

**TO THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 33066/22**

**M.D.  
v.  
Georgia**

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**WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENERS**

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*Equality Now  
The European Human Rights Advocacy Centre*

**25 September 2024**

## **1. Shortcomings in the definitions of sexual violence crimes within Georgian law and challenges in enforcing these laws**

### **Definitions of sexual violence crimes and sentences are not compliant with international human rights standards**

1. The definition of sexual violence crimes in the Criminal Code of Georgia fails to meet the standards developed by the European Court of Human Rights (ECtHR), Committee on the Elimination of Discrimination against Women (CEDAW Committee), the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) and other instruments. Namely, the Criminal Code of Georgia does not provide a consent-based definition of rape. Additionally, some serious acts of rape are classified as minor crimes not constituting rape; and causing a person to engage in sexual acts with a third person is not specifically criminalised.

#### *Lack of a consent-based definition of rape*

2. The definitions of rape and other sexual violence crimes should be based on the lack of free and voluntary consent of the victim that should be assessed in the context of the surrounding circumstances, according to the standards developed by ECtHR,<sup>1</sup> the Istanbul Convention,<sup>2</sup> the CEDAW Committee<sup>3</sup> and other international human rights and criminal law instruments.
3. Contrary to international and regional standards binding on Georgia, the definition of rape and other sexual offences in the Criminal Code of Georgia focuses on the use of force, threat of force, abuse of the victim's helplessness and various forms of coercion. They do not focus on the absence of the free and voluntary consent that should be assessed in the context of the surrounding circumstances.
4. Article 137 of the Criminal Code 'Rape' defines rape as any form of sexual penetration of the body of another person with any body part or object, committed by the use of violence, threat of violence or by abusing the victim's helplessness, which is punishable by imprisonment of six to eight years.
5. Similarly, Article 138 of the Criminal Code 'Another action of a sexual nature' defines an assault of a sexual nature that falls short of penetration committed under violence, the threat of violence or by abusing the victim's helplessness, punishable by imprisonment of four to six years.

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<sup>1</sup> M.C. v. Bulgaria, App. no. 39272/98, (ECHR, 4 December 2003), para. 181

<sup>2</sup> Istanbul Convention, Article 36

<sup>3</sup> CEDAW Committee, General recommendation No. 35, para. 29(e); CEDAW Committee, Vertido v Philippines, Merits, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008

*Acts equivalent to rape not recognised as rape by the Law*

6. The Georgian legislation currently allows for two different rape crimes, one of which calls for more serious penalties on conviction (Article 137 as provided above) while the other, Article 139, is called coercion rather than rape and is defined as a light crime committed in circumstances other than with the use of force and threat of immediate force and helplessness. Defining acts committed with physical force as rape, while treating those committed through coercion as a lesser crime, reinforces the harmful myth that only acts involving physical force qualify as rape.
7. Article 139 criminalises any of the types of behaviour criminalised by Articles 137 and 138, but that have been committed using the threat of damaging property, disclosing defamatory information, information representing private life or such information that may substantially affect the right of that person and/or by abusing a helpless condition of a person affected, or material, official or other kind of dependence. Despite the fact that this article criminalises serious behaviour which equals rape or sexual assault, the act is only punishable by a fine or up to five years' imprisonment.
8. The above provisions were heavily criticised by GREVIO (Council of Europe's Group of Experts on Action against Violence against Women). In its Baseline Evaluation Report on Georgia, GREVIO noted with regard to the provisions of Articles 137 and 139, particularly with regard to the problematic nature of Article 139 (compulsion/coercion), that:
  - a. "Georgian legislation currently incriminates two different types of acts of rape, one of which is termed rape (Article 137) and provides for more serious penalties, and one that is termed coercion to intercourse (Article 139) and is defined as a less serious crime, mainly because it does not require the use of force or threat of immediate force. Instead of ensuring through the conceptualisation of the offences of rape and sexual violence that any sexual act performed on another person without his or her freely given consent is a form of criminal behaviour as required by Article 36 of the Istanbul Convention, the applicable definitions and differences in their sentencing ranges reinforces the myth that rape always involves physical force or threat thereof".<sup>4</sup>
  - b. Moreover, the existing provisions "reinforce the notion of a hierarchy of rape victims" while "in both sets of circumstances, the victim does not consent to the act, which is what criminal liability should hinge upon".<sup>5</sup>

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<sup>4</sup> GREVIO, Baseline Evaluation Report on Georgia (22 November 2022), available at: <https://rm.coe.int/grevio-report-on-georgia-2022/1680a917aa>, para. 256

<sup>5</sup> GREVIO, Baseline Evaluation Report, para. 257

9. GREVIO urged the Georgian authorities to “amend the provisions of the Criminal Code covering rape and the other sexual violence offences under Articles 138 and 139 of the Criminal Code and to fully incorporate the notion of the lack of freely given consent as required by Article 36 of the Istanbul Convention”.<sup>6</sup>

*The lack of criminalisation of causing a person to engage in sexual acts with a third person*

