introduced into criminal or civil proceedings.<sup>98</sup>

While the scope of this overview does not allow for a detailed investigation of practices in all countries of the region, some limited findings from the scoping research interviews may be useful. For example,

<sup>90</sup> Istanbul Convention, art 50(2); CEDAW General Recommendation 35, para 38 (b).

<sup>91</sup> See Amnesty International’s submission to the United Nations Committee on the Elimination of Discrimination against Women, October 2017, p 5, [www.amnesty.org/en/documents/eur36/7102/2017/en/](http://www.amnesty.org/en/documents/eur36/7102/2017/en/).

<sup>92</sup> Istanbul Convention, art 49(1).

<sup>93</sup> *P.M. v Bulgaria*, No. 49669/07, ECHR 028 (2012), 24 January 2012.

<sup>94</sup> Interviews conducted in England, Ireland, Northern Ireland and the Netherlands between May and September 2017.

<sup>95</sup> Interview with Amnesty International, Belfast, 20 July 2017.

<sup>96</sup> United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, “Handbook for Legislation on Violence against Women” ST/ESA/329, 2009.

<sup>97</sup> United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, “Handbook for Legislation on Violence against Women” ST/ESA/329, 2009, p 40.

<sup>98</sup> United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, “Handbook for Legislation on Violence against Women” ST/ESA/329, 2009, p 43.

in Ireland and Northern Ireland, staff or volunteers of the partially state-funded rape crisis centres or victim support units can accompany survivors to the police station or court, and in fact often prepare them for the court proceedings. An example of good practice from Scotland was cited by interviewees in Northern Ireland. In April 2017, a legislative amendment there introduced a duty on judges to provide jury instructions on rape myths and preconceptions in cases where there was a delay in reporting and when there was no physical resistance or force.<sup>99</sup> Amnesty International's *Case Closed* report found that in all the Nordic countries investigated (Denmark, Finland, Norway and Sweden) survivors had access to free complainant's counsel<sup>100</sup> and a similar practice appears to be in place in the Netherlands.<sup>101</sup>

#### ***Y. v Slovenia: The limits of cross-examinations to protect women***

In 2010 a woman filed an application against Slovenia with the European Court on Human Rights arguing that the criminal proceedings to respond to her complaint of sexual assaults against her had been unreasonably delayed and exposed her to traumatic experiences interfering with her personal integrity.<sup>102</sup>

The woman who was born in Ukraine but was living in Slovenia since 2000, alleged that when she was 14 years old, a male family friend forced her to engage in oral sex and sexual intercourse on various occasions between July and December 2001. Her mother reported the events and the girl was first questioned by the police in July 2002. Following unsuccessful attempts to obtain information from the police about the progress of the investigation, the mother complained to the State Prosecutor's Office who in August 2003 lodged a request for a judicial investigation. In September 2006 the Maribor District Prosecutor's Office charged the man with the sexual assault of a child below the age of 15. The trial lasted almost two years. Based on a medical report that contradicted some of the woman's assertions, the court applied the principle that any reasonable doubt should benefit the accused (*in dubio pro reo*) and the man was acquitted.

The European Court on Human Rights did not comment on the guilt or innocence of the man but found that the authorities had failed to provide the woman with the necessary protection in breach of Article 8 of the European Convention of Human Rights. The Court acknowledged that the authorities had taken a number of measures to prevent the woman from being traumatized further, such as excluding the public from the trial and having the defendant removed from the courtroom when she gave her testimony. However, these measures had been insufficient to ensure her protection. In the Court's opinion the fact that the woman's questioning stretched over four hearings held over seven months in itself raised concerns. The Court also examined the two hearings where the man personally cross-examined the woman. In one of them, the man asked the woman over a hundred questions asking her to confirm that she could cry on cue, that she had actively sought his company and that she had confided in him that she wished to dominate men sexually. He also claimed that the charges of rape were fabrications by her mother, asking then several questions about her, including her knowledge of Slovene and personal relationships. In addition, on three occasions the court ordered a short recess due to the woman's agitation and crying. After one of these recesses the man asked her whether she would feel better if they all went to dinner, just as they used to, and maybe then she would not cry so much.<sup>103</sup>

The Court argued that while the defence had to be allowed a certain leeway to challenge the reliability and credibility of the woman and to reveal possible inconsistencies in her statement, cross-examination should not be used as a means of intimidating or humiliating witnesses. The Court said that "questions and remarks suggesting, without any evidentiary basis, that the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him, or that she had confided in him her desire to dominate men, were not aimed only at attacking the applicant's credibility, but were also meant to denigrate her character". In addition, the Court stated that "the offensive insinuations about the applicant also exceeded the limits of what could be tolerated for the purpose of enabling him to mount an effective defence adding that the wide scope of the cross-examination afforded to the man was a distressing experience for the woman."<sup>104</sup>

The Court also held that there had been a violation of the State's procedural obligations under Article 3 (prohibition of inhuman or degrading treatment) of the Convention, finding in particular that, while it was impossible to speculate

<sup>99</sup> Interview with Amnesty International, Belfast, 21 July 2017. See, Abusive Behaviour and Sexual Harm (Scotland) Act 2016, Chapter 1, S. 288DA and 288DB, available at: [www.legislation.gov.uk/asp/2016/22/part/2/chapter/1/enacted](http://www.legislation.gov.uk/asp/2016/22/part/2/chapter/1/enacted). See also coverage of the Rape Crisis Scotland campaign that preceded the change: [www.bbc.co.uk/news/uk-scotland-scotland-politics-39182779](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-39182779).

<sup>100</sup> Amnesty International "Case Closed. Rape and Human Rights in the Nordic Countries. Summary Report" 2010, available at: [www.amnesty.org/en/documents/ACT77/001/2010/en](http://www.amnesty.org/en/documents/ACT77/001/2010/en), p 17. The full 2008 report is available on request.

<sup>101</sup> Interview with Amnesty International, Amsterdam, 23 May 2017; Interview with Amnesty International, Utrecht, 24 May 2017.

<sup>102</sup> *Y. v Slovenia*, No. 41107/10, 28 May 2015.

<sup>103</sup> *Y. v Slovenia*, No. 41107/10, 28 May 2015, paras 34-37.

<sup>104</sup> *Y. v Slovenia*, No. 41107/10, 28 May 2015, para 108

about why it took more than seven years between the applicant's lodging her complaint and the outcome of the proceedings, such a delay could not be reconciled with the requirements of promptness.

#### 4.4 TRAINING OF POLICE, PROSECUTORS, JUDGES, FIRST RESPONDERS

In order to ensure adequate prevention and protection against all forms of violence, states must provide appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence in prevention and detection of such violence, comprehensive and appropriate handling of referrals, gender equality and intersectional discrimination, and the needs and rights of victims with the view of preventing "secondary victimization".<sup>105</sup>

Continuous training of law enforcement officers, prosecutors and judges, as well as law students as future law professionals, was identified by experts and practitioners interviewed in the course of the scoping research as an area that could improve women's access to justice for rape. Even in the Netherlands, which has 800 specialized sexual assault detectives, lawyers interviewed by Amnesty International identified police training as an important area for improvement.<sup>106</sup> Training and awareness raising amongst first responders (for example, GPs, nurses and other medical professionals) was also mentioned.<sup>107</sup>

Issues around communication with the police once a case has been reported have also been raised in the course of the scoping research and included infrequent and insufficient updates, with survivors often not being informed about the progress of the investigation or the next steps in their case for long periods of time.<sup>108</sup> Survivors' suggestions for improvement in this area as quoted by one frontline professional interviewed included receiving copies of all relevant paperwork and a timeline for their case from the police.<sup>109</sup>

A 2016 case from Cyprus illustrates well that barriers to accessing justice for rape often persist despite legislation being in line with human rights standards and based on lack of consent. In this case, a woman was gang raped by two men. The Cypriot Supreme Court reduced their sentence from 12 to 10 years on the basis that, amongst other grounds, there were no signs of physical violence. In the words of the Court, cited in an English translation, "excessive violence was not used to force the victim, but just threats and a slap".<sup>110</sup> The ruling sparked protests and criticism.

#### 4.5 SURVIVOR SUPPORT

Under international human rights law, states have a duty to provide effective remedies, including appropriate support services to facilitate survivors' physical and psychological rehabilitation.<sup>111</sup> Under the Istanbul Convention, states are required to facilitate survivors' recovery from violence<sup>112</sup> through, for instance, ensuring sufficient access to support services such as rape crisis centres.<sup>113</sup> With regard to accessibility, the 2008 Final Activity Report of the Council of Europe Task Force to Combat Violence against Women recommended that one rape crisis centre be available per 200,000 women and one

<sup>105</sup> Istanbul Convention, art 15(1); CEDAW General Recommendation 35, para 38 (b).

