

THE ADMINISTRATION OF JUSTICE ON SEXUAL VIOLENCE CRIMES AGAINST WOMEN IN GEORGIA

Research study

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List of Acronyms

CEDAW - The Convention on the Elimination of all Forms of Discrimination Against Women

CCG - The Criminal Code of Georgia

CPC - Criminal Procedure Code of Georgia

ECtHR - European Court of Human Rights

ICC - The International Criminal Court

Istanbul Convention - The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

LGBTI+ - Lesbian, gay, bisexual, transgender, intersex and other sexuality, sex and gender diverse

UN - United Nations

Chapter 1

Introduction

Sexual violence is one of the most covert forms of violence against women. The underlying cause of violence against women, including sexual violence, lies within structural and systemic inequality, gender discrimination and power imbalance between women and men. Like other forms of gender-based violence, sexual violence is one of the social mechanisms through which women are forced into a subordinate position to men.¹

Compared to other forms of violence against women, sexual violence is often associated with stigma, victims rarely talk about it in public or report to the law-enforcement officials, while perpetrators are punished in an extremely small number of cases due to an ineffective legal system.² Developing effective response mechanisms to sexual violence is a fundamental step for achieving substantive³and transformative equality guaranteed by the Constitution of Georgia.

Recently, Georgia has taken significant steps in combating violence against women and domestic violence, especially for improving criminal prosecutions of such crimes and introducing victim protection and assistance mechanisms. In 2017, Georgia ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter – the Istanbul Convention) and changed several laws to bring them in compliance with the standards of the Istanbul Convention. The existing legislation now defines different forms of violence against women and provides important mechanisms for responding to such violence.

Despite the progress achieved, substantial challenges remain in the administration of justice in cases of sexual violence and the Georgian legislation still falls short of the requirements of the Istanbul Convention concerning the definitions of rape and other crimes of sexual violence. This study found out that the administration of justice on such crimes is frequently based on an outdated, sometimes discriminatory, approach and inappropriate methodology, creating one of the primary obstacles to accessing justice for the survivors of sexual violence.

1 See the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011, Preamble, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000168008482e>.

2 See Roadblocks to Justice, How the Law is Failing Survivors of Sexual Violence in Eurasia, 2019, Equality Now, see e.g. p. 8, available at: https://www.equalitynow.org/roadblocks_to_justice.

3 See the Constitution of Georgia, Article 11.3.

Despite the prevalence of sexual violence⁴, reporting rates are low, and justice is administered only in a small number of cases reported, which is confirmed by this research⁵. In the research period, there were 361 reports concerning sexual violence to the police. In the same period, only 20 perpetrators were convicted.⁶

The research was conducted by the Public Defender's Office of Georgia and the Council of Europe within the framework of the Council of Europe project Preventing and Combating Violence against Women and Domestic Violence in Georgia. It is the first research in Georgia that examines the effectiveness of criminal law response to sexual violence crimes vis-a-vis the Istanbul Convention and other international human rights standards.

This research, its findings and recommendations are not published, related to or endorsed by the Council of Europe's official monitoring bodies, namely, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) or the Committee of the Parties. GREVIO monitors the implementation of the Convention by States Parties. Based on GREVIO baseline evaluation reports, the Committee of the Parties adopts its recommendations to the States Parties concerned. This study is part of a technical cooperation project which supports the Georgian authorities in implementing the standards of the Istanbul Convention and, as such, it can be used as an information source in the monitoring process.

Chapter 2

Methodology

The research analyses the compliance of definitions of sexual violence crimes provided in the Criminal Code of Georgia with the standards set forth in the Istanbul Convention and international human rights law, and the effectiveness of the administration of justice on these crimes in the light of the mentioned standards.

The purpose of this research study is to analyse the legislative gaps and barriers in the implementation of the existing legal framework to the administration of justice on sexual violence crimes in Georgia following the ratification of the Istanbul Convention and its entry into force in 2017, and propose recommendations for improving criminal justice legislation, policy and practice.

For the purposes of this research, **sexual violence crimes** mean crimes listed in Articles⁷137 (rape), 138 (other acts of sexual nature) and 139 (coercion into intercourse or any another act of a sexual nature) of the Criminal Code of Georgia that were perpetrated, investigated, prosecuted and adjudicated between 1 June 2017 and 1 May 2019. The research will focus in particular on cases that were adjudicated by a first instance court. The research will not examine crimes that were perpetrated within this period and that remain in either the investigation or criminal prosecution stage. Moreover, the research does not analyse administration of justice in appellate and cassation courts as none of the cases examined in the framework of the research has reached appeal or/and cassation stages within the temporal scope of the research.

4 According to the National survey on violence against women, 2017, UN Women, GEOSTAT and the European Union, the number of ever-partnered women aged 15–64 reporting intimate partner sexual violence in the past 12-months period is about 4,000 women (0.4 %), the lifetime prevalence of having experienced sexual partner violence is about 24,450 women (2.3 %) and, overall, 26% women (n = 346,510) reported having experienced sexual violence and/or sexual harassment by a non-partner, including sexual abuse as a child during their lifetime. Only 26 per cent of women who reported having experienced physical or sexual partner violence had reported this violence to any agency or support service, out of which only 18% had applied to the police, pp. 41; 49; 55 and 85. Available at: <https://www.geostat.ge/media/26061/National-VAW-Study-Report-ENG.pdf>.

5 During 1 June 2017–1 May 2018, investigation was launched in 251 cases involving sexual violence or attempts of sexual violence against adult women, while only 20 cases resulted in convictions in the said period. Investigation was terminated in 17 cases, while investigation in other cases is still pending. Majority of sexual violence cases never reach court for a trial (see Annex 1). If compared to general prevalence (see footnote 4), reporting rate tends to be low.

6 See Annex N1 of this study.

7 **Note:** this does not rule out existence of other crimes of sexual violence that are not within the scope of this research but are provided in CCG Articles 140–141.

Moreover, the research focuses on crimes committed against **women victims aged 18 or older**, since cases involving underaged victims require analysis using different legal and human rights standards and the use of a different methodology, which fall outside the scope of this study.

At **the first stage** of the study, a research methodology was developed based on the Istanbul Convention and human rights standards, with the feedback from the authorities directly responsible for the administration of justice on sexual violence crimes and overseeing these processes. Moreover, a desk review and analysis of Georgian substantive and procedural legislation was carried out vis-a-vis the Istanbul Convention and other international human rights standards concerning sexual violence against women.

At **the second stage**, an analysis of case files on sexual violence crimes (covering the investigation, prosecution and adjudication of the crimes) was carried out. This entails an analysis of the information requested from the Ministry of Internal Affairs, the General Prosecutor's Office and the courts. Information analysed included complete criminal case files, including court judgements, decisions on the termination of investigations or prosecution and statistical information on the number of initiated and terminated investigations.

Additionally, disaggregated statistical data was requested from relevant authorities on:

- Cases of sexual violence crimes committed against family members pursuant to the Criminal Code of Georgia (CCG) Articles 11¹ and 53^{1.2};
- Cases of bias-motivated crimes based on sex or another discriminatory motive pursuant to Article 53^{1.1}; and
- Cases involving victims vulnerable to discrimination on account of their race, skin colour, language, sexual orientation, gender identity, religion, political or other opinions, citizenship, national, ethnic or social affiliation, origin, property or social status, residence, forced displacement, migration, involvement in prostitution, drug use, alcohol use or other grounds as defined in CCG Article 53¹.

At the same stage, focus group meetings were held with professionals working with victims of sexual violence (state and NGO run support services). It should be noted that initially it was planned to obtain information also by interviewing victims/survivors of sexual violence. However, due to ethical considerations, difficulties related to reaching survivors of violence and potential risk of secondary victimisation, this could not be realised.

At **the third stage**, based on the methodology outlined above, **24 criminal cases, 17 decisions** on termination of investigation and the **information obtained through focus-groups** were analysed based on the standards established by the Istanbul Convention and international human rights law.

Main findings of the research were shared and discussed with the representatives of the Ministry of Internal Affairs, Prosecutor's Office and other relevant authorities on 10 December 2019. These discussions were taken into account when finalising this study.

Chapter 3

Main Findings

The study found out that Georgian legislation on rape and other crimes of sexual violence against women meets some of the basic requirements of the Istanbul Convention and other international human rights standards such as the requirement of mandatory *ex-officio* (public) prosecution and the most aggravating circumstances set forth in the Istanbul Convention such as crimes against a former or current spouse, in the presence of a child, by two or more people acting together, by extreme levels of violence, with the use or threat of a weapon, the offence resulted in severe physical harm for the victim and where the perpetrator had previously been convicted of offences of a similar nature⁸. Moreover, a few positive developments were identified in practice such as granting the legal status of a victim⁹ and conducting investigative actions promptly to make sure that relevant evidence would be obtained promptly, though this only concerns the cases that reached the trial stage. Also, contrary to an extremely harmful practice in some countries, the research identified that criminal prosecutions against women for false reporting were not initiated in those cases where sexual violence crimes were not established, and investigations were closed.

Despite these positive developments, gaps and shortcomings were identified concerning legislative definitions of crimes of sexual violence as well as in their investigation, criminal prosecution and adjudication, falling short of the requirements of the Istanbul Convention and other human rights standards:

- Definitions of rape (CCG Article 137) and other sexual violence crimes (CCG Article 138-139) provided in the Criminal Code of Georgia are not based on **the lack of free and voluntary consent of the victim** as a constituent element of these crimes, which should be assessed based on a context, including whether the environment was coercive¹⁰. In addition, some sexual violence crimes, which by their nature constitute rape, are included under Article 139 (coercion into intercourse or any another act of a sexual nature), which is not classified as a grave crime, entails disproportionately light punishment and various possibilities to receive conditional sentences;
- Despite the gendered nature of sexual violence, justice is not administered from a **gendered perspective and by not taking into consideration the systematic and structural nature of violence against women**. In none of the cases of sexual violence, examined within the research, that resulted in a conviction, the motive of gender or sexual motive in the perpetrator's actions was examined or the structural nature of violence against women indicated by a judge or a prosecutor;
- While the Georgian legislation provides for a pro-active role of the state and mandatory *ex officio* prosecution of crimes of sexual violence, the research suggests that often the burden of bringing a perpetrator to justice rests on the victim rather than the state. When rape is not established following an investigation, the investigation of an alleged crime is not always continued under another relevant article of the Criminal Code and the survivor is not referred to other non-criminal response mechanisms and complaint procedures applicable to cases of violence against women. The full assessment of to what extent the victim bears the burden of criminal proceedings can only be made by studying the pending investigations that have not reached the final outcome – examining which falls outside the scope of this study;
- Prosecutorial and judicial bodies use **excessively strict requirements and corroboration rules for evidence to establish sexual violence**. As a result, only the most extreme forms and exceptional cases of sexual violence are punished. Other serious forms of sexual violence remain unpunished due to excessively strict requirements of standards of proof;
- **In most sexual violence cases, stereotypical approaches or gender stereotypes damaging to the victim are used**

8 See Article 46 of the Istanbul Convention.

9 Legal status of a victim grants the victim certain rights envisaged under the Criminal Procedure Code of Georgia, such as accessing information about criminal proceedings, benefiting from victim protection measures and testifying about the damage suffered as a result of the crime (Article 57).

10 See chapter A.1 of this study.

during the investigation, prosecution and adjudication of cases. Measures for avoiding secondary victimisation of a victim are not used. **Forensic medical examination** of the victim's body, which is viewed as a "mandatory" step for investigating sexual violence, is often an **extremely traumatising** procedure for victims of sexual violence;

- The cases studied within the research suggest that the **aggravating circumstances** provided in the Istanbul Convention (Article 46) and the Georgian legislation pursuant to the Istanbul Convention (including those provided in CCG Article 53¹¹) **have never been invoked** and used in sentencing in cases where materials possibly allowed for establishing such circumstances. In these cases, by disregarding certain aggravating circumstances, the punishment imposed for the crimes cannot be proportionate to the actual nature and gravity of the crimes committed.¹¹
- In some cases, the **court considered various mitigating circumstances** that are provided in the law but considered more appropriate for other types of crimes while, for crimes of sexual violence and those motivated by gender bias, their consideration proves to be discriminatory;¹² and
- Women from disadvantaged groups (persons with disabilities, LGBTI+ women, ethnic minority representatives, migrants, drug users, etc.,) face additional barriers in terms of accessing justice for sexual violence. The existing **legislative regulation** (repressive legislation on prostitution and drug use), **stigma toward women** (especially sex workers, drug users, LGBTI+ women and women with disabilities), **lack of reasonable accommodation** (for women with disabilities), **language barriers** (for migrant and ethnic minorities) or lack of specialised training for criminal prosecution and judicial authorities on specific aspects of disadvantaged groups are the most important barriers in that regard. Issues related to legal response to cases of sexual violence against women in disadvantaged positions need further analysis and examination.

The research concludes that the existing legislation and practice require substantial review to ensure compliance with the requirements of the Istanbul Convention and other human rights standards, and articulates a number of recommendations that are addressed to the Parliament of Georgia, the Ministry of Justice, investigative, prosecutorial and judicial bodies and other relevant authorities.

Chapter 4

Analysis of the Georgian Legislation and Practice on Sexual Violence Within the Human Rights Framework

Georgian legislation provides for a mandatory *ex officio* public prosecution for sexual violence crimes, instead of private or private-public prosecution for such crimes, which is required in the standards of the Istanbul Convention. Georgian law also does not allow terminating an investigation or prosecution of such crimes, based on "reconciliation" or marriage of the victim and the perpetrator or because the perpetrator is no longer socially dangerous.¹³

Sexual violence crimes are punishable both within and outside marriage and there are no discriminatory exceptions in the legislation concerning individuals belonging to different groups. The legislation provides for the possibility to identify bias-motivated crimes based on sex or gender, to aggravate punishment based on this motive and it, the legislation, reflects most of the aggravating circumstances provided in the Istanbul Convention.¹⁴

¹¹ See chapter F of this study.

¹² See chapter F of this study.

¹³ In certain countries of former Soviet Union, if a perpetrator of sexual violence reconciles with the victim, compensates the harm or marries the victim, he is exempted from criminal responsibility or punishment, as he is no longer considered "socially dangerous". See Equality Now's report Roadblocks to Justice, pp. 12, 15, 26 and 40.

¹⁴ See discussion on repeated offences when it comes to sexual violence in Chapter F.2.

The study identified that investigations are immediately launched, conducting different types of investigative actions without delays and granting the legal status of a victim on time in cases that reached the courts and verdicts were delivered. In the cases included in this study, victims seemed not to have confronted the perpetrator during the investigation phase which is key to avoid secondary victimisation. The study also found that investigations for false reporting were not initiated in cases where authorities could not confirm sexual violence and the case was closed. The evidence adduced by the defence about the victim's "poor moral character" or disgruntlement of the defence lawyer with gender equality principles did not seem to influence the delivery of guilty verdict by the courts.¹⁵ In the majority of cases, the sanctions applied seem to take into account the gravity of the crimes committed. The Istanbul Convention requires that national legislation should ensure that criminal offences of violence against women, including sexual violence, are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.¹⁶

A. Limited Definitions of Sexual Violence Crimes in Substantive Law

1. International Human Rights Standards

According to international human rights standards, **the lack of victim's freely given consent** should be the defining element of rape and other types of sexual violence crimes.

Article 36 of the Istanbul Convention requires that national legislations provide the following definition of sexual violence crimes, including rape:

- a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any body part or object;
- b) engaging in other non-consensual acts of a sexual nature with a person; and
- c) causing another person to engage in non-consensual acts of a sexual nature with a third person.

Under this article, *consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.*

According to the Explanatory Report to the Istanbul Convention, the study and analysis of sexual violence crimes during investigation, prosecution and adjudication stages requires a context-sensitive assessment of the evidence to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations.¹⁷

The definitions of sexual violence derive from the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda¹⁸ according to which elements of rape exist when the perpetrator uses force, the threat of force or coercion, and also when the perpetrator exploits coercive circumstances. According to the International Criminal Court decision, victim's consent for a sexual act may not be taken into account if the existing circumstances "**undermined the victim's ability to give voluntary and genuine consent**". The silence of the victim or lack of resistance does not mean the victim's consent.¹⁹ Therefore, consent is not voluntary or genuine and it does not have any significance when it is expressed in a coercive environment.

These standards are reinforced by the ECtHR jurisprudence, which interprets the European Convention on Human Rights and is legally binding for Georgia. In *M.C. v. Bulgaria* (2003), the Court concluded that states' positive obligations under the European Convention on Human Rights "must be seen as requiring the penalisation and effective prosecution of any **non-consensual**

¹⁵ For a comparative analysis with different countries of the world, see *The World's Shame: The Global Rape Epidemic - How laws around the world are failing to protect women and girls from sexual violence*, 2018, Equality Now.