10. Another deficiency in the criminal legislation of Georgia, also raised by GREVIO, is that the legislation does not criminalise causing another person to engage in non-consensual acts of a sexual nature with a third person (Istanbul Convention, Article 36, paragraph 1c). GREVIO urged the Georgian authorities to criminalise such actions as they serve “as part of the control and abuse in intimate partner violence” and demonstrate “the malevolent behaviour of abrogating a woman’s sexual self-determination”.<sup>7</sup>

**Burdensome evidence and corroboration requirements to prove sexual violence**

11. Despite some recent progress, the stringent evidentiary requirements of the criminal justice system provide barriers to access to justice for sexual violence.
12. GREVIO notes that law enforcement and judicial bodies are imposing stringent requirements and corroboration rules for evidence in sexual violence cases. Despite Georgian legislation stating that evidence has no predetermined value (Article 82, paragraph 2, of the Code of Criminal Procedure) and should be evaluated based on its relevance, admissibility and credibility for each case (Article 82, paragraph 1), prosecutors and the judiciary interpret the law as requiring two pieces of direct evidence to support an indictment or conviction for sexual violence. GREVIO is particularly worried that the strict application of this requirement could result in fewer indictments and, consequently, fewer convictions, despite potential exceptions.<sup>8</sup>
13. The Criminal Procedure Code of Georgia states that a judgement of conviction shall be based only on a body of consistent, clear and convincing evidence, which proves the culpability of a person beyond reasonable doubt.<sup>9</sup> It also states that a judgement of conviction cannot be based solely on indirect evidence.<sup>10</sup> Legislation is consistently interpreted as requiring two pieces of direct evidence on which to issue a conviction, with the whole testimony of an individual witness considered to be only one ‘piece’. This strict requirement of ‘two pieces’ means that even if the evidence of survivors is credible and reliable, it can never on its own form the basis for a conviction, unless corroborated by

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<sup>6</sup> GREVIO, Baseline Evaluation Report, para. 261

<sup>7</sup> GREVIO, Baseline Evaluation Report, para. 259

<sup>8</sup> GREVIO, Baseline Evaluation Report, para. 310

<sup>9</sup> Criminal Procedure Code of Georgia, Article 13(2)

<sup>10</sup> Criminal Procedure Code, note to Article 13; Criminal Procedure Code, Article 76

another ‘piece’ of direct evidence. Moreover, a victim’s evidence corroborated by evidence that can be considered ‘indirect’ (such as, for example, the victim told someone about the rape after the incident or sought medical or psychological help) is also insufficient. Such a threshold also effectively rules out a positive determination on the merits because uncorroborated complaints of women who have been victims tend to not go to court.

14. Moreover, forensic examination findings play a crucial role in prosecuting sexual violence cases. While authorities do investigate context-based facts and evidence, most prosecutions and convictions are based on cases where physical injuries and biological materials related to the sexual act are present. Reliance on such evidence contributes significantly to the high attrition rate of sexual violence cases, with many never advancing to the prosecution stage.<sup>11</sup> The ECtHR is “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”.<sup>12</sup>
15. These evidentiary standards leave many forms of sexual violence unpunished and run contrary to the CEDAW Committee’s recommendation to ensure that evidentiary rules and other legal and quasi-judicial procedures are impartial and are not overly restrictive, inflexible or influenced by gender stereotypes or prejudice.<sup>13</sup> Furthermore, the CEDAW Committee specifically recommends that States abolish “corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy”.<sup>14</sup> Moreover, the ECtHR stated that to bring charges and deliver a judgement of conviction, “where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker”.<sup>15</sup>

## **2. Identifying and addressing gender discrimination as an inherent element of sexual violence against women and girls**

16. Gender discrimination is a fundamental aspect of all forms of gender-based violence, including and most explicitly in sexual violence against women and girls. Expressly acknowledging this is central to fully understanding the causes and consequences of gender

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<sup>11</sup> GREVIO, Baseline Evaluation Report, para. 312

<sup>12</sup> M.C. v. Bulgaria, para. 166

<sup>13</sup> Committee on the Elimination of Discrimination against Women, General recommendation on women’s access to justice, 23 July 2015, CEDAW/C/GC/33

<sup>14</sup> CEDAW/C/GC/33, para 25(a)(iii)

<sup>15</sup> Khan v. the United Kingdom, App. no. 35394/97, ECHR, 12 May 2000, paras. 35-37; Allen v. the United Kingdom, App. no. 25424/09, ECHR, 12 July 2003, para. 43, Bykov v. Russia, App. no. 4378/02, ECHR, 10 March 2009, para. 90; Haxhia v. Albania, App. no. 29861/03, ECHR, 8 October 2013, para 129

crimes, seeking effective accountability and redress and identifying transformative preventive approaches.

17. In this submission, the intervenors recall two fundamental principles established by this Court and other international and regional human rights bodies:

- a. gender-based violence constitutes gender discrimination; and
- b. gender-based discrimination is multilayered (encompassing discrimination by the perpetrator and discrimination by the authorities) and can intersect with other vulnerabilities of victims/survivors.