<sup>106</sup> Interview with Amnesty International, Amsterdam, 23 May 2017; Interview with Amnesty International, Utrecht, 24 May 2017.

<sup>107</sup> Interviews conducted in the Netherlands and Northern Ireland, May - July 2017.

<sup>108</sup> Interviews conducted in Ireland and Northern Ireland, England and Wales, July - September 2017.

<sup>109</sup> Interview with Amnesty International, Belfast, 21 July 2017.

<sup>110</sup> Cyprus Mail Online, Protest over rape sentence reduction, 18 July 2016, available at: [www.cyprus-mail.com/2016/07/18/protest-rape-sentence-reduction/](http://www.cyprus-mail.com/2016/07/18/protest-rape-sentence-reduction/).

<sup>111</sup> General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, paras 23, 24 (b), 26 (a), (b), 43, 46 and 47.

<sup>112</sup> Istanbul Convention, art 20. See also General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 40 (c). See also Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 29, available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women).

<sup>113</sup> Istanbul Convention, art 25. See also General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, 2017, para 40 (c). See also Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 30.

counselling centre per 50,000, with an adequate geographical spread. It also advised that such supports must be able to support all women regardless of their background, legal status or economic situation.<sup>114</sup>

While the scope of this overview does not allow for a comprehensive assessment of European countries' provision of comprehensive survivor support, it may provide some basic insights based largely on the scoping interviews. In the majority of common law countries investigated, rape crisis centres were established in the 1970s following strong feminist activism. They are partially state-funded and partially dependent on public donations. Some have been severely affected by austerity measures while others have always struggled with inadequate resourcing due to never being a priority on the successive governments' agendas.<sup>115</sup> The demand for their support was assessed by interviewees as hugely outweighing the supply<sup>116</sup> and the fact that support organizations are often left to compete with each other for private funding was criticized.<sup>117</sup> Amnesty's 2008 *Case Closed* report was also critical of some aspects of the provision of support services in the Nordic countries, in particular in Finland.<sup>118</sup>

## 4.6 SEXUALITY AND RELATIONSHIPS EDUCATION

Awareness-raising and comprehensive sexuality and relationships education (including education about consent, bodily integrity and sexual autonomy) are paramount in eradicating rape culture and preventing rape and sexual violence. The United Nations Handbook for Legislation on Violence against Women notes that the educational system is "one of the most effective entry points at which discriminatory attitudes regarding gender equality and violence against women can be challenged".<sup>119</sup> The Istanbul Convention obliges State Parties to take "the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education".<sup>120</sup> Comprehensive training of teachers and other professionals delivering such education is also essential.

In several countries of the region, the public education system fails to prioritize or indeed deliver such education on a consistent basis or outsources its provision to non-governmental, private or even religious organizations. Even where sexuality education is part of the school curriculum, it often does not include any education on consent (for example, in Denmark or the Netherlands)<sup>121</sup> and the duration of classes and the overall delivery often leave much to be desired. In Norway, for example, a recent survey found that only 42% of students in the 17-19 age group had received information about the right to bodily integrity, as well as rape and sexual violence as part of their sexuality education classes.<sup>122</sup>

In some countries, the quality and scope of sexuality and relationships education is in many cases heavily influenced by some schools' religious ethos (Ireland, Northern Ireland), the religious character of some of the providers to whom their delivery is outsourced (as above) or the government's religion-influenced agenda (such as in Poland, where young people are provided with "Preparedness for Family Life" classes).

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<sup>114</sup> Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV), "Final Activity Report" 2008, p 84, available at: [www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final\\_Activity\\_Report.pdf](http://www.coe.int/t/dg2/equality/domesticviolencecampaign/Source/Final_Activity_Report.pdf).

<sup>115</sup> Interview with Amnesty International, London, 6 September 2017. See also: Dublin Rape Crisis Centre, Submission to the United Nations Committee against Torture, July 2017, available at: [www.drcc.ie/wp-content/uploads/2011/03/DRCC-UNCAT-Submission-final-July-2017.pdf](http://www.drcc.ie/wp-content/uploads/2011/03/DRCC-UNCAT-Submission-final-July-2017.pdf), p 6.

<sup>116</sup> Interview with Amnesty International, London, 6 September 2017; Interviews conducted in Northern Ireland, July 2017.

<sup>117</sup> Interview with Amnesty International, London, 6 September 2017.

<sup>118</sup> Amnesty International, "Case Closed. Rape and Human Rights in the Nordic Countries. Summary Report" 2010, p 21.

<sup>119</sup> United Nations Department of Economic and Social Affairs, Division for the Advancement of Women, "Handbook for Legislation on Violence against Women" ST/ESA/329, 2009, p 30.

<sup>120</sup> Istanbul Convention, art 14(1).

<sup>121</sup> Consultation with Amnesty International Denmark; telephone interview with Amnesty International, 30 August 2017.

<sup>122</sup> [www.nrk.no/norge/unge-misfornoyde-med-seksualundervisninga\\_-\\_laerer-ikke-om-voldtekt-pa-skolen-1.13503309](http://www.nrk.no/norge/unge-misfornoyde-med-seksualundervisninga_-_laerer-ikke-om-voldtekt-pa-skolen-1.13503309). See Amnesty International's submission to the United Nations Committee on the Elimination of Discrimination against Women, October 2017, p 5, [www.amnesty.org/en/documents/eur36/7102/2017/en/](http://www.amnesty.org/en/documents/eur36/7102/2017/en/).

## 4.7 MYTHS AND HARMFUL GENDER STEREOTYPES

Under international human rights law, states are required to counter and eradicate gender-based stereotypes and discriminatory attitudes towards women as a means of preventing gender-based violence.

Article 12(1) of the Istanbul Convention obliges signatories to:

... take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.<sup>123</sup>

Under the United Nations Convention on the Elimination of All Forms of Discrimination against Women, states are obliged to take all appropriate measures to:

... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>124</sup>

In the case of *Vertido v The Philippines*, the CEDAW Committee has recommended to the State party to:

Ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women.<sup>125</sup>

Several Amnesty International sections have in the past commissioned or conducted surveys on attitudes around sexual violence in their countries. Some of these surveys also provided insights into personal experiences of sexual violence and its prevalence. These included, for example surveys by Amnesty UK (2005)<sup>126</sup>, Sweden (2008)<sup>127</sup>, Finland (2010)<sup>128</sup>, Norway (2013),<sup>129</sup> Belgium (2014)<sup>130</sup> and Denmark (2015).<sup>131</sup>

The European Commission's Eurobarometer survey on gender-based violence published in November 2016 found that stereotypes and myths around sexual violence are widespread. A shocking 27% of respondents (more than one in four) stated that they believed that sexual intercourse without consent may be justified in certain circumstances (for example, if the person is drunk or under the influence of drugs, is voluntarily going home with someone, wearing revealing clothes, not saying "no" clearly or not fighting back). More than one in five (22%) of respondents were of the view that women often make up or exaggerate claims of abuse or rape.<sup>132</sup> A little over 11% of respondents expressed a view that forced sex with an intimate partner should not be illegal.<sup>133</sup>

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<sup>123</sup> Istanbul Convention, art 12(1).

<sup>124</sup> United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, art. 5(a).

<sup>125</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b).

<sup>126</sup> UK: New poll finds a third of people believe women who flirt partially responsible for being raped, 2005. [www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being](http://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being).

<sup>127</sup> Amnesty International Sweden, "Var går gränsen? En attitydundersökning om våldtäkt" 2008, available at: [www.amnesty.se/upload/files/2011/05/04/Valdtakt-Var%20gar%20gransen-En%20attitydundersokning%20om%20valdtakt-Amnesty.pdf](http://www.amnesty.se/upload/files/2011/05/04/Valdtakt-Var%20gar%20gransen-En%20attitydundersokning%20om%20valdtakt-Amnesty.pdf).

<sup>128</sup> Amnesty International Finland, "Asenne Esiin! Mieliopikysely seksuaalisesta väkivallasta" 2010, available at: [www.amnesty.fi/asenne-esiin-mieliopikysely/](http://www.amnesty.fi/asenne-esiin-mieliopikysely/).