¹⁶ See Article 45 of the Istanbul Convention.

¹⁷ Explanatory Report to Istanbul Convention, para. 192, available at: <https://rm.coe.int/16800d383a>.

¹⁸ Prosecutor v Akayesu, case no. ICTR-96-4, court decision 02.09.1998, paras. 596-598.

¹⁹ ICC, Rule of Procedure and Evidence, UN document ICC-ASP/1/3 (2002), Rule 70 c-c.

sexual act, including **in the absence of physical resistance** by the victim".²⁰ As noted by the Court, requiring proof of physical-resistance risks leaving certain types of rape unpunished and thus jeopardises the effective protection of sexual autonomy.²¹ The court also noted that consent must be "given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."²²

Notably, the United Nations Committee for Elimination of Discrimination Against Women (CEDAW) also affirms that a definition of sexual violence crimes including marital and acquaintance/partner rape should be based on the lack of freely given consent and take into account the coercive environment (CEDAW General Recommendation No. 35).²³

In *Karen Tayag Vertido v the Philippines*, the CEDAW specifies that the national legislation should:

- a. require the existence of "unequivocal and voluntary agreement" and proof by the accused of steps taken to ascertain whether the complainant/survivor gave consent; or
- b. require that the act take place in "coercive circumstances" and includes a broad range of coercive circumstances.²⁴

The UN Handbook for Legislation on Violence against Women provides further clarifications by specifying that sexual abuse legislation should include a broad range of coercive circumstances and it should not emphasise the use of force because rape in itself is a violent act. **In the case of violence, it should be used as an aggravating circumstance.** According to the handbook, sexual violence is not criminalised in some countries when it occurs in a marriage or intimate relationships. However, in countries where such actions are criminalised, such crimes are rarely investigated and the perpetrators are rarely punished.²⁵

Evidence Establishing Lack of Consent

International human rights instruments indicate how lack of consent should be interpreted and what circumstances should be taken into account to that end.

The International Criminal Court²⁶ relies on Rule 70 for the evaluation of evidence in cases of sexual violence. It states that:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, the 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; and
- (c) Consent cannot be inferred by reason of the silence of or the lack of resistance by a victim to the alleged sexual violence.²⁷

In the case of *Karen Tayag Vertido v. The Philippines*, the CEDAW Committee held that there should be no presumption that the victim consents if she does not physically resist unwanted sexual conduct, "regardless of whether the perpetrator

20 M.C. v. Bulgaria, Case No. 39272/98, 2003, para. 166.

21 M.C. v. Bulgaria, Case No. 39272/98, 2003, para. 166.

22 M.C. v. Bulgaria, No. 39272/98, 2003, paras. 102-107 and 163.

23 CEDAW, General Recommendation No. 35 on gender-based violence against women, CEDAW/C/GC/35, para. 33.

24 *Karen Tayag Vertido v the Philippines*, CEDAW/C/46/D/18/2008, 2010, para. 8.9(b)(ii).

25 UN Handbook for Legislation on Violence against Women, UN, 2010, ST/ESA/329, p. 26, available at: <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>. See also: <https://www.endvawnow.org/en/articles/457-aggravating-circumstances.html>.

26 International Criminal Law Standards established by the International Criminal Tribunal for Rwanda and Yugoslavia were considered in the ICC Rules of Procedure and Evidence (RPE).

27 ICC, Rule 70(a)-(c), Rules of Procedure and Evidence, ICC-ASP/1/3, 2002.

threatened to use or used physical violence.”²⁸ Rather, the Committee held that the accused must give evidence of the steps taken to ascertain whether the victim was consenting.²⁹

The ECtHR found in the *M.C. v. Bulgaria* case that the authorities failed to sufficiently investigate the contextual circumstances of the rape, “putting undue emphasis on ‘direct’ proof of rape;” namely, the force and threat elements as required by the national legislation, and “practically elevating [the victim’s] ‘resistance’ to the status of a defining element of the offence”.³⁰ The Court placed great emphasis on the lack of consent as the defining constituent element in rape cases, citing criminal legislation from numerous European States as well as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY). It stated:

” “While in practice it may sometimes be difficult to prove lack of consent in the absence of ‘direct’ proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. **The investigation and its conclusions must be centred on the issue of non-consent.**”³¹ (emphasis added).

Additionally, as noted earlier, in *Karen Tayag Vertido v the Philippines*, the CEDAW found that establishing “unequivocal and voluntary agreement” requires “proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting.”³²

The state should be guided by the requirements of the Istanbul Convention and other human rights instruments to determine the evidentiary grounds that it will use to establish the lack of victim’s consent in cases of sexual violence. It will be up to the investigators, prosecutors and judges to use new evidentiary standards, based on proactive investigative actions, independently from the victim’s testimony.

2. Georgian Legislation and Practice

Today, Georgian legislation falls short of the Istanbul Convention and international human rights standards according to which definitions of rape and other crimes of sexual violence should be based on the lack of victim’s freely given consent, while violence should be viewed as an aggravating circumstance, as explained in the above section.³³

In 2017, to bring the Georgian legislation in compliance with the Istanbul Convention, relevant CCG articles on sexual violence were amended. However, these articles were not brought in full compliance with the Convention. The most important changes concerned the definition of rape in CCG Article 137. Prior to 2017, this article was interpreted solely in the context of violence between persons of opposite sex and acts between female and male reproductive organs. All other forms of sexual violence, such as sexual violence between LGBTI+ persons or violence between a woman and a man without the involvement of reproductive organs of one or both persons, were excluded from the article on rape. Instead, they fell under CCG Article 138 but carried the same penalty (a violent act of sexual nature

28 Karen Tayag Vertido v. The Philippines, CEDAW/C/46/D/18/2008, 2010, para. 8.5.

29 Karen Tayag Vertido v. The Philippines, CEDAW/C/46/D/18/2008, 2010, para. 8.9, requiring in the pertinent part that states “[r]emove any requirement in the legislation that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimize secondary victimization of the complainant/survivor in proceedings by enacting 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”.

30 *M.C. v. Bulgaria*, Case No. 39272/98, 2004, para. 182. The requirement of a proactive investigation is addressed in more detail, below from the chapter C. Problems related to mandatory ex officio investigation and prosecution onwards.

31 *M.C. v. Bulgaria*, Application No. 39272/98, 2004, para. 181.

32 *Karen Tayag Vertido v the Philippines*, CEDAW/C/46/D/18/2008, 2010, p. 8.9(b)(ii).

33 UN Handbook for Legislation on Violence against Women, UN, 2010, ST/ESA/329, p. 26, available at: <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>. See also <https://www.endvawnow.org/en/articles/457-aggravating-circumstances.html>.

– previous edition³⁴). Today, any type of penetration of the victim's body by a person, using a sex organ or an object, qualifies as rape.

Despite these changes, the definition of rape is still based on violence, the threat of violence or abuse of the victim's helplessness and it is not based on the absence of the victim's consent. Under CCG Article 137, rape is defined as any form of sexual penetration of the body of another person with any body part or object, **committed by use of violence, the threat of violence or by abusing the victim's helplessness** (see below for the interpretation of these elements, including helplessness).

Within this article, **violence** is a part of the definition; it is not an aggravating circumstance. **The threat of violence** is narrowly defined as an immediate threat of death or damage to health or destroying property (as provided in CCG Article 151), if the person being threatened has a reasonable fear that the threat will be carried out³⁵. It does not entail other forms of threats that can have a paralysing effect on the victim's free will, which wrongfully leaves many serious acts committed through such means outside the definition of rape.

Interpretation of abuse of the victim's helplessness is also limited since it is not viewed as a coercive circumstance,³⁶ or when the victim is incapable of giving consent, as required by international standards. Helplessness is defined as a situation in which different factors (age, disability, being under the influence of alcohol or psychoactive substances, etc.) prevent the victim from understanding the meaning of the actions that s/he is subjected to and cause him/her to lack the capacity to resist the perpetrator. The legislation also does not take into account the reasons why the victim could not resist. This may be due to the victim's fear, for instance, that s/he will suffer more damage if s/he resists or if the victim was paralysed or isolated.³⁷

CCG Article 138 that concerned sexual violence act was amended after the ratification of the Istanbul Convention and the homophobic language was removed.³⁸ Article 138 concerns a different act of sexual nature, "which does not contain elements of the crime provided in CCG Article 137, committed under violence, the threat of violence or by abusing the victim's helplessness". This should be understood as an assault of sexual nature that falls short of penetration as opposed to penetrative acts envisaged under Article 137.

Additionally, even though Article 139 was revised in 2017 to bring it in better compliance with the Istanbul Convention, it does not address the lack of consent and context-sensitive assessment, including establishing whether the environment was coercive. The following is punishable under Article 139: "Coercion into sexual intercourse or into other act of sexual nature under the threat of damaging property, disclosing defamatory information, private information or any information that may harm substantially the right of the individual or by abusing financial, official or other dependence of the victim."

This article can be interpreted as involving three separate crimes: 1) coercion into penetration resulting in penetration; 2) coercion into another contact of sexual nature resulting in physical contact of sexual nature; 3) sexual coercion (taken alone) falling short of penetration or any other physical contact of sexual nature. The difference in Article 139 compared to Articles 137 (rape) and 138 (physical contact of sexual nature) is that it offers wider definitions of threats than provided in the latter two articles. In other words, in case of rape, which is not committed by use of violence, the threat of violence or by abusing the victim's helplessness as per Article 137 but by other methods, e.g., the threat of damaging property, disclosing defamatory information, or information representing private life, only Article 139 could be applied. Therefore, the first crime listed above should fall under Article 137 as by its nature it amounts to rape if there was penetration and the second crime should fall under Article 138 since it amounts to another physical contact of sexual nature. If Article 139 is used in these two cases, they fall under the category of

34 Prior to 2017, CCG Article 138 stipulated the following: "1. Homosexuality, lesbianism or other sexual intercourse distorted in form committed under violence, threat of violence or abusing the helplessness of the victim, - shall be punishable by prison sentences ranging from three to seven years."

35 See the definition in practice, for instance, in the order of 31 August 2017 on termination of investigation (CCG Article 19-137).

36 See section A.1 above for outlining standards provided by CEDAW and ICC in relation to coercive circumstances.

37 Tbilisi City Court, case N 4750-18; Zugdidi District Court, case no.1/536-18. Private section of the Criminal Code of Georgia, Book II – Lekveishvili Mzia, Nona Todua and Gocha Mamulashvili, 2017. Decision dated 31 August 2017 on termination of investigation; Decision dated 30 December 2018 on termination of investigation.

38 The following discriminative language was used in the article: "homosexuality, lesbianism or other sexual contact of a depraved form."

minor offences and are subject to a punishment that does not match the severity of sexual violence. The action is punishable by fine or up to five years of imprisonment (the penalty used to be up to three years until 17 March 2020).

Fine as a type of punishment for a crime of sexual violence (under Article 139, which by its nature amounts to rape or another sexual contact of physical nature) is disproportionate in consideration of the type and the nature of sexual violence and the impact on the victim, and the punishment may not have a preventive effect. This was evidenced by this study since in only one out of four convictions under Article 139 imprisonment was imposed as a punishment (and even in this case the crime was committed in a combination of other crimes that affected the determination of the sanction).³⁹

The lack of definition based on victim's consent as a legislative gap, influenced by gender stereotypes, leaves certain types of sexual violence unpunished as illustrated by one of the cases where the investigation was initiated for attempted rape (CCG Article 19-137). The investigation proved, based on the victim and the witness testimonies, video recordings and other evidence, that the victim on the first day of working as an intern for the perpetrator was saying no to the perpetrator's sexual advances repeatedly **"with a loud intonation and a tearful voice"**. Even though the lack of consent was confirmed, the prosecution did not find any signs of crime due to the absence of elements under any of the articles (including CCG Articles 19-139, 150 and 143). According to the prosecution, the **"[alleged perpetrator] started caressing the victim since she was wearing shorts"; the victim "didn't suffer any physical damage," she "didn't resist physically" and "did not cry loudly and did not call anyone for help"**.⁴⁰

Examining the lack of consent is especially important for sexual violence crimes committed within the context of continuous violence, including domestic violence where, even if the victim consents, the consent may not be free and voluntary as indicated by the Istanbul Convention.

Therefore, despite the progressive changes in the Georgian legislation to comply with the Istanbul Convention, four major problems remain:

1. Definition of sexual violence crimes is not based on **the lack of victim's consent**, which should be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances;
2. Violence is an element of the definition of rape,⁴¹ instead of an aggravating factor and, in practice, the resistance of the victim equates to the element of the crime (see chapter D on evidentiary requirements); and
3. Some forms of sexual violence that by their nature amount to rape and other physical contacts of a sexual nature are classified as light crimes (under Article 139), carrying inadequate **punishment**.

It is important that, in the process of administration of justice on sexual violence cases, relevant authorities, in consideration of the legally binding force of the Istanbul Convention, interpret existing criminal law in a foreseeable manner and examine the existence of consent in each concrete case. This would be a progressive interpretation of the law, based on international human rights standards.

B. Disregarding Gender Aspects of Sexual Violence in the Justice System

1. International Human Rights Standards

Under the Istanbul Convention and international human rights standards, violence against women is the result of systemic and structural inequality, power imbalance and subordinate position of women in the society. Justice system should take into account gender aspects of violence against women, including sexual violence, for the use of criminal law mechanisms against such types of crimes to have a transformative effect for achieving de facto substantive equality.

According to the preamble of the Istanbul Convention⁴²: "Violence against women is a manifestation of historically unequal

³⁹ Judgement of Akhaltsikhe Regional Court no.1/080-18.

⁴⁰ Decision on termination of criminal investigation, 31.08.2017, N007250817004.

⁴¹ In contrast to the Istanbul Convention Article 36 definition of rape.

⁴² The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Preamble. Avail-

power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women." The convention's preamble recognises that "the structural nature of violence against women as gender-based violence and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men and that the realisation of de jure and de facto equality between women and men is a key element in the prevention of violence against women."

The Istanbul Convention and international human rights standards recognise that violence against women and domestic violence is a form of discrimination against women.⁴³ In accordance with the CEDAW, gender-based violence is a form of discrimination because it is directed against a woman because she is a woman or that affects women disproportionately.⁴⁴ Under the Istanbul Convention, violence against women is "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women".⁴⁵

Under the ECtHR, during an investigation of violence, the state has an additional obligation to take all necessary measures to identify the motive of bias in the crime.⁴⁶ This means that, in case of sexual violence as a form of gender-based violence against women, the state has an obligation to consider it as a form of discrimination and should integrate a gender perspective in criminal proceedings.

The Standard of Due Diligence

Under the Istanbul Convention and international human rights standards, states must act with due diligence for crimes of gender-based violence, including sexual violence. Due diligence should be exercised to prevent, investigate, punish and provide reparation for acts of violence.⁴⁷

A gender perspective should be considered during the elaboration of state policy or development of practice at any stage and the system of responding to gender-based violence should take into account different forms and expressions of discrimination against women.⁴⁸

The state's obligation 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"⁴⁹ is part of the preventive measures of gender-based violence, including sexual violence. To this end, states should also increase awareness about different forms of violence against women⁵⁰ and forms of its prevention⁵¹, ensure comprehensive, evidence-based and age-appropriate sexual education,⁵² combat stereotypical gender roles and promote non-violent masculinities,⁵³ including targeting gender stereotypes through media.⁵⁴

The obligation to **investigate and punish** sexual violence entails prompt and effective response to all forms of violence⁵⁵ by

able at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>.

43 CEDAW, General Recommendation 19, para. 1 and General Recommendation 35, paras. 2 and 9.

44 CEDAW, General Recommendation 35, para. 1.

45 Istanbul Convention, Article 3.

46 *Nachova v Bulgaria*, No. 43577/98 43579/98, para. 160; *BS v Spain*, No. 47159/08 para. 58; *Identoba v Georgia*, No. 73235/12, para. 67.

47 See Istanbul Convention, Article 5.

48 CEDAW, General Recommendation 35, paras. 41, 43, 47, 48, 49, 50. Istanbul Convention, Article 6.

49 Istanbul Convention, Article 12.1. See also - CEDAW, Article 5.

50 Istanbul Convention, Article 13.1.

51 Istanbul Convention, Article 13.2.

52 CEDAW, General Recommendation 35, para. 35 (a).

53 CEDAW, General Recommendation 35, para. 35 (a).

54 CEDAW, General Recommendation 35, para. 37.

55 UN Handbook for Legislation on Violence against Women, 2012, p 34-36; Istanbul Convention, Article 50(1); CEDAW General Recommendation 35, para. 38

adequately trained professionals who work on such crimes, including with victims, using a victim-centred approach.⁵⁶ States should ensure that investigation or prosecution of sexual violence crimes is not wholly dependent upon a report or complaint filed by a victim⁵⁷ and the primary obligation to investigate and criminally prosecute violence falls on the bodies concerned with the investigation and criminal prosecution, irrespective of the intensity of violence.⁵⁸ A transparent and accessible procedure should exist for the legal liability of police officers and prosecutors that fail to properly fulfil the obligation to respond to a criminal offence.⁵⁹

In addition, under the Istanbul Convention, intentionally forcing an adult or a child into marriage needs to be criminalised. Furthermore, in criminal proceedings initiated following the commission of any of the acts of violence against women – including sexual violence – culture, custom, religion, tradition or so-called “honour” cannot be regarded as a justification for violence. The Istanbul Convention also ensures that forced marriages should be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.⁶⁰

For women and girls that are victims of all forms of violence against women, the state must ensure adequate, timely, comprehensive **reparations** that are proportional to the damage suffered.⁶¹ These reparations should entail financial compensation as well as social and health services including reproductive health and mental health services and guarantees that violence will not be repeated.⁶² The state should implement administrative reparations schemes without prejudice to victims' rights to seek judicial remedies. States should design transformative reparation programs 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, and in consideration of the victim's safety, dignity and decisions.⁶³

2. Georgian Legislation and Practice

Legislation

Georgian legislation recognises that violence against women including sexual violence is gender-based. A corresponding amendment was made to the Law of Georgia on the Elimination of Violence against Women and/or Domestic Violence, Protection and Support of Victims of Violence in 2017 to bring Georgian legislation in compliance with the Istanbul Convention's requirements. Under this law, “violence against women involves all actions in the public or private life that are characteristic to violence against women committed on the grounds of sex, which entail or may entail physical, mental or sexual abuse of women, and which cause or may cause economic damage to women, including the threat of committing such actions, coercion of women, or unauthorised deprivation of liberty of women.”⁶⁴

Despite the amendment, Georgian legislation still does not meet all the requirements of the Istanbul Convention (Article 3)

(b).

56 Istanbul Convention, Article 15(1); CEDAW General Recommendation 35, para. 38 (b).

57 Istanbul Convention, Article 55; See also *Opuz v Turkey* (2009) ECHR 870, paras. 138–139.

58 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).

59 Directive 2012/29/EU of the European Parliament and the directive 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.

60 Istanbul Convention, Articles 32, 37 and 42.

61 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, Article 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.

62 CEDAW General Recommendation 35, para. 44. Istanbul Convention, Article 29.1 and 30.1.

63 CEDAW General Recommendation 35, para. 47. Istanbul Convention, Article 30.2 and 30.3.

64 Law of Georgia on the Elimination of Violence against Women and/or Domestic Violence, Protection and Support of Victims of Violence, Article 31.

and it does not recognise that violence against women, including sexual violence, is a form of discrimination against women. Such a provision is also missing from the Law of Georgia on Elimination of All Forms of Discrimination and the Law of Georgia on Gender Equality.

Under the CCG, the commission of a crime based on sex or gender prejudice amounts to an aggravating factor for all crimes provided in the CCG (Art. 53¹.1), including sexual violence crimes.

Therefore, even though the legislation does not recognise violence against women as a form of discrimination against women, it provides, by referencing relevant CCG articles, an opportunity to administer justice on sexual violence crimes with a gender perspective and based on the experience of structural inequality and discrimination, an underlying cause of sexual violence.

In the process of administration of justice in sexual violence cases, particular attention should be paid to harmful practices such as abduction for marriage and forced marriages.⁶⁵ Forcing someone to marry, including forcing a person into an unregistered marriage, is a criminal offence (CCG, Article 150¹). Abduction for marriage is not specifically criminalised, but it is punishable under the article on illegal deprivation of liberty (CCG, Article 143).

Even though forced marriage and abduction for marriage are criminal offences, according to Equality Now, there is no effective criminal policy for these two practices in Georgia and some post-Soviet countries. As a result, sexual violence committed in cases of abduction for marriage or forced marriage and motivated by prejudice is left unpunished.⁶⁶

Practice

The cases examined within this research clearly suggest that, despite the gender bias of sexual violence, justice is not administered from a gender perspective. Sexual violence is not viewed by investigative and judicial bodies as a gender-based crime that disproportionately affects women and girls due to their sex and gender. Often, women become victims of sexual violence crimes due to power imbalance and due to patriarchal social and cultural norms and practices. Consequently, in all cases that resulted in convictions for sexual violence, the possible motive of bias was not identified, gender perspective was not incorporated in any of the court judgments, and punishments were not made more severe despite the presence of such a motive.

Most notably, criminal prosecution and judicial bodies did not address **gender prejudice in any of the cases where sexual violence was committed together with a discriminatory practice against women such as the abduction of women for forced marriage**. Files of a case handled by Rustavi City Court⁶⁷, reviewed within the research, illustrate that the defendant and two of his friends (co-defendants) justified the abduction of the victim for marriage by claiming that P.Z. and S.Z. “were in love”. Even though prior relationship history between the victim and the defendant (if any) does not affect the nature of the crime, investigators were also referencing to this fact and asking the same question to all witnesses – whether the victim and the defendant were in love and whether they were a girlfriend and a boyfriend. Additionally, based on the review of the case files, it was found that the defendants were using force against the victim and subjected her to intimidation because she did not want to have a relationship with the defendant. The defendant’s family, as well as the defendant’s attorney, claimed that abduction for marriage is a tradition and it should not be considered a crime. Even though the evidence available in the case clearly proved the motive of gender discrimination reinforced by traditions, the prosecutor did not indicate the motive of bias and the judge did not examine the crime during the proceedings in the context of gender and did not consider it as an aggravating factor.

A similar problem was identified in another case of sexual violence committed in connection to **abduction for forced marriage**⁶⁸, where the defendant pled guilty but said that “the problem had been solved” because he married the victim. However, the case

65 Abduction for marriage or bride kidnapping is a form of forced marriage. Bride kidnapping is a harmful practice, which involves abducting a woman or girl against her will through deception or force and subjecting her to physical, psychological or sexual violence or coercion to force her to marry the abductor. The practice is prevalent in some of the countries of the former Soviet Union. See Roadblocks to Justice report, Equality Now, p. 27.

66 See ROADBLOCKS TO JUSTICE: HOW THE LAW IS FAILING SURVIVORS OF SEXUAL VIOLENCE IN EURASIA, EQUALITY NOW, 2019, p. 26-28, available at: https://d3n8a8pro7vhm.cloudfront.net/equalitynow/pages/1581/attachments/original/1547485403/EN-Eurasia_Rpt_ENG_-_Web.pdf?1547485403.

67 Rustavi City Court, case no.1-559-17.

68 Bolnisi District Court, case no.1/81-18.

files suggest that the victim's family members refused several times to let the defendant marry the victim, but he still decided to abduct the victim using force. At the trial, the defence lawyer highlighted the fact of marriage and maintained that, because they got married, there is nothing to worry about and, if the defendant remains in prison, the family would be destroyed. This is indicative of the trend of moving a sexual violence crime from a public to a private field. Even though the judge did not use the arguments of the defence to rule out or reduce the responsibility of the perpetrator, gender was not indicated by the prosecutor or the judge and the judge did not consider the motive of prejudice as an aggravating factor. The decision of Bolnisi District Court was challenged in the appellate court where the judge focused on the Istanbul Convention and women's rights but failed to address gender bias as an aggravating factor and upheld the first instance court's decision.

The previous history of violence and supporting evidence turned out to be insufficient for the courts to identify gender bias. In six⁶⁹ of the cases examined, there was evidence that the victim had experienced physical or psychological violence in the past by partners and non-partners who ultimately committed sexual violence. In one case, for example, the perpetrator used to commit psychological violence against the victim by threatening to disclose her private photos.⁷⁰ In another case,⁷¹ the victim stated that she previously had "conflicts" with the partner, mostly because of jealousy. The court took this fact into account in the application of a preventive measure and upheld preventive detention. However, this was not evaluated as an aggravating factor or an indicator of gender bias by the prosecution or the judge and repeated violence was not considered as an aggravating circumstance in line with the Istanbul Convention.⁷²

In contrast, in some sexual violence cases, defence lawyers invoked principles of gender equality as a concept damaging to the defendants. For instance, one of the defence lawyers maintained that all cases are handled in the context of gender equality, which gives an advantage to victims.⁷³ The judge did not react to these comments.

Notably, in one of the cases⁷⁴ concerning domestic violence and sexual violence (marital rape), the motive of bias was indicated by the prosecution as well as the court. The husband was verbally and physically abusing the wife for years. Based on the case files, three calls had been made to the Emergency Response Center "112" in 2017-2018. The police patrol drafted a report on its response stating that the victim had refused a restraining order being issued against the perpetrator. However, the victim confirmed the violence during the investigation. During the trial, the victim's mother underlined previous acts of violence. However, the defendant was not convicted of sexual violence because, according to the court, there was insufficient evidence for this crime and, therefore, sexual violence motivated by gender bias was not confirmed.

C. Problems Related to Proactive and Ex Officio Investigation and Prosecution

1. International Human Rights Standards

Exercise of due diligence in cases involving sexual violence crimes entails, among others, the obligation to conduct public, ex officio criminal prosecution and proactive approach of the state toward combating violence against women and ensuring measures for protecting and supporting victims. Under the Istanbul Convention, for certain crimes against women, including sexual violence crimes, investigations and prosecutions "shall not be wholly dependent upon a report or complaint filed by a victim" (Article 55). In that respect, it is important for the state to play a proactive role and ensure that the burden related to gathering evidence and prosecuting the perpetrator is not placed on the victim.⁷⁵ In addition, the survivor should be provided access and information about existing complaint procedures, including available international and regional mechanisms (Article 21).

69 Tbilisi City Court, case no.1/297-18; Tbilisi City Court, case no.4750-18 ; Tbilisi City Court, case no.1/3824-18; Tbilisi City Court, case no.1/3206-18 ; Tbilisi City Court, case no.1/5700-18; Tbilisi City Court, case no.1/4873-18.

70 Tbilisi City Court, case no. 1/5700-18.

71 Tbilisi City Court, case no.4750-18.

72 Article 46.b.

73 Zugdidi District Court, case no. 1/658-17.

74 Tbilisi City Court, N 1/4873-18.

75 Explanatory Report to the Istanbul Convention, para. 279.

The CEDAW requires the states to respond to all cases of gender-based violence against women, including by applying ex officio prosecution, as appropriate, to bring the alleged perpetrator to trial in a fair and timely manner and impose adequate penalties.⁷⁶ They should also ensure that rape as a serious crime is always subject to mandatory investigation and prosecution.⁷⁷ The ECtHR establishes the obligation to investigate, based on public interest, even when the victim has withdrawn the complaint.⁷⁸

2. Georgian Legislation and Practice

Legislation

In compliance with the Istanbul Convention, the ECtHR and human rights standards, the Georgian legislation includes a mandatory investigation for all types of crimes, including sexual violence crimes, and criminal prosecution is carried out based on public interest and an evidence evaluation test (explained below in this section), i.e., if a victim of sexual violence withdraws a complaint or his/her statement, it does not mean that judicial proceedings would stop.

In particular, under the Criminal Procedure Code of Georgia (CPC), receiving a report of a crime automatically triggers the obligation to institute an investigation of the crime. Pursuant to CPC Article 100, "after receiving information about a crime, the investigator, or a prosecutor, is obligated to start an investigation. The prosecutor should be immediately notified about the institution of the investigation by an investigator. Additionally, information about a crime is the information provided to an investigator or a prosecutor, the information identified during criminal proceedings or published by the media."⁷⁹ Under the same article, information about a crime "may have a written, verbal or any other form".⁸⁰

Accordingly, information about a crime from any source, including from criminal case files, creates an obligation to institute an investigation. A victim's complaint is not necessary for investigating a crime. This rule applies to all types of violence, including sexual violence. According to the CPC, withdrawal of the report about a crime by the victim or changing the statement may not serve as the basis for deciding not to institute criminal prosecution (CPC Article 105).

Under the Criminal Procedure Code of Georgia, "when making a decision to initiate or terminate criminal prosecution, a prosecutor exercises discretionary powers and takes into consideration the public interests."⁸¹ When making a decision to institute prosecution, based on the criminal policy guidelines,⁸² the prosecutor relies on the evidentiary test and the public interest test. The evidentiary test is met if the evidence available in the case creates sufficient basis for a real prospect of conviction in court and the public interest test is met if launching criminal proceedings has been prompted by public interest.⁸³ Whether there is a public interest to prosecute is determined, among others, by the criminal policy priorities of the state, the gravity of the crime, possible preventative effect of the crime, prior convictions of the person and their personal characteristics.⁸⁴

According to the foregoing principles, the motive of discrimination, including discrimination based on sex, suggests that it is appropriate to institute criminal prosecution.⁸⁵ However, the criminal policy guidelines do not specifically define that gender-based crimes, including sexual violence and domestic violence crimes, are crimes that should be investigated and prosecuted based on public interest.

According to the guidelines, different factors indicate the inexpediency of criminal prosecution, including if the person compensated the loss or the damage to the injured party. However, the guidelines also state that the decision not to institute a crim-

76 CEDAW/C/GC/35, General Recommendation 35, para. 44.

77 CEDAW/C/OP.8/KGZ/1, 21.09.2018, para. 92.a. X. and Y. v. Russia, no. 100/2016, CEDAW/C/73/D/100/2016, 09.08.2019.

78 *Opuz v. Turkey*, App. no. 33401/02, ECHR, 09.06.2009, paras. 139 and 145. *Volodina v. Russia*, app. no. 41261/17, 09.07. 2019.

79 The Criminal Procedure Code of Georgia, Article 101.

80 The Criminal Procedure Code of Georgia, Article 101.

81 The Criminal Procedure Code of Georgia, Article 16.

82 Order N181 of the Minister of Justice of Georgia (8 October 2010) on the approval of the general part of the criminal policy guidelines, 8 October 2020, Tbilisi.

83 See above footnote 79.

84 See above footnote 79, para. 3.

85 See above footnote 79, para. 8.g.

inal prosecution should not be based solely on this ground.⁸⁶ The document does not foresee any exceptions about the irrelevance of compensation of damage for crimes of violence against women in the process of making a decision about prosecution.

Practice

Decisions on the termination of the investigation of a sexual violence case, studied within the research, illustrate that investigations under CCG Article 137 (rape) were terminated based on the case files because elements of the crime were not found, pursuant to the existing legislation. However, in the majority of cases, the obligation of ex officio prosecution could be found because the case files possibly allowed for the case to be re-characterised under another article on sexual violence (e.g. CCG Art 139) or another crime of violence against women (e.g. stalking, abuse, coercion), and for the investigation to be continued, or actions subject to non-criminal law mechanisms were evident (sexual harassment and different actions provided in the Law on Violence Against Women and Domestic Violence, which do not reach the threshold of a criminal offence) and they warranted legal action.

In none of the cases, there was information that the victim was informed about and referred to the non-criminal law mechanisms that apply to sexual harassment (including the mechanisms provided for by civil and anti-discrimination laws) and are provided in the law on violence against women and domestic violence (restraining and protection orders). The criminal case files do not include information about any protection measures offered to the victim (including restraining orders) to ensure her safety.

During the period from 1 July 2017 to 1 May 2019, investigation was terminated in 17 cases of sexual violence (crimes provided in CCG Articles 137–139).⁸⁷ Absence of action provided in the criminal law was cited as grounds for terminating the investigation,⁸⁸ justified by the fact that evidence gathered during the investigation⁸⁹ did not confirm that the alleged perpetrator had committed an action provided in the CCG. In particular, the following is cited as grounds for terminating the investigation: it has not been found that the action was committed under violence, the threat of violence or by abusing the victim's helplessness, which according to the existing legislation is a constituent element of rape. In case of other sexual violence crimes (Article 138–139), it was found that the constituting elements of these crimes were not found.

Notably, the investigation was terminated in some cases because the victim changed her testimony or her initial complaint filed with the law enforcement authorities.⁹⁰ In cases of rape and attempted rape, the issue of investigation is decided based on the victim's latest statement, if there are more than one. However, it is not clear from the decisions what the investigator/prosecutor did to exclude the possibility that the victim changed her initial statement due to pressure from the alleged perpetrator or another person, stigma associated with sexual violence or fear of reprimand by the society. Additionally, in some cases, the forensic examination did not find any evidence of a crime. However, even if the physical evidence of sexual violence is not visible or not found in forensic examination, it does not mean that there was no sexual violence.