<sup>129</sup> Amnesty International Norway, "Undersøkelse om voldtekt Laget for Amnesty International Norge" 2013, available at: [www.amnesty.no/aktuelt/flere-nyheter/skolen-svikter-i-kampen-mot-voldtekt-0](http://www.amnesty.no/aktuelt/flere-nyheter/skolen-svikter-i-kampen-mot-voldtekt-0).

<sup>130</sup> Amnesty International and SOS Viol, "Etude des opinions et des comportements de la population belge en matière de violences sexuelles" 2014, available at: [www.amnesty.be/IMG/pdf/enquete\\_synthese\\_final.pdf](http://www.amnesty.be/IMG/pdf/enquete_synthese_final.pdf).

<sup>131</sup> See: [www.amnesty.dk/nyhedsliste/2015/kan-en-kvindes-paaklaedning-goere-hende-ansvarlig-for-at-blive-voldtaget](http://www.amnesty.dk/nyhedsliste/2015/kan-en-kvindes-paaklaedning-goere-hende-ansvarlig-for-at-blive-voldtaget).

<sup>132</sup> European Commission, Special Eurobarometer 449, Report - Gender-based Violence, 2016, available at: [https://data.europa.eu/euodp/data/dataset/S2115\\_85\\_3\\_449\\_ENG/resource/d9160123-8dad-4400-bbb3-ffa35daca2cb](https://data.europa.eu/euodp/data/dataset/S2115_85_3_449_ENG/resource/d9160123-8dad-4400-bbb3-ffa35daca2cb), p 7.

<sup>133</sup> European Commission, Special Eurobarometer 449, Report - Gender-based Violence, 2016, p 44.

## 4.8 AWARENESS-RAISING CAMPAIGNS

Issues around awareness, not only amongst perpetrators, first respondents and the law enforcement but also survivors, were raised by several experts interviewed during the course of the scoping research (for example in Ireland, Northern Ireland or the Netherlands). The frequent occurrence of sexual violence within the context of domestic violence or violence in marriage and other intimate relationships was often stressed.<sup>134</sup> Women who experience sexual violence in this context sometimes don't recognize it as such; and when they do, they often tend to speak of the physical or emotional violence and not of the sexual violence when talking to professionals and/or reporting it, also because of shame. As one interviewee from Northern Ireland put it, the prohibition of rape in marriage, "has not filtered down culturally".<sup>135</sup>

In some countries, where different agencies provide support to domestic and sexual violence victims, domestic violence professionals are not always trained to ask about sexual violence or to respond to reports of it.<sup>136</sup> In others, such as in Northern Ireland, all agencies have a statutory duty to report any such offence or a suspicion thereof to the police. This often results in survivors never disclosing sexual violence for fear of repercussions, in a context where there is little faith in the justice system's effectiveness in punishing rape and protecting victims.

A 2013 study by the European Institute for Gender Equality (EIGE) noted that "campaigns are critical to prevent violence against women, not only by raising awareness of what constitutes violence and its unacceptability, but also to challenge the underlying attitudes and behaviours which support it."<sup>137</sup> The study provides a useful overview of 30 awareness-raising campaigns on violence against women and sexual violence from various EU countries. It found that 10 EU countries undertook campaigns focused on sexual violence with some specific ones, for example on sexual violence in the context of dating (Denmark), marital rape (France) or the use of drugs for the purpose of raping a person (Germany).<sup>138</sup>

In several countries (for example, Sweden and Ireland), it is young people who are particularly conscious of issues around sexual violence, respect and consent in relationships and it is them who are pushing for change or raising awareness, for example through campus campaigns, programmes of workshops on consent<sup>139</sup> or participatory research on students' experiences of sexual violence.<sup>140</sup>

In some countries, for example Northern Ireland, awareness raising is often framed around how to protect oneself from rape and targeted towards young women, and does not address rape culture or target men. In Denmark, the national police force launched a campaign in 2017 aiming at encouraging victims to report rape and sexual violence to the police.<sup>141</sup> A frontline worker interviewed in the course of the scoping research pointed out that awareness raising on sexual violence could also benefit from positive messaging. She observed that when survivors come forward, the media often sensationalize their stories, whereas "It happened to me. I'm ok" could be a different and powerful message.<sup>142</sup> The #MeToo campaign and movement, which grew organically and sparked mass global engagement in October 2017, prove this point as well.

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<sup>134</sup> Interviews conducted in Ireland and Northern Ireland, July 2017.

<sup>135</sup> Interview with Amnesty International, Belfast, 21 July 2017.

<sup>136</sup> Interview with Amnesty International, Amsterdam, 23 May 2017.

<sup>137</sup> European Institute for Gender Equality, "Study to identify and map existing data and resources on sexual violence against women in the EU", 2013, available at: <http://eige.europa.eu/rdc/eige-publications/study-identify-and-map-existing-data-and-resources-sexual-violence-against-women-eu-report>, p 10.

<sup>138</sup> European Institute for Gender Equality, "Study to identify and map existing data and resources on sexual violence against women in the EU", 2013, p 10.

<sup>139</sup> SMART Consent. Interpreting and Communicating Sexual Consent, National University of Ireland Galway, [www.nuigalway.ie/smartconsent/](http://www.nuigalway.ie/smartconsent/)

<sup>140</sup> For example, SCORE (Student Consent Research Collaboration) "Stand Together Report", Queen's University Belfast Students' Union, 2016, available at: [www.qubconsentni.wordpress.com/](http://www.qubconsentni.wordpress.com/); University College Dublin, Not Asking for It campaign: <https://www.ucdsu.ie/getinvolved/campaigns/consent/>; National University of Ireland Galway, Smart Consent (report, workshops, film): [www.nuigalway.ie/smartconsent/](http://www.nuigalway.ie/smartconsent/).

<sup>141</sup> [www.politi.dk/da/aktuelt/nyheder/Selvom+det+startede+godt+kan+det+stadig+v%C3%A6re+voldt%C3%A6gt.htm?WBCMODE=presentationunpubl](http://www.politi.dk/da/aktuelt/nyheder/Selvom+det+startede+godt+kan+det+stadig+v%C3%A6re+voldt%C3%A6gt.htm?WBCMODE=presentationunpubl).

<sup>142</sup> Interview with Amnesty International, Belfast, 21 July 2017.

**QB10** Some people believe that having sexual intercourse without consent may be justified in certain situations. Do you think this applies to the following circumstances? (MULTIPLE ANSWERS POSSIBLE)  
(%)

		Being drunk or using drugs	Voluntarily going home with someone, for example after a party or date	Wearing revealing, provocative or sexy clothing	Not clearly saying no or physically fighting back	Flirting beforehand	Having several sexual partners	Being out walking alone at night	If the assailant does not realise what they were doing	If the assailant regrets his actions	None of these	Refusal (SPONTANEOUS)	Don't know
EU28		12	11	10	10	7	7	7	4	2	68	1	4
BE		18	16	15	14	11	11	12	8	5	57	0	2
BG		21	17	13	16	14	5	8	8	2	49	1	7
CZ		12	18	10	19	17	10	9	3	2	54	1	2
DK		2	7	2	6	4	2	1	2	1	83	1	2
DE		9	13	9	14	7	6	4	2	1	67	1	5
EE		13	11	10	11	8	4	4	3	1	67	1	6
IE		11	9	9	8	7	7	7	3	3	76	0	3
EL		11	15	11	16	8	8	4	2	1	67	0	1
ES		2	3	2	3	2	1	1	1	0	89	1	2
FR		15	7	16	12	6	8	9	10	3	64	0	4
HR		19	11	16	9	15	6	4	5	2	54	1	8
IT		14	15	10	7	6	7	10	4	1	69	1	2
CY		18	15	15	14	9	9	5	4	2	64	0	1
LV		20	20	16	11	13	8	12	4	3	56	1	6
LT		14	12	10	10	12	8	7	3	2	66	1	5
LU		17	15	17	15	7	10	10	9	2	58	1	3
HU		24	20	21	14	19	18	18	4	3	50	1	2
MT		18	13	20	11	13	11	5	5	3	62	0	1
NL		5	7	6	8	7	4	4	4	2	84	0	0
AT		15	11	9	12	6	10	8	6	4	62	3	3
PL		12	10	10	9	7	7	9	3	2	62	1	7
PT		19	15	12	10	5	13	15	3	1	66	0	4
RO		30	26	25	22	17	20	16	11	4	40	0	4
SI		8	8	7	5	4	4	4	3	1	76	2	3
SK		14	14	16	13	13	10	9	6	3	53	3	5
FI		2	7	3	6	4	4	2	1	0	88	0	1
SE		2	3	2	4	2	2	2	3	2	93	0	0
UK		12	5	6	6	6	4	5	4	3	72	1	5

Highest percentage per country      Lowest percentage per country

Highest percentage per item      Lowest percentage per item

Base: All respondents (N=27.818).