Even though, based on the information provided in decisions on the termination of the case⁹¹, the majority of terminated cases studied within this research did not contain any elements of CCG Article 137 on rape, which is why the investigation was terminated, in a number of cases elements of other possible crimes motivated by gender bias were identified, e.g., psychological violence or stalking. However, these cases were not re-characterised, and the investigation was not continued. In the event of

86 See above footnote 79, para. 8.c.

87 Letter from the Office of the General Prosecutor of Georgia, dated 9 July 2019, N 13/50123.

88 Investigation was terminated in 16 out of 17 cases under CPC Article 105(a), and in 1 case under CPC Article 105(2b).

89 The key evidence includes evidence provided by the victim and the perpetrator, and in some cases reports of forensic, biological examinations or trace analysis.

90 For instance: reports of violence or any other action of sexual nature, when such incident did not take place (April 30, 2019 decision; 24 October 2018 decision; 25 July 2018 decision; 21 November 2017 decision).

91 We must note that, unlike criminal cases where verdict was delivered, in decisions on termination of investigation, we only analysed text of the decision as opposed to the entire case file.

identification of such facts, the investigating body has the obligation to re-characterise the crime under CCG Articles 100-101 or open an investigation into a new crime.

In a number of such cases,⁹² instead of a sexual violence crime, acts of sexual harassment were identified. Because sexual harassment is not a criminal offence, a criminal investigation should be terminated. However, it is important to inform the victim and refer her to mechanisms for combating sexual harassment as provided in the civil, administrative and anti-discrimination laws. There was no evidence in the decisions on the termination of investigation that the victim was informed about such mechanisms. The problem is also confirmed by victim service providers, who reported that, in an event of termination of the investigation in a criminal case, victims are not usually referred to non-criminal law mechanisms for combating violence against women.

Analysis of the decisions on termination of investigation also illustrates the problem of interpretation of CCG Article 138 in practice, amended following the ratification of the Istanbul Convention. In some cases, crimes that, according to the information provided in decisions on termination of the investigation, may contain elements of rape or may amount to sexual harassment are characterised under the said article, while sexual harassment is not a criminal offence. For instance, according to the 13 August 2018 decision on termination of the investigation, the investigation was initiated based on S.G.'s report about sexual violence committed by G.D. by abusing S.G.'s helplessness. According to the contents of the report, the woman reported to the police about rape. The decision does not provide any justification as to why the investigation was instituted under CCG Article 138.1, instead of Article 137 on rape. In the process of the investigation, the crime was not re-characterised under a different article and the investigation was terminated eventually for the lack of evidence as provided in CCG Article 138.

As noted earlier, in some decisions on termination of the investigation, forms of violence provided in the Law on Violence Against Women and Domestic Violence are evident instead of a criminal offence. When the investigation into the criminal offence is terminated, the victim is not informed about or referred to non-criminal law mechanisms, e.g., restraining or protective orders and services for victims of violence. For instance, according to the 3 April 2019 decision, R.L. offered to take N.T. for a drive who was sitting in his car, but N.T. refused. Nevertheless, R.L. started to drive in a certain direction. N.T. got annoyed and asked R.L. to stop the car. R.L. stopped the car and sat next to N.T., in the backseat of the car, asking her to calm down. N.T. said that she was hungry, and she wanted to go to a restaurant that serves *khinkalis*. R.L. drove to the restaurant and got out of the car to order food. In the meantime, N.T. got out of the car, stopped a cab and went home. When she got home, she found R.L. there. This action, according to the information provided in the decision on termination of the investigation, may not amount to a criminal offence. However, to protect the victim from gender-based violence, a restraining or protective order may be used.

The analysis of decisions on termination of investigation also suggests that, in some cases, where the investigation was instituted under CCG Article 19-137 (attempted rape), elements of crimes provided in these articles were not identified. Even though the action possibly contained elements of the crime provided in CCG Article 139 (coercion into sexual intercourse or other act of sexual nature under the threat of violence), the decision on the termination of the investigation does not provide justification as to why the crime was not re-characterised under CCG Article 139 or what measures were taken to rule out the crime provided in CCG Article 139.

The decision on terminating an investigation, dated 31 August 2017, which illustrates the problems that may arise in practice due to the **lack of "consent"** in the definition of sexual violence, contrary to the requirement of the Istanbul Convention, is especially important. The investigation was instituted for attempted rape (Article 19-137) and was terminated due to the absence of the action provided in the criminal law (also see Chapter A). According to the decision, G.K. was caressing the victim for several hours, touching different parts of her body. The victim D.Gh. was demanding him to stop. Also, she was crying and telling G.K. loudly to stop, to move away from her and leave the room. According to the decision, the foregoing was confirmed by the investigation, based on the statements of G.K., N.G. and G.A. questioned as witnesses, by examining CCTV recordings from the pawnshop and a combination of other materials available in the case. Even though the lack of consent was confirmed, the prosecutor concluded that there was no crime due to the absence of the elements of any of the articles (including CCG Articles 19-139,

92 30 March 2018 decision; 31 July 2018 decision; 29 September 2018 decision.

150 and 143), and the victim did not sustain any physical damage, did not put up any physical resistance, yell or call for help.⁹³

The law enforcement authorities can institute an investigation for false reporting by the victim, but this practice was not used in the cases studied under this research, which indicates that law enforcement officials assume victims' credibility in sexual violence cases, which indicates a victim-centred approach required by the Istanbul Convention. Based on the information requested from the Office of the General Prosecutor of Georgia and the Ministry of Internal Affairs of Georgia⁹⁴ in the period of 1 July 2017-1 May 2019, there have been no prosecutions under Article 373 of the CCG (false reporting) against women aged 18 and above.

D. Excessively Strict Evidentiary Requirements to Prove Sexual Violence

1. International Human Rights Standards

According to the international human rights standards, excessively strict evidentiary requirements in cases of violence against women limit women's access to justice. Under the CEDAW, rules of evidence and their implementation, especially in cases of violence against women, should be reviewed and measures should be adopted to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes.⁹⁵

The CEDAW also recommends states to "revise the rules on the burden of proof to ensure equality between the parties, in all fields where power relationships deprive women of the chance for a fair judicial treatment of their case."⁹⁶ Additionally, the UN's Handbook for Legislation on Violence against Women recommends that a requirement of corroboration of the statement of a sexual violence survivor be prohibited by states.⁹⁷

Evidentiary rules can have both *de jure* and *de facto* discrimination effect on access to justice by women who are victims of violence. Under the Istanbul Convention, for instance, "evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary" (Article 54). According to the ICC Rules of Procedure and Evidence: "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."⁹⁸

Explanatory report of the Istanbul Convention further provides that "Prosecution of this offence 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 recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations."⁹⁹

Moreover, it is a long-settled principle of international law that judges may rely on the evidence of a single witness/victim to

93 Decision on the termination of investigation in the criminal case 31.08.2017, N0072 50817004. This is contrary to the principles developed by the ECtHR, in *M.C. v. Bulgaria*, 4 December 2003, in which the Court stated that it was "persuaded 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. The Court also noted as follows: "Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence" (para. 161).

94 Letter from the General Prosecutor's Office of Georgia N 13/83867 29/11/2019. The same letter also noted that the Prosecutor's Office does not record disaggregated statistics regarding crimes that were falsely recorded.

95 Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/33, General Recommendation No. 33 on women's access to justice (CEDAW GR 33), para. 51(h).

96 CEDAW GR 33, para. 15(g).

97 Handbook for Legislation on Violence against Women, UN Women. Available at: <https://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>.

98 The International Criminal Court, the Rules of Procedure and Evidence, Rule 70(d).

99 Istanbul Convention Explanatory Report, para. 192.

enter a conviction without the need for corroboration,¹⁰⁰ even though corroborative evidence remains valuable in any criminal prosecution and it will almost always come to light from a comprehensive investigation.

2. Georgian Legislation and Practice

Legislation

According to Georgian legislation, evidence has no pre-determined force (CPC Article 82.2) and it should be evaluated in terms of its relevance, admissibility and credibility for the criminal case (CPC Article 82.1). To deliver the verdict of not guilty, a combination of cohesive evidence beyond a reasonable doubt is required (CPC Article 82.3).

For criminal cases, including sexual violence cases, the legislation does not foresee the so-called mandatory evidence; the prosecutor is free to determine what sort of evidence is sufficient to support charges. In that respect, it meets the applicable international human rights standards. However, the legislation also does not define inadmissible evidence as provided in the Istanbul Convention and the standards discussed above.

Practice

Cases examined within the research suggest that **evidentiary requirements of criminal prosecution and judicial authorities are excessively strict**, which leaves different forms of sexual violence **unpunished**. In particular, in such cases, justice is administered and the verdict of guilty is delivered only if there are physical injuries and biological material associated with a violent sexual act on the victim's body. **Such practice extremely limits the possibility to punish the crimes determined in the Georgian legislation** (CCG Articles 137, 138 and 139) **in practice** and narrows down sexual violence crimes to a single element of CCG Article 137, viz., committing a crime under violence. The practice runs against the international human rights standards which provide that proving rape does not require the use of force and evidence of injuries¹⁰¹; that evidentiary requirements should not be overly restrictive and inflexible and that corroboration should not be a determining factor for bringing charges.¹⁰²

In the cases examined within this research, criminal prosecution was instituted and a verdict of guilty was subsequently delivered mostly in cases where a forensic examination of the victim's body confirmed the existence of signs of violence associated with a sexual act and the perpetrator's biological materia. Even though a forensic expert report is not mandatory evidence according to the legislation, in most of the cases that lack such findings and evidence, criminal prosecution is not initiated or it is initiated but the defendant is not convicted. For instance, in one case,¹⁰³ the main reason for the verdict of guilty was not delivered under Article 137 was the fact that the examination did not find any mechanical injuries in the victim's vagina. The defendant was convicted only under Article 126, which is beating or other kinds of violence causing physical pain.

In another case, the victim had multiple injuries. According to her, the defendant engaged in and finished a sexual act with her. According to the findings of the forensic examination in this case, the hymen had been damaged but it was still intact. Nevertheless, the investigation was initiated into attempted rape (instead of rape) and finished with the same characterisation¹⁰⁴ even though the evidence available in the case indicated rape instead of attempted rape. According to the expert's report, "the hymen is intact, but it is bleeding slightly from a crack caused by stretching of the hymen". The report also states that the victim had multiple bodily injuries. Such an inference from the condition of the hymen violates the human rights of women and girls and has no scientific or clinical basis to prove sexual intercourse or rape¹⁰⁵ (see chapter E below on virginity testing and victim's

100 See the International Criminal Tribunal for the former Yugoslavia case law: Haradinaj et al., Appeal Judgment, paras. 145, 219; Tadic, Appeal Judgment, para. 65; Bagilishema, Appeal Judgment, para. 79; Dragomir Milosevic, Appeal Judgment, para. 215; Kupreskic, Appeal Judgment, para. 220; Lukic & Lukic, Appeal Judgment, para. 375.

101 See Chapter A.1.

102 See Chapter D.1.

103 Tbilisi City Court, N 4750-18

104 Rustavi City Court - case no.1-559-17.

105 See the UN Inter-Agency Statement on Eliminating Virginity Testing, available at: <https://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1>

secondary victimisation during a forensic medical examination). Additionally, full penetration is not required to prove rape and penetration, however slight, already constitutes rape.¹⁰⁶

E. Gender Stereotypes and Problems Related to the Protection of Victims from Secondary Victimisation

1. International Human Rights Standards

According to international human rights standards, in cases of violence against women, including sexual violence cases, stereotypes that are damaging for the victim should not be used and secondary victimisation in criminal (and civil) justice process should be avoided. Gender stereotypes in the criminal justice process may significantly hinder women's access to justice before, during and after trial.¹⁰⁷

According to the CEDAW, gender stereotypes can have an impact on law enforcement authorities, especially in cases of gender-based violence,¹⁰⁸ and secondary victimisation significantly affects the quality of women's access to justice.¹⁰⁹ Therefore, the CEDAW recommends states to "take effective measures to protect women against secondary victimization in their interactions with law enforcement and judicial authorities."¹¹⁰ To this end, according to the CEDAW, it is important that states use a "confidential and gender sensitive approach" during questioning, evidence collection and other procedures related to the investigation.¹¹¹

These principles are also reinforced by the ECtHR in *Y v. Slovenia*, where the Court recognised the anguish and humiliation experienced by the survivor of sexual violence during the judicial proceedings and, finding the violation of the European Convention (Art. 8), stated that "cross-examination should not be used as a means of intimidating or humiliating witnesses."¹¹²

According to the Explanatory Report to the Istanbul Convention: "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."¹¹³

Submission of evidence related to the victim's "morals" and sexual life to court and referencing such evidence to rule out the crime or mitigate the punishment is victim-blaming and against the international human rights standards. Under the Istanbul Convention, such evidence should be permitted only when it is relevant and necessary.¹¹⁴ Under the Explanatory Report of the Convention, "in judicial proceedings evidence relating to the sexual history and sexual conduct of a victim is sometimes exploited in order to discredit the evidence presented by the victim. The defence sometimes uses previous sexual behaviour history evidence in order to challenge the respectability, the credibility and the lack of consent of victims. This particularly regards cases of sexual violence, including rape. Presenting this type of evidence may reinforce the perpetuation of damaging stereotypes of victims as being promiscuous and by extension immoral and not worthy of the protection provided by civil and criminal law. This may lead to de facto inequality, since victims, who are overwhelmingly women, are more likely to be provided with this protection if they are judged to be of a respectable nature."¹¹⁵

Further, the Explanatory report notes that "a victim's past sexual behaviour should not be considered as an excuse for acts of violence against women and domestic violence allowing to exonerate the perpetrator or to diminish his liability."¹¹⁶ Additionally,

¹⁰⁶ See e.g. *Kunarac et al.*, Appeal Judgment, IT-96-23 & IT-96-23/1-A, para. 127.

¹⁰⁷ See *Roadblocks to Justice* report, Equality Now, 2019.

¹⁰⁸ CEDAW GR 33, para. 27.

¹⁰⁹ CEDAW GR 33, paras. 17 and 18.

¹¹⁰ CEDAW GR 33, para. 51 (c).

¹¹¹ CEDAW GR 33, para. 51 (g).

¹¹² *Y v. Slovenia*, ECtHR, May 28, 2015, para. 108.

¹¹³ Istanbul Convention Explanatory Report, p. 192.

¹¹⁴ Istanbul Convention, Article 54.

¹¹⁵ Istanbul Convention Explanatory Report, para. 277.

¹¹⁶ Istanbul Convention Explanatory Report, para. 278.

under the handbook by UN Women provides that states should prohibit the introduction of the complainant's sexual history as evidence in sexual violence proceedings.¹¹⁷

Concerning the use of stereotypes in sexual violence cases, it should be noted that in the case *Karen Tayag Vertido v. The Philippines*, the CEDAW Committee determined that the claimant had been denied an effective remedy by the state due in part to numerous gendered stereotypes and myths relied upon throughout the trial court's decision.¹¹⁸ The judge, in that case, had acquitted the accused, finding that the victim should have fought him off once she had regained consciousness and while he was raping her. In its decision, the Committee stressed that:

” Stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence.¹¹⁹

The CEDAW concluded that Ms Tayag Vertido suffered “revictimisation through the stereotypes and gender-based myths relied upon in the judgement.”¹²⁰

Stereotypes may influence a judge's decision if the judge relies on them to interpret the law or factual circumstances of the case. Judges may facilitate the perpetuation of stereotypes by failing to challenge stereotyping, for example, by lower courts or the parties to legal proceedings. Judicial stereotypes can have the following effects:

- distort judges' perceptions of the factual circumstances of a particular situation of violence;
- affect judges' understanding of the nature of the criminal offence;
- affect judges' vision about the damage experienced by the victim;
- affect judges' vision of who is a victim of gender-based violence;
- affect judges' perception of the defendant's culpability;
- influence judges' views about the credibility of witnesses;
- lead judges to permit irrelevant or highly prejudicial evidence to be admitted to the court and/or affect the weight judges attach to certain evidence;
- hinder the realisation of victim's rights;
- influence the directions that judges give to juries;
- cause judges to misinterpret or misapply laws; and
- shape the ultimate legal result.¹²¹

According to the UN Special Rapporteur on the independence of judges and lawyers, gender stereotypes may take the form of the following beliefs that are gender discriminatory:

- proof of physical violence is required to show that there was no consent;
- women are likely to lie therefore evidence should be accepted only if corroborated;
- women can be inferred to be consenting to sex if they remained silent;
- previous sexual experience predisposes women to be sexually available, or to automatically consent to sex;
- women bear the responsibility for sexual attacks or invite them by being out late or in isolated places or by dressing in a particular manner;
- it is impossible to rape a sex worker; and

117 Handbook for Legislation on Violence against Women, UN Women, 2012.

118 *Karen Tayag Vertido v. The Philippines*, CEDAW/C/46/D/18/2008, 2010.