Source: European Commission, Special Eurobarometer 449, Report - Gender-based Violence, 2016, p 64.

An expert working directly with sexual violence survivors interviewed in Northern Ireland pointed to the fact that victims' responses to rape and its aftermath, and their survivorship are often scrutinized and judged by people in their immediate environment, by the broader community if it is aware of the case, and by those in the justice system.<sup>143</sup> There is an expectation on women and girls to be "model victims": vulnerable, compliant, sexualized. Amnesty's *Case Closed* report on rape in the Nordic countries quoted research on Sweden in this regard, which found that "the victim's verbal skills and social status were of decisive importance in this context. Young and intoxicated women in particular had problems fulfilling the stereotypical role of the 'innocent victim'. As a result, neither rapes within intimate relationships nor 'date rapes' involving teenage girls generally led to legal action. ... Other groups of women ... seemed to have problems asserting their claims in rape investigations, such as, for example, women from Asia or Eastern Europe who had relationships with Swedish men, sex workers, homeless women, women suffering from substance abuse or mental illness, and women who had previously reported rape."<sup>144</sup> Simultaneously, regardless of how they react, women and girls are always criticized for either acting too "normal" or being too "emotional" and developing mental health problems as opposed to "moving on" and "being brave", or, for example, for not reporting rape until many years after, especially if it happened in childhood.<sup>145</sup>

Interviewees from different countries pointed to the shame and stigma associated with rape and sexual violence as some of the reasons for women never seeking justice. Media reporting and language around rape can also perpetuate harmful stereotypes and myths around, for example false claims. It is often believed that acquittal for rape means that the victim lied, for example, and reports proven to be false get a lot of media coverage. Media reports invariably also focus on what the victim was wearing or whether she drank alcohol, perpetuating misunderstanding of rape and consent and diminishing women's confidence in being believed and accessing justice.

Awareness raising at all levels of society, sexual and relationship education and stereotype- and myth-busting are crucial for eradicating rape culture and ultimately preventing sexual violence against women and girls and impunity for it.

## 5. STATISTICS. PREVALENCE AND ATTRITION RATES

Despite the fact that rape is recognized as a serious crime and that disaggregated data collection is a requirement under the Istanbul Convention,<sup>146</sup> figures on reporting, prosecution and convictions are not readily available, more so in some European states than others, as noted also by the authors of the majority of the studies on sexual violence in Europe cited in this overview.<sup>147</sup> The 2013 study by the European Institute for Gender Equality emphasized that in some countries, sexual violence statistics are collected by several agencies and not centrally recorded, which adds to the difficulty of obtaining reliable figures and comparing information.<sup>148</sup> This is the case in Ireland, for example, where statistics are collected by the Gardaí (police), the Director of Public Prosecutions, the courts service and the Central Statistics Office, and are not disaggregated. All of the experts interviewed in the country during the

<sup>143</sup> Interview with Amnesty International, Belfast, 21 July 2017.

<sup>144</sup> Amnesty International "Case Closed. Rape and Human Rights in the Nordic Countries. Summary Report" 2010, p 17. The full 2008 report is available on request. Sources on Sweden referred to: "Family violence and sexual abuse – comparison between police commissioner districts in Stockholm county of the relationship between the organisation and the quality of investigations", Interim report, 2006 and Eva L Diesen, "Family violence and sexual abuse – a comparison of investigative quality between police commissioner districts in Stockholm country", Interim report, 2008.

<sup>145</sup> Interview with Amnesty International, Belfast, 20 July 2017.

<sup>146</sup> Istanbul Convention, art 11.

<sup>147</sup> See, for instance, Kelly, L. and Lovett, J. "Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe" 2009, p 17; European Institute for Gender Equality, "Study to identify and map existing data and resources on sexual violence against women in the EU" 2013, p 11.

<sup>148</sup> European Institute for Gender Equality, "Study to identify and map existing data and resources on sexual violence against women in the EU" 2013, p 11.

scoping research indicated that this results in a lack of reliable data. The European Institute for Gender Equality also points to the fact that data on sexual violence is not harmonized at EU level, making comparisons challenging if not impossible, with varying legal definitions, as shown in this overview, adding to the difficulty.<sup>149</sup>

Amnesty's 2008 *Case Closed* report on sexual violence in Denmark, Finland, Norway and Sweden noted the difficulties with comparative statistical analyses as well: "The countries' criminal statistics are not comparable. Apart from the differences in the size of their populations, there are also different modes of recording rapes that are reported to the police. In Denmark and Norway the statistics record cases (generally one case for one victim), while in Sweden the statistics record reported acts of rape. If, for example, a woman is repeatedly raped by the same man during the course of one day, each rape will be registered as a separate offence. This is also true for cases where a woman is raped by a group of men. Hence, crime statistics in Denmark and Norway show how many people have reported rape, while the Swedish statistics show how many acts of rape have been reported."<sup>150</sup> It is thus perhaps not surprising that according to the 2009 study by Professor Liz Kelly and Jo Lovett, the 2006 reporting rate in Sweden was the highest of all countries surveyed, twice as high as that in England and Wales, four times the rate in Finland and 35 times – in Hungary.<sup>151</sup>

It is equally difficult to assess whether changes in reporting figures are due to an actual increase or decrease in instances of rape, whether they reflect changes in reporting, for instance due to increased faith in the system, or else point to improved recording by the police. Additionally, low reporting or prevalence figures can be misinterpreted by authorities and taken to mean that sexual violence is on the decrease and thus result, for instance, in lower resource allocation to rape crisis centres. For example, several experts interviewed during the scoping research in Ireland indicated that the government hailed as success the relatively low level of sexual violence prevalence recorded for Ireland in the 2014 FRA survey (8% against the EU average of 11%).<sup>152</sup> The following sections summarize comparative data available, taking the difficulties outlined into consideration.

## 5.1 PREVALENCE OF SEXUAL VIOLENCE

Information on prevalence of rape and sexual violence in EEA countries is more readily available than data on attrition rates. And it is staggering. According to the most recent EU-wide survey, the 2014 Fundamental Rights Agency (FRA) survey on violence against women,<sup>153</sup> one in ten women in the EU (11%) has experienced some form of sexual violence from the age of 15, either by an intimate partner (with the vast majority of partner violence referred to in the survey involving heterosexual couples)<sup>154</sup> or by another person.<sup>155</sup> An estimated 3.7 million had experienced it during the 12 months preceding the FRA interview. One in 20 women in the EU (5%) has been raped post-age 15.<sup>156</sup> The FRA assesses that this corresponds to over 9 million women in the EU who have been raped since they were 15 years old.<sup>157</sup>

Only 15% reported their most serious incident of intimate partner sexual violence to the police, the figure being 14% for non-partner violence.<sup>158</sup> Where the sexual violence was committed by a non-partner, almost one in 10 women indicated that there was more than one perpetrator.<sup>159</sup>

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<sup>149</sup> European Institute for Gender Equality, "Study to identify and map existing data and resources on sexual violence against women in the EU" 2013 p 9.

<sup>150</sup> Amnesty International "Case Closed. Rape and Human Rights in the Nordic Countries. Summary Report" 2010, p 20.

<sup>151</sup> Kelly, L and Lovett, J., "Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe" 2009, p 19.

<sup>152</sup> Interview with Amnesty International, Dublin, 18 July 2017; Interview with Amnesty International, Dublin, 18 July 2017. See graphic 1 on page 24 below.

<sup>153</sup> European Union Agency for Fundamental Rights (FRA), "Violence against women: an EU-wide survey . Main results" (FRA survey) 2014.

<sup>154</sup> FRA survey 2014, p 48.

<sup>155</sup> The FRA survey was based on a random sample of women aged 18 to 74 years across all EU Member States.

<sup>156</sup> FRA survey 2014, p 21.

<sup>157</sup> FRA survey 2014, p 41.

<sup>158</sup> FRA survey 2014, p 59.

<sup>159</sup> FRA survey 2014, p 21.