119 *Karen Tayag Vertido v. The Philippines*, CEDAW/C/46/D/18/2008, 2010, para. 8.4.

120 *Karen Tayag Vertido v. The Philippines*, CEDAW/C/46/D/18/2008, 2010, para. 8.8.

121 See OHCHR, *Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases*, 2014, pp. 20, 22.

- raped women have been dishonoured or shamed or are guilty rather than victimised.¹²²

In-Court and Out-of-Court Protection

Investigative authorities should protect the victim from unnecessary and invasive investigative actions. Victims of sexual violence should not undergo a forensic examination without informed consent and if there are no serious physical injuries or if the examination cannot confirm any circumstances that are relevant to the case.¹²³

To protect the victim from secondary victimisation, it is crucial to ensure her safety, provide sufficient support, and evaluate the risks that victims face in cases of sexual violence.

As such, victims of sexual violence are entitled to in-court protection measures to avoid their confrontation with the perpetrator and possible re-traumatisation in the courtroom. Protection measures may include separate waiting areas, the use of screens, in camera hearings, using statements (audio-visual) given during the preliminary phase of the procedure as evidence and testimony via videoconferencing. The application of contempt measures by the court and the availability of a complaint mechanism is also important in addressing threatening behaviour towards victims and witnesses.¹²⁴

Victims of gender-based violence are entitled to the protection of their right to privacy, which can take the form of barring the media from the courtroom and closing all or parts of the proceedings to the public. Ensuring in-court and out-of-court protection requires ongoing risk assessments and management to be undertaken by law enforcement authorities across the justice chain at each stage of the process. An examination of case files should reveal the application of risk assessments and management at each stage of the process.¹²⁵

Judges also have the discretion to adjust court procedures to the particular capacity and needs of victims and witnesses. Examples include:

1. Adjusting questioning to eliminate unnecessary, intrusive, repetitive, or embarrassing questions;
2. Allowing for frequent breaks during the testimony;
3. Altering the courtroom settings to make them less formal; and
4. Having a support person present in the court, sitting next to the victim or witness.¹²⁶

Use of stereotypes during the trial can manifest in comments made by the judge in the courtroom, in the decision-making process by the court or when the judge is not reacting to the comments made by the parties or attendees.¹²⁷

2. Georgian Legislation and Practice

Legislation

Georgian legislation does not prohibit the use of gender stereotypes by prosecutors, judges or defence lawyers and it does not provide any specific guarantees for the protection of victims from secondary victimisation in the courtroom, including during the direct and cross-examination of the victim and a criminal investigation.

¹²² Human Rights Council, Interim report of the Special Rapporteur on the independence of judges and lawyers, A/66/289, 2011, para. 48.

¹²³ UNODC Handbook on Effective Prosecution and Responses to Violence against Women and Girls, pp. 108-109.

¹²⁴ UNODC, Good practices for the protection of witnesses in criminal proceedings involving organized crime, available at: http://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf

¹²⁵ See UNODC, Good practices for the protection of witnesses in criminal proceedings involving organized crime, pp. 32-33.

¹²⁶ See above, UNODC, Good practices for the protection of witnesses in criminal proceedings involving organized crime, pp. 32-33.

¹²⁷ Zugdidi District Court, case no.1/536-18; Tbilisi City Court, case no.1/4189-18; Tbilisi City Court, case no.1/3206-18.

The courts are prohibited from independently obtaining or examining any evidence that corroborates the charges or helps the defence. Obtaining and submitting evidence falls under the competencies of the parties. As an exception, the judge may ask a clarifying question in agreement with the parties, if this is necessary to ensure a fair trial.¹²⁸

The CPC provides for the use of special protection measures for the participants of a trial.¹²⁹ Only the prosecution can use these measures and they can be applied if a public hearing of the case may harm substantially the privacy of the participant; making the identity of the participant public puts his/her life or his/her close relative's life, health and property at risk or the participant depends on the accused.¹³⁰ Notably, the CPC does not recognise special protective measures for victims of violence, including victims of sexual violence. The protection measures listed above can be applicable for all crimes, including sexual violence.

Practice

Criminal case files examined for this research made it clear that, in the majority of sexual violence cases (in 22 out of 24 cases, except in cases where the investigation was terminated), various stereotypical approaches toward such crimes and gender stereotypes that are damaging to the victim are used during the investigation and at the trial. Such approaches run against human rights standards against the application of gender stereotypes (outlined in Chapter E.1 above), are not relevant to the crime committed, lead to the victim's secondary victimisation and hinder access to justice.

In particular, case files suggested that investigators were asking **irrelevant and gender-insensitive** questions to victims, contributing to their secondary victimisation. Examples of such questions include whether this was the victim's first sexual act¹³¹ and whether she experienced pleasure during the sexual act.¹³² In addition, witnesses were asked questions about the victim's moral character, including whether the victim was taking boys home. Also, questions were asked about how the victim was dressed¹³³ – such questions served the only purpose of examining the victim's moral character, which is not relevant for the case and humiliating for the victims.

The cases examined also illustrate that, during the investigation, victims had to **recount the same details of their traumatic experience several times**. In some cases, victims were questioned several times (at least twice and at most four times), none of which resulted in providing new information to the investigation.¹³⁴ In the process of questioning, victims had to recall and repeat details of the violent history several times, which may lead to their re-traumatisation while investigators are not using any mechanisms or tactics for protecting the victims from trauma.

The analysis of decisions on the termination of the investigation, provided by the Office of the General Prosecutor of Georgia, has revealed that in two cases victims' prior sexual relationships with other persons were focused on¹³⁵ even though this was not necessary or relevant to the crime under investigation or to the person whose possible actions were examined. Additionally, in two cases, the prosecution focused on the victim's health (mental disorder¹³⁶, epilepsy¹³⁷) but the case file did not specify how the victim's health was relevant to establishing the fact of violence.

128 The Criminal Procedure Code of Georgia (CPC), Article 25.2

129 The Criminal Procedure Code of Georgia, Article 68.

130 The Criminal Procedure Code of Georgia, Article 67.

131 Tbilisi City Court, case no.1/4189-18; Tbilisi City Court, case no.1/3206-18.

132 Bolnisi District Court, caseno.1/81-18; Tbilisi City Court, case N 2840-18; Tbilisi City Court, case no.3268-17

133 Tbilisi City Court, case N 4621-17.

134 Tbilisi City Court, case N 5832-18; Tbilisi City Court, case N 1/4123-18; Tbilisi City Court, case N 1/4873-18; Bolnisi District Court, case no.1/81-18; Akhaltsikhe District Court, case no.1/080-18; Zugdidi District Court, case no.1/658-17.

135 Document no.0012798251; document no.006190618002.

136 Document no.0011771318.

137 Document no.0010477160.

In several cases, the attitude of the defence lawyer toward the victim was demeaning and insulting.¹³⁸ Defence lawyers focused on the victim's sexual past, asked questions that were **not relevant for the case but instead served the purpose of discrediting and humiliating the victim, harming her reputation and credibility**. For instance, one victim was characterised as "treacherous".¹³⁹ Examples of the questions asked to victims include: "Did you feel that the defendant finished and had an orgasm?"¹⁴⁰; "Do you have a partner?"¹⁴¹; "Why did you get divorced?"¹⁴²; "Did you have sex with your husband intensively?"¹⁴³; "Are you frigid?"¹⁴⁴; "How many young men have you been with?"¹⁴⁵; "Are you a virgin?"¹⁴⁶; "Was your husband manly?"¹⁴⁷

Additionally, in one case, the defence lawyer demonstrated a cynical attitude toward gender equality. In particular, during his opening remarks, the defence lawyer said: "Today all crimes are packaged as a gender equality issue, which violates the defendant's rights and favours the victim in any case."¹⁴⁸

As noted earlier, when parties or attendees of the criminal proceedings are making statements or asking questions that contain gender stereotypes, the judge has the responsibility to disallow them. However, a case examined within this research suggests that the judge does not pay any attention to such statements or gives only a verbal warning, urging to refrain from making such statements in the future.¹⁴⁹ Notably, multiple stereotypes and degrading attitudes toward the victim were found in the case files provided by Zugdidi District Court.¹⁵⁰

In all the 24 cases examined, only two victims had a lawyer.¹⁵¹ However, lawyers cannot affect substantially the process of investigation and the trial. In other cases, victims had to protect their rights and shield themselves against stereotypical approaches.

Additionally, in all cases, **victims had to face the perpetrators during the trial and, often, perpetrators themselves posed questions to the victims, often causing confusion, intimidation and discomfort**. The defendants were asking tricky questions such as, "This is what happened, right?"; "What did I tell you?"; "Isn't that what happened? etc."¹⁵² Having reviewed all case files, it was found that the measures for avoiding a confrontation between the victim and the perpetrator at the trial were not taken. Neither the judge nor the prosecution objected to such interaction or reacted to them in any way to avoid the traumatisation of the victim.

Based on the cases studied within the research, we also found that the prosecution did not use **special protective measures meant for the victims in any of the sexual violence cases**. It is not clear from the case files whether the need for using such measures was evaluated and what measures were taken for risk assessments.

Failure to impose preventive detention on persons charged with sexual violence, when case files suggested that they could have influenced the victim or other persons, was a problem. For instance, in one of the cases, the defendant forced the victim for an oral act with him. Afterwards, he forced her to take off her shorts and underwear and had non-consensual sex with her

138 Zugdidi District Court, case no.1/536-18; Tbilisi City Court, case no.1/4189-18; Tbilisi City Court, case no.1/3206-18.

139 Tbilisi City Court, case no.1/3206-18.

140 Zugdidi District Court, case no.1/536-18.

141 Zugdidi District Court, case no.1/536-18; Tbilisi City Court, case no.1/4189-18.

142 Zugdidi District Court, case no.1/536-18.

143 Zugdidi District Court, case no.1/536-18.

144 Zugdidi District Court, case no.1/536-18.

145 Zugdidi District Court, case no.1/536-18.

146 Tbilisi City Court, case no.1/3206-18.

147 Zugdidi District Court, case no.1/536-18.

148 Zugdidi District Court, case no.1/658-17.

149 Zugdidi District Court, case no.1/536-18.

150 Zugdidi District Court, case no.1/536-18.

151 Telavi District Court, case N 1/286-18; Mtskheta District Court, case no. N 1/223-18.

152 Mtskheta District Court, case N 1/223-18; Tbilisi City Court, case N 1/4123; Tbilisi City Court, case N 1/3824-18; Tbilisi City Court, case N 1/297-18.

using force. The forensic examination did not find any mechanical injuries in the victim's mouth or anus. The defendant's biological material was found on the victim's shorts. The court denied the prosecution's request for imprisonment and, instead, was released on bail, in the amount of GEL 100,000, as a pre-trial preventive measure.¹⁵³

In parallel with the criminal justice processes, the State Fund for Protection and Assistance of (Statutory) Victims of Human Trafficking plays an important role in providing services to victims of violence. One of the primary functions and objectives of the Fund is to rehabilitate and provide assistance to victims of sexual violence.¹⁵⁴ Women who are victims of sexual violence receive additional medical services from the Fund. The remaining services are the same as the services provided to victims of domestic (physical or psychological) violence. Services meant specifically for sexual violence victims are not available in state shelters and crisis centres.¹⁵⁵

Victim's Secondary Victimization During Forensic Medical Examination

According to the practice, **a forensic medical examination report** is important evidence of crime during investigation. In nearly all cases studied within the research, two out of three experts were men and one was a woman.

Based on the criminal case files and focus group meetings conducted within the research, it was found that, during the forensic examination, female victims of sexual violence often face insensitive, degrading approach based on gender stereotypes, which harms their participation in the process of justice and leads to their secondary victimisation. For instance, a victim's attorney who participated in a focus group meeting stated that her client described the process of forensic examination as **another rape** due to the degrading environment.

Furthermore, the research found that the condition of the hymen is often examined as a part of the comprehensive genital examination to determine whether a woman or girl has had vaginal intercourse. In total, investigators posed questions about the hymen to the expert examination bureau in 9 cases of rape and attempted rape. In one of the cases, for example,¹⁵⁶ according to the expert report, "hymen is intact, but it is bleeding slightly from a crack caused by stretching of the hymen." The report also states that the victim had multiple bodily injuries. In this case, charges were not brought under the rape article and the crime was classified as attempted rape. Such inferences from the condition of the hymen violate the human rights of women and girls and have no scientific or clinical basis to prove sexual intercourse or rape.¹⁵⁷

In one of the cases, the victim was summoned to the forensic bureau in the morning for a forensic examination. For unidentified reasons, she had to wait until evening at the bureau. During the trial, the victim stated that she was discomforted by the wait and she was critical of the experts. Additionally, the victim stated during the trial that she had to stay at the bureau the entire day and they did not allow her to wash herself, which irritated the victim.¹⁵⁸

Based on the focus group meetings, the study also found that often **victims of sexual violence refuse a forensic examination because of the expert's gender**. Victims are not able to choose the sex of the forensic expert. A forensic examination by an expert from the opposite sex brings additional stress upon the victim. According to one of the attorneys, the victim refused to undergo an examination because the expert "was a man and I couldn't take off my clothes, I couldn't show it to him." The materials in one of the cases also found that the victim initially refused to undergo the examination because of the sex of the experts.¹⁵⁹ Focus group participants also stated that experts often use insensitive language toward victims.

This is a problematic issue as confirmed by the information requested from the LEPL Levan Samkharauli National Forensics Bu-

153 Zugdidi District Court, case no.1/658-17.

154 Statute of the State Fund for Protection and Assistance of (Statutory) Victims of Human Trafficking, Article 3(i).

155 The information has been obtained at a focus group meeting by the employees of the State Fund.

156 Rustavi City Court - case no.1-559-17.

157 See the UN Inter-agency Statement on Eliminating Virginity Testing, available at: <https://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1>.

158 Tbilisi City Court, case no.1/4189-18.

159 Zugdidi City Court, case N1/658-17.

reau.¹⁶⁰ According to the information, the bureau currently has 39 medical experts nationwide. Among the 20 experts working in Tbilisi, only 9 are women. The problem is especially acute in the regions where only one is a woman among a total of 19 experts.¹⁶¹

Notably, all forensic reports contain identical statements, viz., the examination was conducted in a peaceful environment, without any complications. Such identical statements raise questions given the traumatic experience of victims of sexual violence and may be indicative of the formalistic and possibly gender insensitive approach.

Notably, in one of the cases, a victim underwent a psychiatric examination for the evaluation of mental health. Based on the case files, reasons to suspect the victim's psychiatric state were not clear. Therefore, the purpose of the decision to conduct a psychiatric examination during the investigation was unclear.¹⁶² This may have been caused by suspicions about the victim's story.

As noted earlier, law enforcement and judicial bodies are using an excessively high evidentiary standard in cases of sexual violence and, in practice, findings of a forensic examination often play a decisive role in whether the alleged perpetrator will be prosecuted. Often, if the examination finds no evidence of sexual violence, criminal prosecution is not even initiated. Therefore, it is extremely important that the examination is carried out in a gender sensitive environment, responsive to the victim's interests, with full protection of the victim's dignity and rights.

F. Inadequate Punishments and Aggravating/Mitigating Circumstances as a Barrier to Justice

1. International Human Rights Standards

The Istanbul Convention requires that national legislation should ensure that criminal offences of violence against women, including sexual violence, are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness.¹⁶³ Based on international human rights standards, in cases of violence against women, particular attention should be paid to the application of aggravating circumstances.¹⁶⁴ In such cases, it is especially important to identify aggravating factors because crimes against women traditionally fell under a private sphere and, historically, they were not considered punishable or their seriousness was ignored.

Under Article 46 of the Istanbul Convention, the following circumstances can be taken into consideration as aggravating circumstances by a judge:

- the offence was committed against a former or current spouse or partner as recognised by the internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
- the offence or related offences were committed repeatedly;
- the offence was committed against a person made vulnerable by particular circumstances;
- the offence was committed by two or more people acting together;
- the offence was preceded or accompanied by extreme levels of violence;
- the offence was committed with the use or threat of a weapon;
- the offence resulted in severe physical or psychological harm for the victim; and
- the perpetrator had previously been convicted of offences of a similar nature.¹⁶⁵

Under Article 43 of the Istanbul Convention, the criminalisation of sexual offences applies irrespective of the relationship between the perpetrator and victim. The Explanatory Report indicates that the criminal offences of sexual violence and rape

¹⁶⁰ Letter no.5006341619.