#### Prevalence of sexual violence against women from age 15, EU (2014)

- 1 in 3 experienced physical and/or sexual violence
- **1 in 10 (11%) experienced sexual violence**
- 1 in 20 (5%) was raped
- **Approx. 9 million women** between 18 and 74 **have been raped**
- 6% experienced an attempted rape
- There has been more than 1 perpetrator for almost 1 in 10

The survey was accompanied by an interactive **data explorer** that can be used to find and visualise specific data by country and region, as well as compare it to other Member States' results and EU averages.<sup>160</sup>

## 5.2 REPORTING AND ATTRITION RATES

### 5.2.1 REPORTING TO THE POLICE

The 2014 FRA survey provides some useful data on reporting of sexual violence incidents to the police in EU Member States, with the lowest rate of reporting recorded in Denmark and Finland (7%) and the highest (27%) in Cyprus, the EU average being 14%.<sup>161</sup>

The survey found that survivors reported the most serious incident of intimate partner sexual violence to the police in 15% of cases and the most serious incident of non-partner sexual violence in 14% of cases.<sup>162</sup> Approximately one quarter of survivors indicated that shame or embarrassment were the reasons for not reporting the most serious incidents of sexual violence to the police or any other organisation.<sup>163</sup>

More insights into the reasons for not reporting physical and sexual violence to the police have been summarized in the table below:

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<sup>160</sup> Available at: [www.fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-women-survey?mdq1=theme&mdq2=3506](http://www.fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-women-survey?mdq1=theme&mdq2=3506).

<sup>161</sup> <http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-women-survey>.

<sup>162</sup> FRA survey 2014, p 59.

<sup>163</sup> FRA survey 2014, p 55.

**Table 3.6: Reasons for not contacting the police following the most serious incident of violence since the age of 15, by type of violence and perpetrator (%)<sup>a,b</sup>**

	Any partner (current and/or previous)		Non-partner	
	Physical violence	Sexual violence	Physical violence	Sexual violence
Dealt with it myself/involved a friend/ family member	41	33	36	26
Too minor/not serious enough/ never occurred to me	34	17	38	16
Did not think they would do anything	7	13	6	12
Did not think they could do anything	5	12	6	9
Fear of offender, or reprisal	11	20	6	14
Somebody stopped me or discouraged me	2	3	1	2
Shame, embarrassment	11	23	5	26
Thought it was my fault	4	6	4	13
Did not want anyone to know/kept it private	11	21	4	18
Too emotionally upset to contact the police	4	5	3	7
Did not want the offender arrested or to get in trouble with police	5	5	3	2
Would not be believed	2	9	2	14
Afraid I would lose the children <sup>c</sup>	2	4	n/a	n/a
Did not want the relationship to end <sup>c</sup>	4	6	n/a	n/a
Went directly to a magistrate or judge to report the incident	(0)	(0)	(0)	(0)
Somebody else had reported it, or police came to know about it on their own	1	2	3	3
Went somewhere else for help	2	2	3	4
Other reason	7	13	11	13
<i>n</i>	4,606	1,562	3,709	1,615

Notes: *a* Respondents were able to give more than one answer, so categories may total to more than 100 %.

*b* Results based on a small number of responses are statistically less reliable, so observations based on fewer than 30 responses are put in brackets and observations based on fewer than five responses are suppressed (denoted with '-').

*c* This answer category was available to the respondents only when they were asked about partner violence.

Source: FRA gender-based violence against women survey dataset, 2012

The 2013 “Barometer on rape” compiled by the European Women’s Lobby (EWL) equally noted that “from previous research, large scale surveys and the experience of NGOs working with victims/survivors of sexual violence, we know that only a small number of rapes are reported to the police compared to the real numbers of rapes”.<sup>164</sup> Professor Liz Kelly’s and Jo Lovett’s 2009 study also asserts that it is only a minority of rape and sexual assault incidents that are ever reported.<sup>165</sup> The EWL’s “Barometer on rape” found that the low levels of reporting were due to fear, lack of awareness or information of support services available, as well as concerns of not being believed. It also pointed out that “gender stereotypes, as well as societal expectations with regard to women and men’s behaviour (gender roles) can contribute to an atmosphere where date rape is possible and indeed acceptable.”<sup>166</sup>

<sup>164</sup> EWL “Barometer on Rape” 2013, p 7.

<sup>165</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009, p 17.

<sup>166</sup> EWL “Barometer on Rape” 2013, p 11.

## 5.2.2 ATTRITION

There are few studies providing a comprehensive overview of rape attrition rates in countries of the region. The most comprehensive and in-depth study on attrition levels in selected countries of the region was published by Professor Liz Kelly and Jo Lovett in 2009 and covers 11 European countries with different legal systems in-depth (Austria, Belgium, England and Wales, France, Germany, Greece, Hungary, Ireland, Portugal, Scotland and Sweden), as well as provides some information and data on another 22 countries (Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, FYROM, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Switzerland and Turkey).<sup>167</sup>

The authors note that the differences among legal systems, the legal definitions of sexual violence crimes and the diverse data collection systems of varying quality make cross-country comparisons of attrition rates difficult and stress that the study “does not claim that the data used is internally and externally validated”.<sup>168</sup> They note that in most cases, attrition rates are calculated as proportions of reported cases that do not result in convictions and that sometimes, proportions in relation to cases prosecuted are also taken into account.<sup>169</sup> However, due to significant differences in roles of prosecuting authorities and their practices and procedures in the various countries surveyed, the study does not compare data on prosecutions but focuses on convictions, and mainly covers the rates and figures for 2006, as well as over sustained periods of time (1997 to 2007 in most cases).

The study identified four patterns in relation to attrition in Europe, concluding that the vast majority of countries surveyed (68%) exhibited “classic attrition”, that is a rise in reporting and a decrease in convictions over a sustained period of time (Austria, Belgium, Cyprus, England and Wales, Estonia, Finland, Germany, Greece, Iceland, Ireland, Italy, Lithuania, Latvia, Scotland, Sweden and Switzerland). In only three countries (Denmark, France and Luxembourg), increased reporting rates were accompanied by increases in convictions. Four countries surveyed (the Czech Republic, Hungary, Portugal and Romania) displayed the so-called “reverse attrition”, whereby lower reporting rates and lower convictions were recorded,<sup>170</sup> and one country (Poland) showed an anomalous result, with more prosecutions than reports.<sup>171</sup> While the study is almost 10 years old and legislative and practice-related changes in the countries surveyed may have resulted in changes in their attrition rates, it is valuable to consider its key findings, summarized by the authors as follows:

- increased reporting, especially in Northern/Western Europe;
- substantial variations in reporting rates per 100,000 of the population;
- variations in conviction rates, both over time and between countries;
- a correlation between high conviction rates and low reporting;
- the majority of European countries, especially over the last decade, exhibit the classic attrition pattern.<sup>172</sup>

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<sup>167</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009.

<sup>168</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009, p 17.

<sup>169</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009, p 17.

<sup>170</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009, p 22.

<sup>171</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009, p 25.

<sup>172</sup> Kelly, L and Lovett, J., “Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe” 2009, p 25.

# 6. INTERNATIONAL HUMAN RIGHTS STANDARDS

International law and standards on rape have been developed within the framework of gender-based violence and violence against women.<sup>173</sup> Violence against women has been recognized as a form of gender discrimination, which results from the historically unequal power relations between women and men,<sup>174</sup> and “seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”.<sup>175</sup> Such violence includes “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”.<sup>176</sup> The United Nations Convention on the Elimination of All Forms of Discrimination against Women urges states to take all appropriate measures to “eliminate discrimination against women by any person, organization or enterprise” and “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.<sup>177</sup> The obligation to eliminate gender-based discrimination and violence against women is of an immediate nature and delays cannot be justified on any grounds, including on economic, cultural or religious grounds.<sup>178</sup> States are responsible for preventing and prosecuting gender-based violence acts by state actors,<sup>179</sup> and have a “due diligence” obligation “to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-state actors which result in gender-based violence against women”.<sup>180</sup>

Furthermore, the United Nations Special Rapporteur on Violence Against Women argued that the obligation of states to prevent and respond to acts of violence against women with **due diligence** has become part of customary international law.<sup>181</sup> The Special Rapporteur noted that “the State is obliged to act with due diligence to prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by private or state actors.”<sup>182</sup> The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) further codifies the due diligence standard in relation to states’ obligation to address gender-based violence against women in legally binding norms with regards to prosecution, prevention,

<sup>173</sup> This framework includes legally binding treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará); the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol); and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). In addition, there has been authoritative guidance by the CEDAW Committee in its General Recommendations No.19 on violence against women (1992), No. 28 on the core obligations of States parties under article 2 of the Convention, UN Doc. CEDAW/C/GR/28, (2010), No. 33 on women’s access to justice, UN Doc. CEDAW/C/GR/33, (2015), and No.35 gender-based violence against women, updating general recommendation No. 19, UN Doc. CEDAW/C/GR/35, (2017), and in multiple concluding observations on countries; international policy instruments such as the Beijing Declaration and Platform for Action; groundbreaking CEDAW Committee decisions (e.g. *AT v Hungary* (2005), *Fatma Yildirim v Austria* (2007); *Vertido v The Philippines* (2010), *S.V.P. v Bulgaria* (2011); *R.P.B v The Philippines* (2011)); as well as decisions by the Inter-American Commission on Human Rights, Inter-American Court, and the European Court of Human Rights (e.g. *Maria da Penha Maia Fernandes v Brazil* (2000); *Velasquez-Rodriguez v Honduras* (1988), *Raquel Martí de Mejía v Peru* (1996); *Aydin v Turkey* (1997); *Opuz v Turkey* (2009)).