¹⁶¹ Kutaisi, Batumi, Akhaltsikhe, Gori, Rustavi and Gurjaani.

¹⁶² Tbilisi City Court, case no.3268-17.

¹⁶³ See Article 45 of the Istanbul Convention.

¹⁶⁴ See, for instance, Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (the 'Updated Model Strategies'), adopted by the General Assembly under Resolution 65/228 (2010), para. 17(b).

¹⁶⁵ Article 46, Istanbul Convention.

established per the convention should be applicable to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim. "Sexual violence and rape are a common form of exerting power and control in abusive relationships and are likely to occur during and after a break-up. It is crucial to ensure that there are no exceptions to the criminalisation and prosecution of such acts when committed against a current or former spouse or partner as recognised by internal law."¹⁶⁶

According to the ECtHR jurisprudence, the state has the responsibility to take all measures in the process of administration of justice to identify the possible motive of discrimination in the actions of the perpetrator.¹⁶⁷

As to mitigating circumstances, under the Istanbul Convention, there should be no reference to so-called "honour" as a mitigating circumstance and "in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour."¹⁶⁸

In sexual and gender-based crimes, the following should not be indicated as mitigating circumstances: a) proper behaviour before the court; b) expressing remorse; c) financial status; d) victim incited the accused to commit violence; or e) reconciliation with a victim.¹⁶⁹

The punishments imposed in cases of violence against women and sexual violence should take into account the nature and seriousness of the crime, previous history of violence, the defendant's character and being a menace to the society. Light punishment should not be imposed based on the victim's character, including her "morals" or sexual life.¹⁷⁰

2. Georgian Legislation and Practice

Legislation

Current criminal legislation of Georgia, in compliance with the Istanbul Convention, contains most of the requirements provided in the international standards concerning aggravating circumstances. Additionally, there are certain mitigating circumstances provided in the law that are applied to all types of crimes in general, including sexual violence. Even though some mitigating circumstances may be appropriate for other types of crimes, their application to sexual violence and gender-based crimes is discriminatory (see below).

The CCG provides in Article 53.3. for circumstances that the court should take into account for sentencing: "When imposing a sentence, the court should take into consideration circumstances that mitigate or aggravate the liability of the offender, in particular, the motive and goal of the crime, the unlawful intent demonstrated in the act, the character and degree of the breach of obligations, the modus operandi and unlawful consequences of the act, prior history of the offender, personal and financial circumstances, and conduct of the offender after the offence, in particular, the offender's desire to indemnify the damage and reconcile with the victim."¹⁷¹ These circumstances apply to all types of crimes and the legislation does not contain any special provision or exception for gender-based crimes.

To bring the legislation into compliance with the Istanbul Convention, in 2017-2018, CCG Article 53¹, which provides aggravating circumstances, was reformulated as follows:

” 1. Commission of a crime on the grounds of race, colour, language, sex, sexual orientation, gen-

¹⁶⁶ Istanbul Convention Explanatory Report, para. 194.

¹⁶⁷ ECtHR, *Nachova v Bulgaria*, para. 160; *BS v Spain*, para. 58; *Identoba v Georgia*, para. 67.

¹⁶⁸ The Istanbul Convention, Article 42.1.

¹⁶⁹ Methodology document of Lori Mann developed for this research.

¹⁷⁰ See UNODC Handbook on Effective Prosecution and Responses to Violence against Women and Girls, p. 122.

¹⁷¹ CCG, Article 53.3.

der identity, age, religion, political or other beliefs, disability, citizenship, national, ethnic or social origin, material status or rank, place of residence or other discriminatory grounds shall constitute an aggravating circumstance for all the relevant crimes provided for by this Code; and

2. Commission of a crime by one family member against another¹⁷², against a vulnerable person, a minor or in presence of a minor, especially cruel crime, using a weapon or threatening to use a weapon, by abusing official status amounts to aggravating circumstances for all relevant crimes provided in this Code.

The foregoing article specifies that, if there are any aggravating circumstances, the punishment should be at least a year more than the minimum duration of punishment provided in the relevant article.¹⁷³ The purpose of punishment is to restore justice, avoid the commission of a new crime and ensure re-socialisation of the perpetrator.¹⁷⁴

In 2018, an important amendment was introduced concerning repeated offences. According to the amendment to CCG Article 11¹, certain domestic violence crimes provided in the criminal law, including sexual violence crimes, will be considered repeated if they were preceded by the crime provided in Article 126¹⁷⁵ or any other domestic violence crime.¹⁷⁶ Even though, to a certain extent, the amendment brings the Georgian legislation in compliance with the Istanbul Convention, the rule on repeated offences should be extended not only to domestic violence crimes but also to other crimes of violence against women that are provided in the Istanbul Convention.

As to other aggravating factors provided in the Istanbul Convention, they are reflected in relevant articles of sexual violence crimes, including severe physical harm or other grave consequences; committing the crime repeatedly; the perpetrator had previously committed any of the offences provided in CCG Articles 138-141; the offence was committed by two or more people acting together; the offence was committed with particular cruelty to the victim or other persons (see CCG Articles 137-139).

As to mitigating factors and circumstances that rule out culpability, the Georgian legislation provides for the following (CCG Chapter IX):

- Release from criminal liability due to age (Article 33);
- Release from liability due to mental illness (Article 34);
- Diminished capacity (Article 35);
- Mistake of law {error juris} (Article 36);
- Execution of orders or instructions (Article 37); and
- Releasing from criminal liability for other non-culpable actions (Article 38).

In light of this, Georgian legislation complies with the Istanbul Convention and other human rights standards discussed in the first part of this chapter, according to which, concerning violence against women, the following should not be mitigating circumstances: committing a crime in a domestic sphere, committing a crime in the name of so-called 'honour', morals of the victim or any particular aspects of the relationship between the victim and the perpetrator. However, because the foregoing mitigating circumstances exist, as a result of gender stereotypes in the criminal justice process, they are still used at different stages of criminal proceedings.

¹⁷² Under Article 11¹ of the Criminal Code, the following persons shall be considered family members: mother, father, grandfather, grandmother, spouse, child (stepchild), adopted child, foster child, adopting parent, adopting parent's spouse, foster carer (foster mother, foster father), grandchild, sister, brother, a parent of the spouse, son-in-law, daughter-in-law, former spouse, a person in an unregistered marriage and his/her family member, guardian, custodian, supporter, as well as any other persons that maintain or maintained a common household.

¹⁷³ CCG, Article 531.3.

¹⁷⁴ CCG, Article 39.

¹⁷⁵ This article provides that domestic violence is "violence, regular insult, blackmail, humiliation by one family member against another family member, which has resulted in physical pain or anguish."

¹⁷⁶ Note to CCG Article 11¹.

Practice

The cases studied within the research suggest that **aggravating circumstances** provided in the Istanbul Convention (Article 46) and Georgian legislation pursuant to the Istanbul Convention (including those provided in CCG Article 53¹⁷⁷) **have never been invoked** in cases where case files possibly allowed for the identification of a number of such circumstances. For instance, the motive of bias¹⁷⁷ or committing a crime against family members have not been invoked as aggravating circumstances (even though in 5 cases the perpetrator was a former spouse or a partner and in 2 cases the crime was committed for "starting a family"). Prior history of violence was never indicated as an aggravating factor including in cases involving restraining orders as evidence or where systematic use of violence was detected. For instance, in a case where the victim suffered 43 injuries on her body and face, the perpetrator was left without a custodial sentence based on a plea agreement; the five-year sentence was suspended and the perpetrator was allowed to perform 5 years of probation (CCG Article 19-137).¹⁷⁸

While in the majority of cases sanctions applied seem to take into account the gravity of the crimes committed, the use of inappropriately light punishment for the crime provided in CCG Article 139 was especially problematic. Among the 4 guilty verdicts that were examined, only 1 imposed imprisonment (for 1 year and 6 months) while all these cases referred to sexual violence committed with the use of different forms of coercion.

It was a problem that in some cases **the court considered different mitigating circumstances** that are provided in the law, which are more appropriate for other types of crimes, while their consideration is discriminatory in case of crimes of sexual violence and those motivated by gender bias. These are the following circumstances: the perpetrator has reconciled with the victim or provided financial assistance, he is the only breadwinner in the family, the victim is not complaining, the perpetrator feels remorse, the perpetrator cooperated with the investigation and the perpetrator does not have a prior record (these circumstances were identified in a total of 6 cases).

A clear example of using discriminatory extenuating circumstances and **a disproportionately light punishment** is a case of attempted rape heard at Mtskheta District Court (CCG Article 19-137)¹⁷⁹ where, despite the perpetrator's particular cruelty toward the victim, he was **left without any prison punishment** owing to a plea agreement. During the trial, the victim R.I. announced that she had sustained 43 injuries on her face and body as a result of violence; her face was swollen, and her mouth was filled with blood on the day the crime was committed. According to the victim, due to the injuries suffered on the day the crime was committed, her health greatly deteriorated. Based on the findings of a biological examination conducted during investigation, there were spots of human blood on R.I.'s clothes and she had abrasions and contusions on her body as well as a bruised hand. Despite the witness statement and the forensic report on the injuries, the defendant was sentenced to five years of deprivation of freedom as a type and a measure of punishment for attempted rape, which was suspended and the defendant was given a five-year period of probation. Notably, during sentencing, the judge relied on the fact that "the victim reconciled with the perpetrator and did not have any complaints about him." Having studied the case file, it was also found that, to substantiate their request for a plea agreement, the defence cited the fact that the victim and the perpetrator had reached an agreement and the victim had received compensation (financial assistance).

During sentencing, courts paid particular attention to the circumstances provided in CCG Article 53 and indicated that the court would impose a fair punishment on the perpetrator, within the limits prescribed by the Code, in consideration of the provisions of the general part of the Code. Majority of court decisions contain an identical statement that the punishment imposed aims to ensure the perpetrator's safe integration in the society and it will prompt the perpetrator to think and understand the nature of the crime committed, the public menace and the gravity of the outcome, which will help restore justice. Courts do not consider elimination of gender inequality, an underlying cause of violence against women, to be a part of "restoration of justice". Even though in two of the cases the court cites the Istanbul Convention, stating that gender-based violence that may inflict physical,

177 Notably, the motive of bias was pointed out in a case concerning domestic violence and sexual violence. However, the defendant was found not guilty of sexual violence (Tbilisi City Court, N 1/4873-18).

178 Mtskheta District Court, case N 1/223-18.

179 Mtskheta District Court, case N 1/223-18.

psychological, sexual or economic harm on women is one of the forms of discrimination against women, the motive of bias was not presented by the prosecutor and not taken into account by the court as an aggravating factor.¹⁸⁰

G. Additional Obstacles Faced by Vulnerable Groups

Women from vulnerable groups (persons with disabilities, LGBTI+ women, ethnic minority representatives, migrants, women who use drugs) face additional barriers in terms of accessing justice for sexual violence, due to the legislative regulation (repressive legislation on prostitution and repressive legislation on drug use), stigma toward women (especially sex workers, drug users, LGBTI+ women and women with disabilities), lack of reasonable accommodation (for persons with disabilities) or language barriers (for migrant and ethnic minorities). Questioning of testimonies of women with psychosocial needs and viewing them as not credible due to their status was identified as a particular problem by the focus groups, which risks leaving the perpetrators unpunished. Sexual violence can cause serious trauma and mental health problems, especially if support is not immediately available for short and long-term.

Lack of specialised training for judicial bodies about specific aspects of vulnerable groups is also a problem. Since women who represent these groups face additional barriers in terms of using legal remedies, substantial information about their specific problems could not be obtained within this research and are subject to further research.

Chapter 5

Recommendations

For the Parliament of Georgia:

- Amend the definition of rape (CCG Article 137) and other sexual violence articles (CCG Articles 138 and 139) for these definitions to be based on **free, genuine and voluntary** consent under the Istanbul Convention, which should be evaluated in the context of surrounding circumstances;
- **Remove violence or use of force** from the definition of rape (CCG Article 137) and the definition of other physical sexual violence (CCG Article 138) and **define violence as an aggravating circumstance** for these articles;
- Revise the CCG Article 139 to avoid potential overlaps with CCG Articles 137 and 138 to make sure that the offences involving penetration and other physical contacts of sexual nature, currently included in CCG Article 139, are integrated into CCG Article 137 and 138 and that CCG Article 139 is only applicable for sexual coercion falling short of penetration and other physical contacts of sexual nature;
- Revise CCG Article 11¹ about **repeat offence** and, based on the Istanbul Convention, amend the provision to apply to all types of violent crimes against women including sexual violence crimes;
- Spousal, family member and former or current intimate partner sexual violence should be identified as an aggravating factor of sexual violence crimes (CCG Articles 137 and 139) under the Istanbul Convention; and
- Introduce in CCG Article 53 (general rules of sentencing) a note about the inadvisability of use of certain mitigating circumstances for crimes of violence against women and domestic violence, including "reconciliation" of the defendant and the victim, provision of financial assistance by the defendant, the victim not complaining, the perpetrator feeling remorseful and witnesses testifying to his positive character.

For the Ministry of Internal Affairs of Georgia and the Office of the General Prosecutor of Georgia:

- Ensure that criminal prosecution of all forms of violence provided in the sexual violence legislation are prioritised, especially in cases where the perpetrator did not use physical force and convictions should not be limited to cases where physical injuries or/and biological materials associated with a sexual act is available as evidence;
- Ensure sufficient guidelines and training of investigators, forensic experts and prosecutors on the techniques of

180 Bolnisi District Court, caseno.1/81-18; Tbilisi City Court, caseno.1/4873-18.

- gathering different types of evidence in sexual violence cases, which also entails a victim-centred approach and exclusion of stereotypical gender attitudes in the process of evidence taking;
- Prosecutors and investigators should prioritise obtaining adequate evidence in sexual violence cases, concerning aggravating circumstances provided in the Istanbul Convention and the Georgian legislation, and characterise the crime and present it to the court based on these circumstances;
 - In sexual violence cases, investigators and prosecutors should ensure gathering adequate evidence to prove aggravating circumstances provided in CCG Article 53¹; and
 - Investigators and prosecutors should pay particular attention to the examination of history and repetition of violence as an aggravating factor, irrespective of whether a restraining or protective order was issued for the victim in the past.
 - Ensure that investigation/prosecution of sexual violence crimes is not terminated solely based on the victim's rejection or change of statement, or inconsistent statements, or refusal to press charges against the perpetrator, or inability to testify for a particular reason, including due to the victim's physical or mental health. Decisions on termination of investigation should indicate measures taken by the investigator/prosecutor to determine whether the victim changed her statement as a result of pressure coming from a perpetrator or other person, the stigma associated with sexual violence, fear to be reprimanded by society or any other similar reason;
 - When an investigation has been instituted in connection to rape or attempted rape and there is no supporting evidence for sexual violence, it is important to re-characterise the crime under another relevant CCG Article – e.g. violence (CCG Article 126), coercion (CCG Article 150) or stalking (CCG Article 151¹), instead of terminating the investigation for the lack of elements of rape in particular;
 - When an investigation has been instituted in connection to rape or other forms of sexual violence that are criminally punishable, but elements of sexual harassment are evident, the victim should be referred to non-criminal law mechanisms that apply to sexual harassment;
 - When an investigation has been launched in connection to rape or other forms of sexual violence but elements of the crime have not been established and violence against women is evident, according to the law on violence against women and domestic violence, the victim should be referred to the mechanisms provided by the said law (restraining or protective order) as well as relevant international and regional complaint mechanisms;
 - Design a policy about not prosecuting the victim for false reporting when sexual violence is not found in the case;

For the Ministry of Internal Affairs of Georgia, the Office of the General Prosecution and the Judiciary:

- Ensure that inflexible and burdensome evidentiary requirements and corroboration rules are not applied to bringing charges and delivering the judgement of conviction for sexual violence;
- Ensure ongoing risk assessments and management to be undertaken by law enforcement actors, in cooperation with relevant actors, across the justice chain at each stage of the judicial process;
- **The practice of mandatory forensic medical examination in sexual violence cases should be revised** and all measures should be taken to ensure that, due to intrusiveness of the procedure, the victim's body is not examined without informed consent and in cases where other evidence is available in the case, which can help identify information relevant to the case, and when other cumulative evidence available in the case is sufficient for charging the perpetrator;
- Ban drawing adverse inferences from the condition of the hymen, examined as part of a comprehensive gynaecological examination since the condition of the hymen cannot determine whether a woman or girl has had vaginal intercourse and has no scientific or clinical basis to prove sexual intercourse or rape. Hymen examination can impact judicial proceedings, often in favour of perpetrators and sometimes resulting in perpetrators being acquitted;¹⁸¹
- Only if there is a reasonable suspicion about the victim's mental health problems and her mental health may have