<sup>174</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, preamble; Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, preamble; The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, preamble.

<sup>175</sup> CEDAW Committee, General Recommendation 19, para 1.

<sup>176</sup> CEDAW Committee, General Recommendation 19, para 6.

<sup>177</sup> CEDAW, art 1(e) and (f).

<sup>178</sup> CEDAW Committee, General Recommendation 35 on gender-based violence against women, updating general recommendation No. 19, UN. Doc. CEDAW/C/CG/35, para 21.

<sup>179</sup> CEDAW Committee, General Recommendation 35, paras 21 and 22.

<sup>180</sup> CEDAW Committee, General Recommendation 19, para 9; See also General Recommendation 35, para 24(b).

<sup>181</sup> Report of the Special Rapporteur on violence against women (Yakin Ertürk), “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women – The Due Diligence Standards as a Tool for The Elimination of Violence Against Women”, UN Doc. E/CN.4/2006/61.

<sup>182</sup> Report of the Special Rapporteur on violence against women (Yakin Ertürk), “Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women – The Due Diligence Standards as a Tool for The Elimination of Violence Against Women”, UN Doc. E/CN.4/2006/61, para 19.

protection, support and provision of reparations to victims and survivors.<sup>183</sup> The sections below briefly discuss specific standards in relation to key elements of the due diligence standard.

## 6.1 LEGAL FRAMEWORK ON SEXUAL VIOLENCE

The Istanbul Convention requires **criminalization of rape and all other non-consensual acts of sexual nature**.<sup>184</sup> Rape and other sexual violence should be defined as **crimes against a person's bodily integrity and sexual autonomy**<sup>185</sup> as opposed to crimes against morality, public decency, honour or the family and society. Legislation should include a combination of gender-neutral and gender-specific provisions to reflect the specific experiences and needs of women and girls survivors of violence, while allowing the prosecution of gender-based and sexual violence against men and boys too.<sup>186</sup>

Based on the recognition that sexual assault is a violation of person's sexual autonomy,<sup>187</sup> international human rights standards have evolved to the understanding that **sexual assault including rape should be defined by the lack of consent to sexual activity**.<sup>188</sup> Furthermore, consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances.<sup>189</sup> As a voluntary and ongoing agreement to engage in a particular sexual activity, consent can be rescinded at any time.<sup>190</sup> Developments in the international criminal law has led to the recognition that consent can be given freely and genuinely only where the free will of one the consenting parties is not overpowered by coercive circumstances, and when the person is capable of consenting.<sup>191</sup> Therefore, a sexual assault definition should include a broad range of coercive circumstances where consent cannot be freely given, while outside such circumstances it should require proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting.<sup>192</sup> The UN Handbook for Legislation on Violence against Women cautions that "definitions of sexual assault based [solely] on a lack of consent may, in practice, result in the secondary victimization of the complainant/survivor by forcing the prosecution to prove beyond reasonable doubt that the complainant/survivor did not consent".<sup>193</sup> It further recommends

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<sup>183</sup> See Council of Europe, "Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). Safe from Fear, Safe from Violence", 2014, p 3, available at: <https://edoc.coe.int/en/violence-against-women/6138-leaflet-safe-from-fear-istanbul-convention.html>

<sup>184</sup> 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."

<sup>185</sup> See CEDAW Committee, General Recommendation 35, para 33; *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii); See also Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 24; available at: [www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women](http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women).

<sup>186</sup> UN Handbook for Legislation on Violence against Women. United Nations Entity for Gender Equality and the Empowerment of Women; 2012, p 12, available at: <http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>.

<sup>187</sup> See Beijing Declaration and Platform for Action, Report of the Fourth World Conference on Women, UN Doc A/CONF.177/20/Add.1 (1995), para 96; See also *M.C. v Bulgaria* (2003) ECHR 651, paras 164-166.

<sup>188</sup> See *M.C. v Bulgaria* (2003) ECHR 651, paras 164-166. 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 (page 28) and Article 8(2)(e)(vi)-1, pp 36-37. See also *Vertido v The Philippines*, para 8.9(b)(ii); Istanbul Convention, art 36; CEDAW Committee, General Recommendation 35, para 33.

<sup>189</sup> *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). See also Istanbul Convention, art 36 (2); CEDAW Committee, General Recommendation 35, para 33; UN Handbook for Legislation on Violence against Women, 2012, p 24.

<sup>190</sup> This has been affirmed in national courts' judgments, for example, by the High Court of Justice of England and Wales in *R v DPP and "A"* [2013] EWHC 945 (Admin), available at: [www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf); Supreme Court of California, 29 Cal. 4th 756, 60 P.3d 183, 128 Cal. Rptr. 2d 783, 2003 Cal., available at: <http://caselaw.findlaw.com/ca-supreme-court/1330844.html>.

<sup>191</sup> See 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 art 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).

<sup>192</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b)(ii).

<sup>193</sup> UN Handbook for Legislation on Violence against Women, 2012, p 25.

defining an expansive list of “coercive circumstances” without reverting to an emphasis on use of force or violence.<sup>194</sup>

International human rights law and standards also require a **comprehensive definition of rape** to include all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.<sup>195</sup> In addition, 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.”<sup>196</sup> 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.<sup>197</sup> Further, states should “[s]pecifically criminalize sexual assault within a relationship (that is ‘marital rape’, either by providing that sexual assault provisions apply ‘irrespective of the nature of the relationship’ between the perpetrator and complainant; or [by] stating that ‘no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation’).”<sup>198</sup>

**Rape has been recognized as a form of torture**,<sup>199</sup> where the perpetrator is a state agent, such as a police officer or a member of security forces, whether or not the conduct is perpetrated in custody or outside of custodial settings.<sup>200</sup> State agents are law enforcement, prison or military officials but also other actors who are “acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law”.<sup>201</sup> States also have an obligation to exercise due diligence to prevent, investigate, prosecute and punish acts of torture and other ill-treatment committed by non-state or private actors, and failing to do so results in States’ “consenting to or acquiescing in such impermissible acts”.<sup>202</sup> The failure of the state to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture, facilitates and enables non-state actors to commit such acts with impunity, and the state’s indifference or inaction provides a form of encouragement or *de facto* permission for such acts. This principle has been applied to states’ failure “to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking”.<sup>203</sup> In addition, the denial of access to safe abortion for women and girls who have been raped has been recognized as a violation of the prohibition of torture and other ill treatment.<sup>204</sup>

## 6.2 COMPREHENSIVE, VICTIM-CENTRED AND GENDER-RESPONSIVE POLICIES TO COMBAT AND PREVENT GENDER-BASED AND SEXUAL VIOLENCE

The due diligence standard requires states to adopt and implement comprehensive and coordinated policies to prevent and combat all forms of violence against women.<sup>205</sup> Such policies should place the rights of the victim and survivors at the centre of all measures and be implemented through effective co-operation among all relevant agencies, institutions and organizations, including national human rights

<sup>194</sup> UN Handbook for Legislation on Violence against Women, 2012, p 25.

<sup>195</sup> Istanbul Convention, 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.

<sup>196</sup> Istanbul Convention art 45 (1).

<sup>197</sup> UN Handbook for Legislation on Violence against Women, 2012, p 24.

<sup>198</sup> UN Handbook for Legislation on Violence against Women, 2012, p 24.

<sup>199</sup> See *Aydin v Turkey* (1997) ECHR 75, paras 74-76, and 86. See also *Miguel Castro-Castro Prison v Peru*, Inter-American Court of Human Rights, 25 November 2006, paras 310-312.

<sup>200</sup> See for example *V. L. v Switzerland*, CAT, UN Doc. CAT/C/37/D/262/2005 (2007) para 8.10; *Fernández Ortega et al. v Mexico*, Inter-American Commission (2010) para 128; *El-Masri v The Former Yugoslav Republic of Macedonia* (39630/09), European Court Grand Chamber (2012) paras 205-11; *Raquel Martí de Mejía v Peru*, Inter-American Commission on Human Rights Case 10.970, Report No. 5/96 (1 March 1996).

<sup>201</sup> CAT *General Comment 2*, UN Doc. CAT/C/GC/2, para 15.

<sup>202</sup> CAT *General Comment 2*, UN Doc. CAT/C/GC/2, para 15.

<sup>203</sup> CAT *General Comment 2*, UN Doc. CAT/C/GC/2, para 15.

<sup>204</sup> See Annual Report of the Special Rapporteur on torture, UN Doc. A/HRC/22/53 (2013) paras 49-50; HRC General Comment 28, para 11; HCR Concluding Observations: Argentina, UN Doc. CCPR/CO.70/ARG, para 14.

<sup>205</sup> Istanbul Convention, art 7.1.

institutions and civil society organizations.<sup>206</sup> Furthermore, all systems set up to address gender-based violence have to be designed in a way that takes into consideration the impact on multiple and intersecting forms of discrimination on women's specific experience of violence and the different needs they may have, with a particular attention to women subjected to compounded discrimination.<sup>207</sup> See a brief discussion below of some key elements of victim-centred, gender-responsive policies with regards to prosecution and prevention of violence, protection and access to support services, and reparation for victims.

## 6.2.1 PROSECUTION

International law and standards require states to ensure that the responsible law enforcement agencies respond to all forms of violence promptly and appropriately,<sup>208</sup> and engage adequately in the prevention and protection against all forms of violence, including the employment of preventive operational measures and the collection of evidence.<sup>209</sup> To this end, states must provide appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence in prevention and detection of such violence, comprehensive and appropriate handling of referrals, gender equality and intersectional discrimination, and the needs and rights of victims with the view of preventing "secondary victimization".<sup>210</sup> States must also ensure that investigations into or prosecution of sexual violence offences "shall not be wholly dependent upon a report or complaint filed by a victim if the offence was committed in whole or in part on its territory, and that the proceedings may continue even if the victim withdraws her or his statement or complaint".<sup>211</sup> The primary responsibility for initiating prosecutions in cases of violence against women - regardless of the level or form of violence - should lie with police and other prosecution authorities.<sup>212</sup> A transparent and accessible judicial review for police and/or prosecutors who fail to prosecute should be available.<sup>213</sup>

## 6.2.2 VICTIM PROTECTION

International law and standards require states to take all necessary measures to **protect the rights and interests of the victims, including their special needs as witnesses, at all stages of investigation and legal proceedings.**<sup>214</sup> To this end, states should ensure some key policies are put in place in order to guarantee the rights and interest of victims. These include: timely and effective access to legal proceedings; removing fees or court charges for victims/survivors;<sup>215</sup> access to adequate and timely information on available support services and legal measures for victims and survivors;<sup>216</sup> provision of free legal aid, interpretation, and court support, including independent legal counsel and intermediaries.<sup>217</sup> The rights of complainants/survivors should be guaranteed also during legal proceedings, including, among others, the right to decide whether or not to appear in court or to submit evidence by alternative means, and give evidence in court in a manner that does not require confronting

<sup>206</sup> Istanbul Convention, art 7.2 and 7.3.

<sup>207</sup> CEDAW Committee, General Recommendation 35, paras 41, 43, 47, 48, 49, 50; Istanbul Convention, art 3.

<sup>208</sup> UN Handbook for Legislation on Violence against Women, 2012, p 34-36; See also Istanbul Convention, art 50(1); CEDAW General Recommendation, para 38 (b).

<sup>209</sup> Istanbul Convention, art 50(2); CEDAW General Recommendation 35, para 38 (b).

<sup>210</sup> Istanbul Convention, art 15(1); CEDAW General Recommendation 35, para 38 (b).

<sup>211</sup> Istanbul Convention, art 55; See also *Opuz v Turkey* (2009) ECHR 870, paras 138-139.

<sup>212</sup> Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), para 14(b).

<sup>213</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, "establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, art 11.

<sup>214</sup> UN Handbook for Legislation on Violence against Women, 2012, p 37. See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147 92006), available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>. See also Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0029>.

<sup>215</sup> UN Handbook for Legislation on Violence against Women, 2012, p 37; CEDAW General Recommendation 35, para 44.

<sup>216</sup> Istanbul Convention, art 19.

<sup>217</sup> UN Handbook for Legislation on Violence against Women, 2012, p 38; Istanbul Convention, articles 56 (d), (e), (h), 57.

the defendant;<sup>218</sup> protection within the court structure to ensure that contact between victims and perpetrators is avoided where possible;<sup>219</sup> measures to protect the privacy and the image of the victim.<sup>220</sup> Protecting complainants/survivors' rights also involves certain measures to ensure proper collection and submission of evidence including training of officials to competently conduct criminal investigations and developing protocols for timely collection and preservation of forensic evidence,<sup>221</sup> gathering of medico-legal evidence in a context of therapeutic assistance to the victim,<sup>222</sup> and a possibility of prosecution in the absence of the complainant/survivor and without them giving evidence.<sup>223</sup> Legislation should also prohibit courts from drawing any adverse inference from a delay of any length between the alleged commission of violence and the reporting thereof.<sup>224</sup>

International law and standards require states to **remove all discriminatory evidentiary rules and procedures**, "including procedures allowing for women's deprivation of liberty to protect them from violence, practices focused on 'virginity' and legal defences or mitigating factors based on culture, religion or male privilege, such as the so-called 'defence of honour', traditional apologies, pardons from victims/survivors' families or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death being often reserved to women, as well as judicial practices that disregard a history of gender-based violence to the detriment of women defendants."<sup>225</sup> Other discriminatory practices in legal proceedings that should be removed include also: the application of gender stereotypes and prejudices in all legal procedures in cases involving crimes of rape and other sexual offenses which may undermine the impartiality and fairness of the trials;<sup>226</sup> the practice of cautionary warning/"corroboration rule" whereby a court warns itself or the jury that it is dangerous to convict on the uncorroborated evidence of the complainant/survivor, which discriminates against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy in regard to complainants in cases of sexual violence;<sup>227</sup> evidence relating to the sexual history and conduct of the victim shall be permitted, in both civil and criminal proceedings, only when it is relevant and necessary,<sup>228</sup> and only in closed (*in camera*) hearings;<sup>229</sup> so called "virginity testing", which is medically unreliable and violates medical ethics, is inherently discriminatory, results in significant physical and mental pain and suffering, and where committed forcibly and involving vaginal penetration can constitute sexual assault or rape, torture or cruel, inhuman and degrading treatment.<sup>230</sup>

States should also **remove all legal barriers to reporting crimes of violence** such as "laws that prevent or deter women from reporting gender-based violence, such as guardianship laws that deprive women of legal capacity or restrict the ability of women with disabilities to testify in court; the practice of so-called 'protective custody'; restrictive immigration laws that discourage women, including migrant domestic workers, from reporting this violence as well as laws allowing for dual arrests in cases of domestic violence, or for prosecution of women when the perpetrator is acquitted among others."<sup>231</sup> Legislation should not include a provision criminalizing false accusations/allegations, which is discriminatory and

<sup>218</sup> UN Handbook for Legislation on Violence against Women, 2012, p 39; Istanbul Convention, articles 56 (i).

<sup>219</sup> UN Handbook for Legislation on Violence against Women, 2012, p 39; Istanbul Convention, articles 56 (g).

<sup>220</sup> UN Handbook for Legislation on Violence against Women, 2012, p 39; Istanbul Convention, articles 56 (f), CEDAW General Recommendation No. 33, para 18(f).

<sup>221</sup> CEDAW General Recommendation No. 33, "General recommendation on women's access to justice", UN Doc CEDAW/C/GC/33 (2015), para 51(i).

<sup>222</sup> Office of the United Nations High Commissioner for Human Rights, "Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", UN Doc. HR/P/PT/8Rev.1 (2004), para 270, cited in ICJ, "Women's Access to Justice for Gender-Based Violence. A Practitioners' Guide", 2016.