181 The UN Inter-agency Statement on Eliminating Virginity Testing, available at: <https://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1>.

influenced the information provided by the victim to the law enforcement authorities, the victim's mental health can be examined and psychiatric evaluation can be ordered;

- Train investigators, prosecutors and judges on gender stereotypes, secondary victimisation in sexual violence cases and their elimination in the criminal justice process;
- Train judges on special rules for preparing reasoned decisions in cases that involve gender stereotypes;
- Guidelines for investigators and prosecutors on sexual violence, including for interviewing victims of sexual violence during the investigation, should be prepared to avoid secondary victimisation of victims and prevent them from repeating the same information;
- During direct and cross-examination of the victim at a trial, special measures should be taken to avoid her secondary victimisation (for instance, avoiding certain questions, questioning the victim remotely, etc.);
- Victim of sexual violence should be referred to the medical and trauma support services irrespective of official victim status;
- Ensure that administration of justice in cases of sexual violence against women includes **gender perspective** and the purpose of justice is to, among others, eliminate gender inequality and ensure substantive equality, based on the principles of Istanbul Convention;
- View crimes of sexual violence against women as a **form of discrimination against women**, based on the Istanbul Convention and human rights standards. To this end, in all possible cases, in consideration of the underlying causes of gender violence, evidence should be obtained and analysed and taken into account to confirm the motive of gender discrimination (a reference to CCG Article 53¹ should be made accordingly); and
- In cases of sexual violence and forced marriage (that often manifests in abduction for marriage), in all cases, administration of justice should take into account the element of gender bias, the motive of discrimination should be identified in the perpetrator's action and proper weight should be given to it during the characterisation of the crime and sentencing. Culture, custom, religion, tradition or so-called "honour" cannot be regarded as justifications for violence against women, including forced marriage and sexual violence;
- A single record of **statistical information** about sexual violence crimes against representatives of vulnerable groups should be maintained, disaggregated by sex, ethnic origin, disability, sexual orientation and gender identity, involvement in prostitution and other indicators of vulnerability;
- **Individual barriers** (including legislative barriers) faced by each vulnerable group, due to their individual circumstances, should be examined and effective measures should be taken for their elimination in order for women to be able to report sexual violence;
- Investigators and prosecutors should ensure obtaining relevant evidence to confirm **the motive of bias** for sexual violence committed against representatives of vulnerable groups and judges should consider these factors, including **the aggravating circumstance** on an offence which was committed against a person made vulnerable by particular circumstances (Istanbul Convention, Article 46), during sentencing as aggravating circumstances (CCG Article 53¹);
- Decisions on termination of investigation should include a substantiation as to **the particular measures** taken by the investigator/prosecutor for confirming sexual violence against a representative of a vulnerable group, **in consideration of the person's vulnerability**.

For the Judiciary:

- Ensure **consideration and analysis of a broad range of evidence in sexual violence crimes**, for the perpetrator to be brought to justice in crimes where crime has been committed without using physical violence or where injuries on the victim's body and the perpetrator's biological material associated with a sexual act are not available as evidence, but the crime may be confirmed by other types of evidence;
- Courts should pay particular attention to consideration of aggravating circumstances provided in the Istanbul Convention and the Georgian legislation and not use any mitigating circumstances that are based on harmful gender stereotypes and have a discriminatory effect in such crimes (for instance, reconciliation between the defendant and the victim and provision of financial assistance to the victim by the perpetrator);

- Spousal, family member and intimate partner sexual violence should be taken into account as an aggravating factor, based on CCG Article 53^{1.2} (commission of a crime by one family member against another);
- Courts should fully consider the gravity of sexual violence crimes and prioritise the safety of victims, the risk of repetition of violence and imposition of imprisonment for these crimes (especially CCG Article 139); and
- In sexual violence cases, especially in rape cases, because of their consequences, the perpetrator should not be relieved of imprisonment after a plea agreement is made.

For LEPL Georgian Bar Association:

- Train criminal lawyers on gender stereotypes and secondary victimisation in sexual violence cases and their elimination in the criminal justice process, based on the Ethics Code for lawyers.

For LEPL Levan Samkharauli National Forensics Bureau:

- Increase the number of female forensic examiners and allow women victims of sexual violence to choose the sex of the examiner; and
- Train and provide guidance for forensic examiners on specific rules for conducting the examination of victims of sexual violence.

For the State Fund for Protection and Assistance of (Statutory) Victims of Human Trafficking:

- The state should broaden adequate **special services** for assisting victims of sexual violence. They should be referred to such services during the investigation, whether or not they have been given the victim status;
- The state should ensure that support services for the protection and assistance of victims of sexual violence are responsive to the needs of vulnerable groups.

For the Ministry of Justice:

- Amend Order N181 of the Minister of Justice of Georgia (8 October 2010) on the approval of the general part of the criminal policy guidelines and determine that criminal prosecution of crimes of violence against women, including all forms of sexual violence, should be prioritised, especially for crimes not perpetrated with the use of force, and compensation by the perpetrator for damages suffered should not influence institution of prosecution based on public interest or place a burden on the victim.

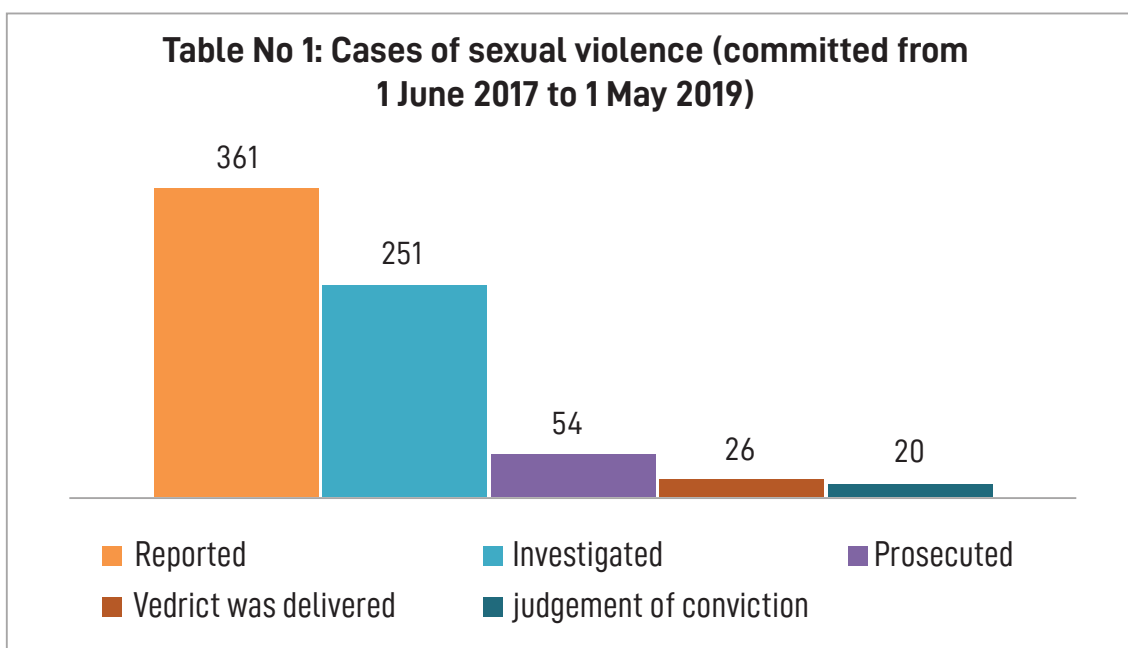
Annex N1: Statistical Information on Crimes of Sexual Violence

For the research, the office of Public Defender of Georgia requested statistical information from the Ministry of Internal Affairs of Georgia, Prosecutor's Office of Georgia and Supreme Court of Georgia on sexual violence reports, actions taken in response to these reports and results. The statistical information covers the period from 1 June 2017 to 1 May 2019.

In addition, segregated data was requested from the Ministry of Internal Affairs of Georgia on the age, nationality, ethnicity and other characteristics of victims of sexual violence. However, this information has not been provided as such data is not collected by the Ministry of Internal Affairs.

In the mentioned period,¹⁸² LEPL "Public Safety Management Centre 112" of the Ministry of Internal Affairs of Georgia received **361 calls** relating to sexual violence (any action of a sexual nature).¹⁸³ As for the rate of the launch of an investigation, according to the information provided,¹⁸⁴ an investigation was initiated into **251 cases** of sexual violence in the period from 1 June 2017 to 1 May 2019.

According to the information provided by the Prosecutor's Office of Georgia,¹⁸⁵ criminal prosecution was launched in **54 cases** of sexual violence and criminal prosecution was terminated in **17 criminal cases** during the reporting period.¹⁸⁶ According to the information provided by the Supreme Court of Georgia,¹⁸⁷ the city (district) courts of Georgia reviewed and ruled on **26 criminal cases** of sexual violence from 1 June 2017 to 1 May 2019. Judgments of conviction were delivered in 20 out of those 26 cases.



¹⁸² From 1 June 2017 to 1 May 2019.

¹⁸³ It should be noted that this is a primary classification of calls and not the final data.

¹⁸⁴ Letter MIA 2 19 01707886 to the Ministry of Internal Affairs of Georgia, 1 June 2019.

¹⁸⁵ Letter N 13/46533 to the Prosecutor's Office of Georgia, 27 June 2019.

¹⁸⁶ Letter N 13/50123 to the Prosecutor's Office of Georgia, 9 July 2019.

¹⁸⁷ Letter N P-861-19 to the Supreme Court of Georgia, 31 May 2019.

Table No 2: Indicators of investigation, criminal prosecution and verdict, based on specific articles

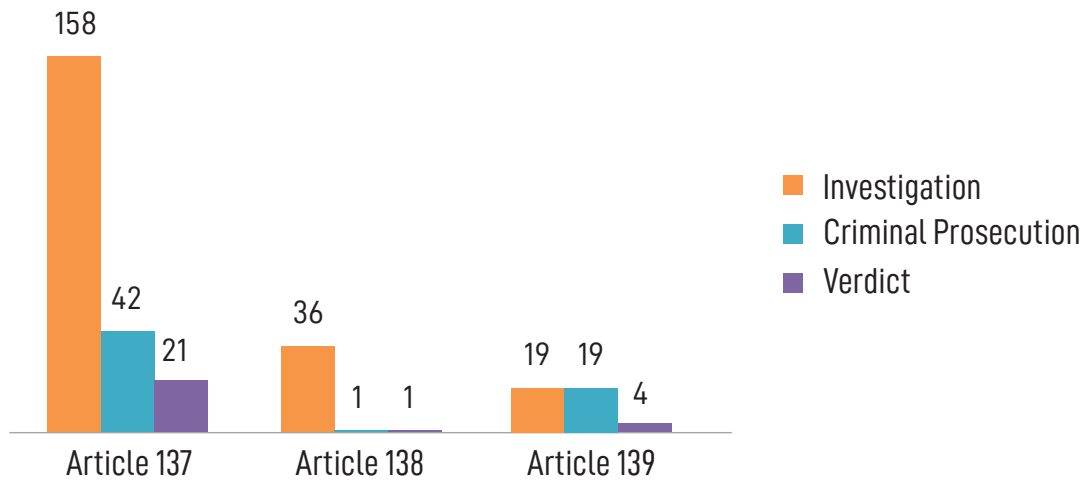


Table No 3: Indicators of investigation, criminal prosecution and verdict in connection with the cases of sexual violence by years

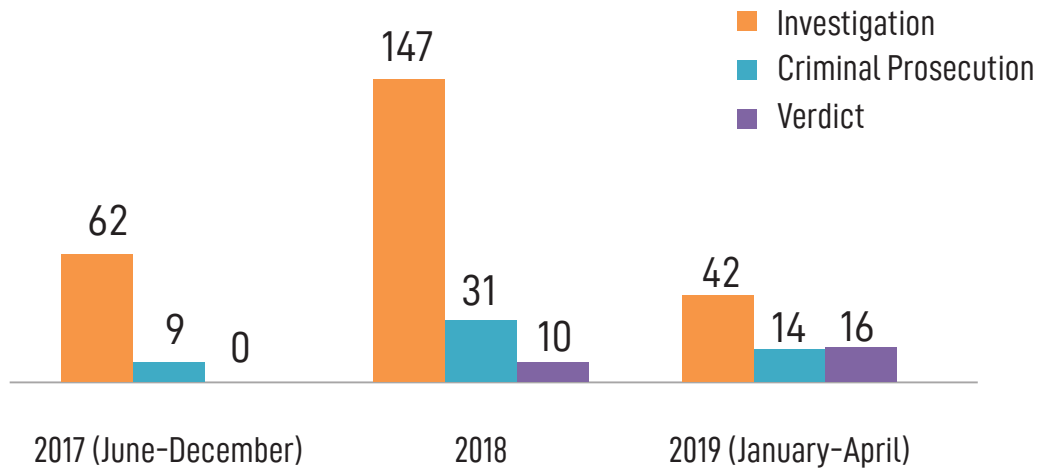
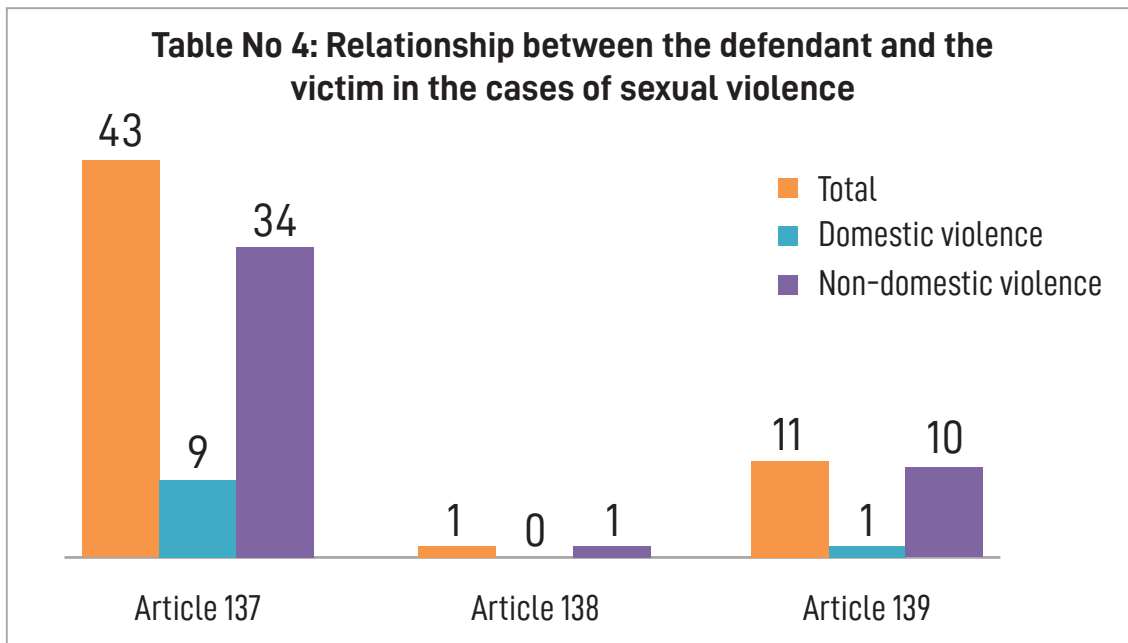


Table 4: According to the information provided by the Prosecutor General's Office of Georgia, from 1 June 2017 to 1 May 2019, criminal prosecution was initiated against 55 persons and 55 persons were recognised as victims. The statistics on victims are as follows: 43 individuals were recognised as victims of the crime provided in Criminal Code of Georgia, Article 137; 1 as a victim of the crime provided in Criminal Code of Georgia, Article 138, and 11 as victims of the crime provided in Criminal Code of Georgia Article 139.



For the research, the social relationship between the victims and the perpetrators was analysed. 10 out of 55 cases of sexual violence¹⁸⁸ were allegedly committed by a family member¹⁸⁹ (domestic violence cases) and 45 were committed by a non-family member (non-domestic violence cases).

As for the mentioned data according to the articles of the Criminal Code of Georgia, the crime provided in Article 137 of the Criminal Code of Georgia was committed by a family member in 9 out of 43 cases. The crime provided in Article 138 of the Criminal Code of Georgia was committed by a non-family member. The crime provided in Article 139 of the Criminal Code of Georgia was committed by a family member in 1 out of 11 cases.

Table 5: Among the 10 cases of domestic violence, 9 represented the crime referred to in Article 137 of the Criminal Code of Georgia and one was the crime referred to in Article 139 of the Criminal Code of Georgia. Among the crimes under Article 137 of the Criminal Code, 5 cases were committed by a spouse, 2 by a former spouse, 1 by a former partner and 1 by a son. Among the 10 cases of domestic violence, none were prosecuted under Article 138. As for the crimes under Article 139 of the Criminal Code, 1 case was committed by a spouse.

¹⁸⁸ It should be noted that criminal prosecution was initiated in 54 cases against 55 persons.

¹⁸⁹ For the purposes of Criminal code of Georgia, domestic violence crime shall mean a crime which is committed by one family member against another family member. The following persons shall be considered family members: a mother, father, grandfather, grandmother, spouse, child (stepchild), adopted child, foster child, adopting parent, adopting parent's spouse, foster carer (foster mother, foster father), grandchild, sister, brother, a parent of the spouse, son-in-law, daughter-in-law, former spouse, a person in an unregistered marriage and his/her family member, guardian, custodian, supporter, as well as any other persons that maintain or maintained a common household.

Table No 5: Relationship between the defendant and the victim in the cases of domestic violence

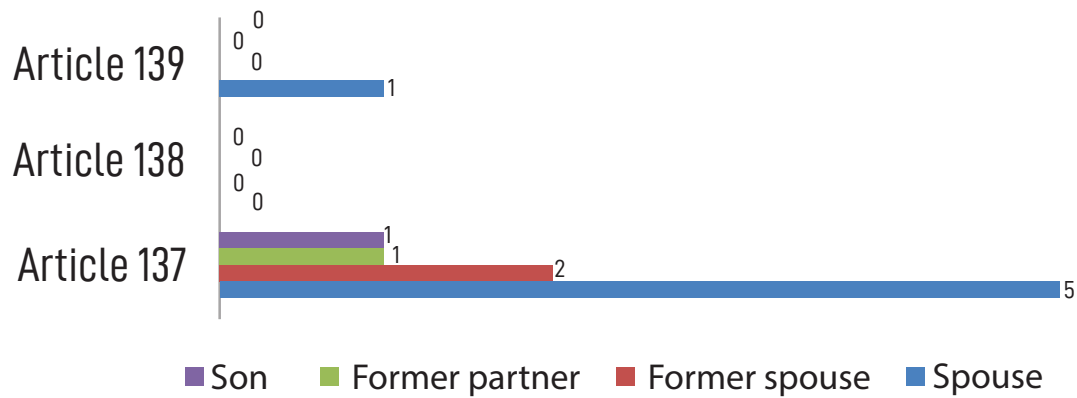


Table 6: As for the cases of non-domestic violence, 34 out of 45 cases represented the crime provided in Article 137 of the Criminal Code, 1 case represented the crime provided in Article 138 of the Criminal Code, and 10 cases represented the crime referred to in Article 139 of the Criminal Code. Among the crimes under Article 137 of the Criminal Code, 15 cases were allegedly committed by a stranger, 11 by an acquaintance, 1 by a partner, 3 by a neighbour, 1 by a friend (listed under acquaintance in table 6) and 3 by a relative (non-family member). The crime under Article 138 of the Criminal Code was committed by a stranger. As for the crimes under Article 139 of the Criminal Code, 5 of them were committed by an acquaintance, 3 by a partner, 1 by a neighbour and 1 by a boyfriend (listed under a partner in table 6). In 66% of cases of non-domestic violence, the victim knew the perpetrator. In 33% of cases, the perpetrator was a stranger.

Table No 6: Relationship between the defendant and the victim in the cases of non-domestic violence

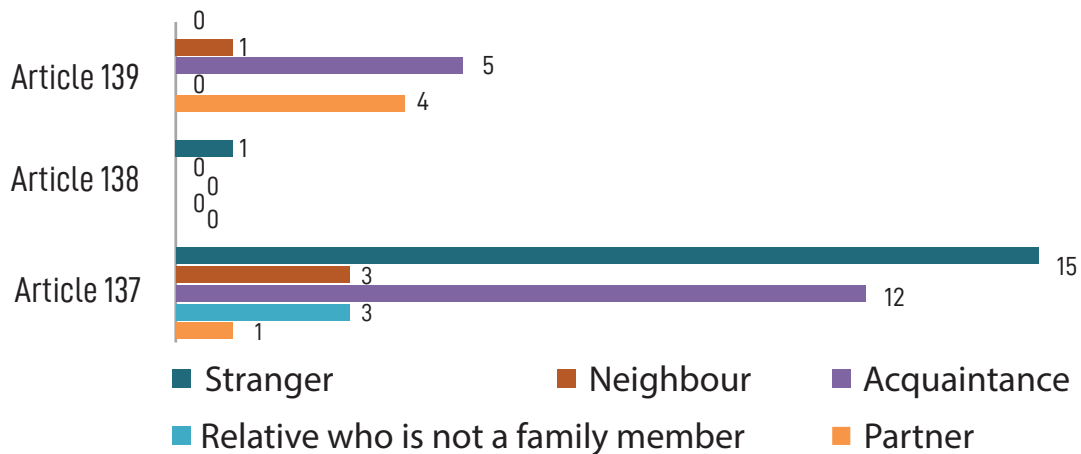


Table 7: According to the information provided by the Prosecutor's Office of Georgia, out of 55 persons prosecuted for sexual violence committed from 1 June 2017 to 1 May 2019, 26 persons were charged for the crime provided in Article 137 of the Criminal Code of Georgia; 17 persons under Article 19-137 of the Criminal Code of Georgia; one person under Article 138 and 11 persons under Article 139.

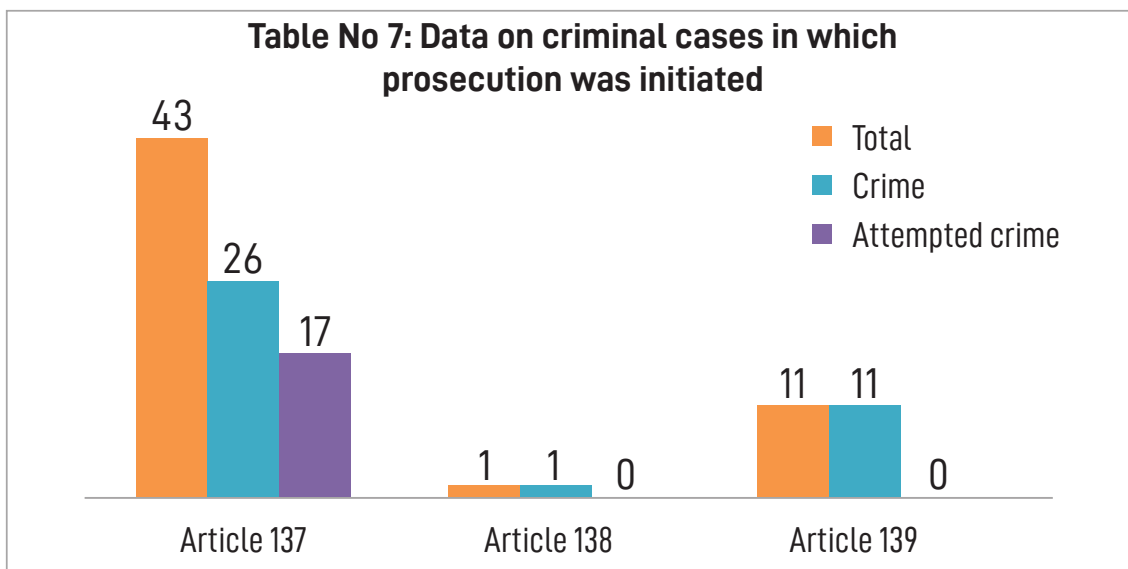
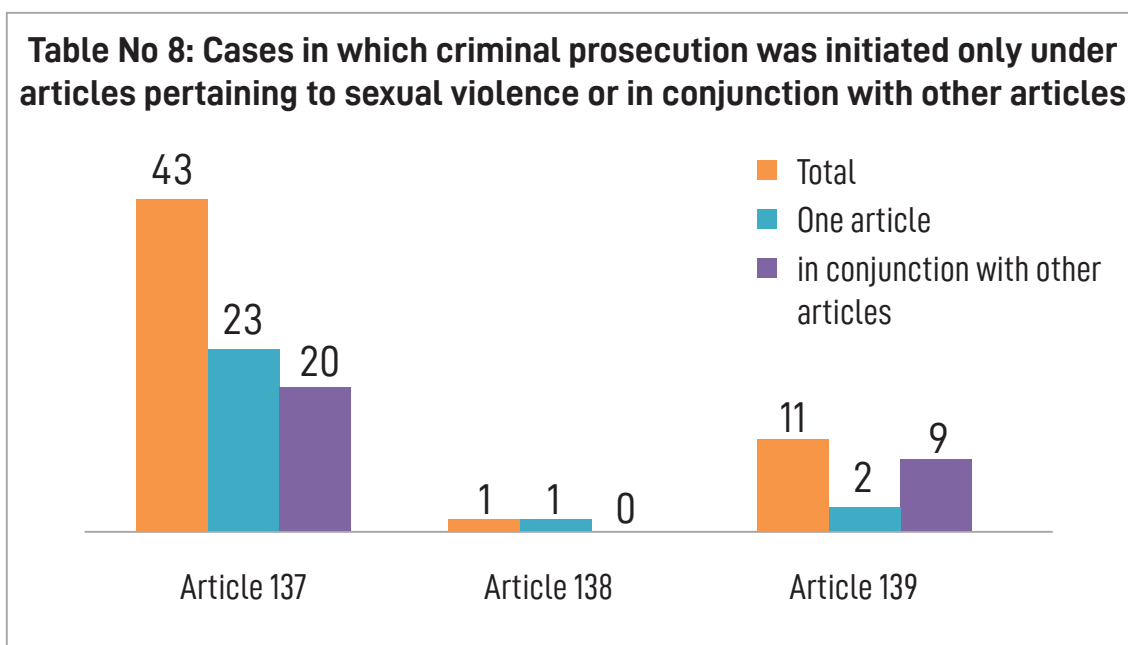


Table 8: 26 out of 55 defendants of crimes committed from 1 June 2017 to 1 May 2019 were charged with only one sexual violence crime while 29 persons were charged with other offences as well.

23 out of 43 persons accused of rape and attempted rape were charged only under Article 137 of the Criminal Code of Georgia while 20 persons were charged in conjunction with other articles. One person prosecuted under Article 138 of the Criminal Code was charged under Article 138 only, 2 of the 11 defendants were charged under Article 139 only while 9 persons were charged in conjunction with other articles.



Annex N2: Georgian Legislation

CCG Articles Amended Following the Ratification of the Istanbul Convention:

Article 137. Rape

1. Rape, i.e., penetration of sexual nature in the body of an individual in any form, using a body part or an object, committed under violence, threat of violence or by abusing the victim's helplessness shall be punishable by deprivation of freedom from six to eight years, with deprivation of weapon-related rights or without it.

2. The same action:

- a) perpetrated by abusing one's official power; and
- b) that resulted in the victim's severe health injury or any other severe outcome shall be punishable by deprivation of freedom from eight to ten years, with deprivation of weapon-related rights or without it.

3. The same action perpetrated:

- a) repeatedly;
- b) by someone who had previously committed one of the offences set forth in Articles 138-141 of this Code;
- c) by a group;
- d) knowingly against a person with a disability or a pregnant woman; and
- e) against a person under the care, guardianship or supervision of the offender or against a family member shall be punishable by deprivation of liberty from ten to thirteen years, with deprivation of weapon-related rights or without it.

4. The same action:

- a) perpetrated with particular cruelty against the victim or other person;
- b) resulting in taking of the victim's life; and
- c) perpetrated knowingly by the offender against a minor
- d) perpetrated against a minor abusing trust, authority or influence shall be punishable by deprivation of liberty from fifteen to twenty years, with deprivation of weapon-related rights or without it.

Article 138. Another Act of Sexual Nature

1. Another act of sexual nature that does not contain signs of the crime provided in Article 137 of this Code, committed under violence, the threat of violence or by abusing the victim's helplessness shall be punishable by deprivation of liberty from four to six years, with deprivation of weapon-related rights or without it.

2. The same action perpetrated:

- a) repeatedly;
- b) by abusing one's official position;
- c) by a group;
- d) knowingly by the offender against a person with a disability or a pregnant woman;
- e) by someone who had previously committed one of the offences set forth in Articles 137, 139, 140 and 141 of this Code;
- f) against a person under the care, guardianship or supervision of the offender or against a family member; and
- g) that resulted in the victim's severe health injury or any other severe outcome shall be punishable by deprivation of liberty from six to nine years, with limiting of weapon-related rights or without it.

3. The same action:

- a) perpetrated knowingly against a minor;
- b) perpetrated knowingly against a minor by abusing trust, authority or influence;
- c) resulting in taking a victim's life

shall be punishable by imprisonment from 11 to 15 years, with limiting of weapon-related rights or without it.

4. The same action:

- a) perpetrated knowingly against a person that has not reached the age of 14;
- b) perpetrated with particular cruelty.
- Shall be punishable by imprisonment from 15 to 20 years, together with limiting the rights related to weapons or without it.

Article 139. Coercion into Sexual Intercourse or Any Other Act of a Sexual Nature

1. Coercion into sexual intercourse or other action of sexual nature, under the threat of damaging property, by disclosing defamatory information, information about personal life or information that may prejudice substantially the right of an individual or by abusing the victim's helplessness or material, official or other dependence shall be punishable by fine or by deprivation of liberty for the term of up to five years, with deprivation of weapon-related rights or without it.

2. The same action that resulted in the victim's severe health injury or any other severe outcome shall be punishable by deprivation of liberty from five to seven years, with deprivation of weapon-related rights or without it.

3. The same action, perpetrated:

- a) Repeatedly;
- b) by someone who had previously committed one of the offences set forth in Articles 137, 139, 140 and 141 of this Code;
- c) by a group;
- d) knowingly by the offender against a person with a disability or a pregnant woman;
- e) against a person under the care, guardianship or supervision of the offender or against a family member shall be punishable by deprivation of liberty from seven to nine years, with deprivation of weapon-related rights or without it.

4. The same action:

- a) resulting in taking of the victim's life;
- b) perpetrated knowingly by the offender against a minor shall be punishable by deprivation of liberty from nine to fifteen years, with deprivation of weapon-related rights or without it.

CCG Articles That were in Force Before the Ratification of the Istanbul Convention:

Article 137. Rape

1. Rape, i.e., sexual intercourse through violence, the threat of violence or abusing the helplessness of the victim, - Shall be punishable by imprisonment from three to seven years.

2. The same action perpetrated:

- a) repeatedly; and
- b) by the one who had previously committed one of the offences set forth in Articles 138-141 of this Code shall be punishable by prison sentences ranging from five to ten years.

3. Rape:

- a) by a group;
- b) knowingly by the offender against an underage, a pregnant woman or person with disability;
- c) with particular cruelty against the victim or other person;
- d) by abusing one's official position;
- e) that through negligence has resulted in the death of the victim; and
- f) that through negligence has been corollary to the victim's contraction of AIDS, serious rupture of health or other grave consequence shall be punishable by imprisonment for the term from five to fifteen years.

4. Raping of a person under fourteen years shall be punishable by imprisonment for the term from ten to twenty years.

Article 138. Sexual Abuse Under Violence

1. Homosexuality, lesbianism or other sexual intercourse distorted in form committed under violence, the threat of violence or abusing the helplessness of the victim shall be punishable by prison sentences ranging from three to seven years.

2. The same action perpetrated:

- a) repeatedly;
- b) by one who had previously committed any of the offences referred to in Articles 137, 138 and 141 of this Code; and
- c) knowingly by the offender against a pregnant woman or a minor shall be punishable by imprisonment from five to fifteen years.

3. Sexual abuse under violence:

- a) against one who has not reached fourteen years;
- b) by a group;
- c) that through negligence has resulted in the death of the victim;
- d) that through negligence has been corollary to the victim's contraction of AIDS, serious health rupture or other grave consequence;
- e) under extreme violence; and
- f) by using one's official position shall be punishable by prison sentences ranging from ten to twenty years.

Article 139. Coercion into Sexual Intercourse or Other Action of Sexual Character

Coercion into sexual intercourse, homosexuality, lesbianism or other sexual contacts under the threat of disclosing defamatory information or damaging property or by using one's material, official or other dependencies shall be punishable by fine or by corrective labour for the term not in excess of one year or by imprisonment for up to two years.

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