<sup>223</sup> UN Handbook for Legislation on Violence against Women, 2012, p 40.

<sup>224</sup> UN Handbook for Legislation on Violence against Women, 2012, p 41; CEDAW Committee, General Recommendation 35, para 33.

<sup>225</sup> CEDAW General Recommendation 35, para 31(b).

<sup>226</sup> *Vertido v The Philippines*, CEDAW Communication 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), para 8.9(b).

<sup>227</sup> UN Handbook for Legislation on Violence against Women. 2012, pp 41-42; CEDAW General Recommendation No 33, para. 25(a)(iii). ICC's Rules of Procedure and Evidence, Rule 63.

<sup>228</sup> UN Handbook for Legislation on Violence against Women; 2012, p 42; Istanbul Convention, art 54; Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, adopted by the General Assembly under its resolution 65/228 (2010), para 15(e).

<sup>229</sup> The ICC's Rules of Procedure and Evidence, Rule 70 (d).

<sup>230</sup> Independent Forensic Expert Group, (2015) 33 J Forensic Leg Med 121-124, p 5.

<sup>231</sup> CEDAW Committee, General Recommendation 35, para 31 (c).

may have a deterring effect on reporting of crimes of sexual violence.<sup>232</sup> All these concerns are particularly relevant for women who are experiencing multiple and intersecting forms of discrimination and who are less likely to report any crimes of violence against them “for fear that they will be humiliated, stigmatized, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials”.<sup>233</sup> States should act to prevent such abuses and “promote a culture and a social environment whereby justice-seeking by women is viewed as both legitimate and acceptable rather than as cause for additional discrimination and/or stigmatization”.<sup>234</sup>

### 6.2.3 SUPPORT SERVICES FOR SURVIVORS OF VIOLENCE

International law and standards require states to provide **comprehensive and integrated support services to assist survivors of violence**,<sup>235</sup> including adequate equitable access to such services, in particular by urban and rural populations, by establishing, where possible, at least the following minimum standards of availability of support services for complainants/survivors: one national women’s phone hotline providing assistance and referrals to other service providers for complainants/survivors of violence accessible around the clock and free of cost; one shelter/refuge place for every 10,000 inhabitants, providing safe emergency accommodation, qualified counselling and assistance in finding long-term accommodation; one women’s advocacy and counselling centre for every 50,000 women, providing proactive support and crisis intervention for complainants/survivors, including legal advice and support, as well as long-term support for complainants/survivors, and specialized services for particular groups of women such as for example migrants, survivors of trafficking, etc.; one rape crisis centre for every 200,000 women.<sup>236</sup> There should be timely and effective access to comprehensive and integrated services for rape survivors, including pregnancy testing, emergency contraception, safe and legal abortion services, treatment for sexually transmitted diseases, treatment for injuries, post-exposure prophylaxis and psycho-social counselling, for complainants/survivors of sexual violence at the expense of the state.<sup>237</sup> Access to such services should not be conditional upon the complainant/survivor reporting the violation to the police.<sup>238</sup>

### 6.2.4 REPARATIONS

International law and standards are clear that states should provide effective reparation to women and girls victims/survivors of gender-based violence, which are adequate, timely, comprehensive and proportionate to the gravity of the harm suffered.<sup>239</sup> Reparation should include different measures, “such as monetary compensation and the provision of legal, social and health services including sexual, reproductive and mental health for a complete recovery, and satisfaction and guarantees of non-repetition”.<sup>240</sup> States should also “establish specific reparation funds, or include allocations for gender-based violence against women within existing funds, including under transitional justice mechanisms”; “implement administrative reparations schemes without prejudice to victims/survivors’ rights to seek judicial remedies” and “design transformative reparation programmes that help to address the underlying discrimination or disadvantage which caused or contributed significantly to the violation, taking account of individual, institutional and structural aspects” by giving priority to “the victim’s/survivor’s agency, wishes and decisions, safety, dignity and integrity”.<sup>241</sup>

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<sup>232</sup> UN Handbook for Legislation on Violence against Women, 2012, p 42.

<sup>233</sup> CEDAW General Recommendation No 33, para 10.

<sup>234</sup> CEDAW General Recommendation No 33, para 35(d).

<sup>235</sup> UN Handbook for Legislation on Violence against Women, 2012, p 29. See also World Health Organization, Guidelines for Medico-Legal Care for Victims of Sexual Violence, Geneva, 2003.

<sup>236</sup> UN Handbook for Legislation on Violence against Women, 2012, p 29.

<sup>237</sup> UN Handbook for Legislation on Violence against Women, 2012, p 30; Istanbul Convention, art 25.

<sup>238</sup> UN Handbook for Legislation on Violence against Women, 2012, p 30; Istanbul Convention, art 25.

<sup>239</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. See also CEDAW General Recommendation 35, paras 46-47; Istanbul Convention, art 5.2. See also Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc. A/HRC/14/22, (2010), paras 12-85.

<sup>240</sup> CEDAW General Recommendation 35, para 44. Istanbul Convention, articles 29.1 and 30.1.

<sup>241</sup> CEDAW General Recommendation 35, para 47. Istanbul Convention, articles 30.2 and 30.3.

## 6.2.5 PREVENTION

International law and standards oblige states to “promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on the idea of stereotyped roles for women and men”.<sup>242</sup> States should also conduct educational campaigns to “increase awareness and understanding among the general public of the different manifestations of all forms of violence”<sup>243</sup> and “information on measures available to prevent acts of violence”.<sup>244</sup> States should provide “age-appropriate, evidence-based and scientifically accurate comprehensive sexuality education for girls and boys”,<sup>245</sup> “target stereotyped gender roles and promote values of gender equality and non-discrimination, including non-violent masculinities” through “integration of gender equality content into curricula at all levels of education both public and private from the early childhood on and in education programmes with a human rights approach”.<sup>246</sup> Finally, states should encourage media “to eliminate discrimination against women in their activity, including harmful and stereotyped portrayal of women or specific groups of women, such as women human rights defenders”.<sup>247</sup>

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<sup>242</sup> Istanbul Convention, art 12(1). See also CEDAW, art 5 (a).

<sup>243</sup> Istanbul Convention, art 13.1.

<sup>244</sup> Istanbul Convention, art 13.2.

<sup>245</sup> CEDAW General Recommendation 35, para 35 (a).

<sup>246</sup> CEDAW General Recommendation 35, para 35 (a).

<sup>247</sup> CEDAW General Recommendation 35, para 37.

# 7. 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, for example, the International Criminal Court's definition, the CEDAW Committee's General Recommendation 35, CEDAW Committee's guidance in *Vertido v Philippines*, the Istanbul Convention and the European Court of Human Rights' jurisprudence. Amend the definition of rape in legislation so that it is 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;
4. Explicitly criminalise rape and sexual violence within marriage either by providing that relevant provisions apply "irrespective of the nature of the relationship" between the perpetrator and complainant; or [by] stating that "no marriage or other relationship shall constitute a defence to a charge of sexual assault under the legislation";<sup>248</sup>
5. Legislate for *ex-officio* prosecutions of rape while ensuring adequate victim protection.

### Concerning policies and practices:

6. Improve the timeliness and efficiency of the legal process and reduce the length of time between reporting to the police and court proceedings;
7. Ensure effective victim protection during the legal process, through free legal aid, especially in criminal proceedings, for example through access to victims' counsel, support in court, not having to meet the defendant when appearing in court, *in camera* proceedings, testifying through video link and prohibition of introducing survivors' sexual history into proceedings;
8. Provide appropriate, continuous training for the relevant professionals working with survivors or perpetrators in prevention and detection of sexual violence, comprehensive and appropriate handling of referrals, gender equality and intersectional discrimination, and the needs and rights of victims with the view of preventing "secondary victimization" and ensure continuous training on spotting signs of sexual and domestic violence for first responders (such as GPs and other medical professionals);
9. Provide mandatory, comprehensive, age-appropriate, gender-sensitive, evidence-based and unbiased sexuality and relationships education to pupils and students of all genders, including education about consent, bodily and sexual autonomy and the right to bodily integrity;
10. Provide adequate, sustainable resources and ensure accessibility of holistic support to all sexual violence survivors, throughout the country, including to those who do not report it to the police;
11. Promote changes in the social and cultural patterns of behaviour of people of all genders with a view to eradicating harmful gender stereotypes and myths around sexual violence.

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<sup>248</sup> UN Handbook for Legislation on Violence against Women, 2012, p 24.