18. Guided by these principles, the intervenors respectfully submit that the present case provides the Court with an opportunity to develop its approach in cases of sexual violence by routinely examining Article 14 of the Convention (including of its own motion) through an intersectional lens, as an inherent aspect of these cases.

### **Gender-based violence constitutes gender discrimination**

19. There is a clear consensus in international human rights law, including as adopted by this Court, that violence against women constitutes gender-based discrimination, and is the result of systemic and structural inequality, power imbalances and the subordinate position of women in society.<sup>16</sup> Pursuant to the Istanbul Convention, the CEDAW Convention, and within the Inter-American and African human rights systems, sexual violence, as an extreme form of gender-based violence, is expressly recognised as gender discrimination.

20. The Istanbul Convention defines violence against women as “...*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*” (emphasis added). The Convention’s Preamble directly refers to the power dynamic and historic societal and legislative subordination of women: “*Violence against women is a manifestation of historically unequal 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..... 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*

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<sup>16</sup> See for example, *Opuz v Turkey*, no. 33401/02, at 200; *Bălşan v Romania*, no. 49645/09, at 88; *Volodina v Russia*, no. 41261/17 at 110; Istanbul Convention, Article 3(a); Istanbul Convention Explanatory Report, § 1; The Inter-American Court of Human Rights, *Fernandez Ortega et al v. Mexico* (30.08.2010) at 119; CEDAW Committee General recommendation No. 19, at 6-7; CEDAW Committee General recommendation No. 28 at 19; CEDAW Committee General Recommendation No. 35 at 1, 21; *O.G. v Russian Federation*, CEDAW Communication no. 91/2015 at 7.3; see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/31/57, 2016, at 55.

equality between women and men is a key element in the prevention of violence against women.” (emphasis added)

21. GREVIO recognises that “*In order to effectively tackle the root causes of violence against women, the implementation of laws and the shaping of policies must acknowledge and recognise that women’s overexposure to gender-based violence in comparison to men emerged from and is sustained by structural inequalities between women and men, as well as structural patterns of discrimination against women which are justified and reinforced by socially entrenched negative stereotypes and prejudicial attitudes against women.*”<sup>17</sup> (emphasis added)
22. The CEDAW Committee also identifies violence against women as a form of discrimination under Article 1 of the CEDAW Convention, directed towards a woman because she is a woman or that affects women disproportionately.<sup>18</sup> In particular, the Committee has found that sexual violence against women constitutes gender-based discrimination, in breach of the Convention.<sup>19</sup>
23. Similarly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) defines violence against women as “*any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere*” (emphasis added).<sup>20</sup> Article 6 of the Convention of Belém do Pará provides for the right of every woman to a life free from violence, including the right of women to be free from all forms of discrimination and the right of women to be valued and educated free of stereotyped patterns of behaviour and cultural practices based on concepts of inferiority or subordination. In interpreting and applying these standards, the Inter-American Court of Human Rights has, at least since the case of *Miguel Castro Castro Prison v. Peru* (2006),<sup>21</sup> identified sexual violence as a violation of human rights as analysed through a gender-based approach.<sup>22</sup>
24. Further, the African Commission on Human and Peoples’ Rights has found, in the landmark case of *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, that sexual violence constitutes discrimination against women.<sup>23</sup>

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<sup>17</sup> GREVIO Baseline Evaluation Report on Poland, para. 6

<sup>18</sup> CEDAW Committee General recommendation No. 19

<sup>19</sup> See e.g. *SVP v Bulgaria* (31/2011) at 9.3; *Reyna Trujillo Reyes and Pedro Arguello Morales v. Mexico* (75/2014), at 9.4

<sup>20</sup> Inter- American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), Article 1

<sup>21</sup> *Castro Castro v. Peru* [2006] IACtHR, Ser. C No. 160.

<sup>22</sup> See further, *Case of Rosendo Cantú et al. v. Mexico* [2010] IACtHR, Ser. C No. 216; *Case of J. v. Peru* [2013] IACtHR, Ser. C. No. 275; *González et al. (“Cotton Field”) v. Mexico* (2009).

<sup>23</sup> Communication 323/06 at 165.

## Considering intersectional discrimination

25. Consolidating the above is the recognition by the CEDAW Committee and the Inter-American human rights system that gender discrimination may be compounded by victims'/survivors' intersecting vulnerabilities. For example, the CEDAW Committee emphasises that "*women experience varying and intersecting forms of discrimination, which have an aggravating negative impact*", and calls on states parties to consistently take into account the risks of intersectional discrimination, ensuring that all policies and measures designed to address gender-based violence take into account the particular situation of women affected by intersecting forms of discrimination.<sup>24</sup>
26. The CEDAW Committee identified intersectional discrimination in *M.W. v. Denmark* concerning gender-based violence towards the applicant and her son by her former partner, and the discriminatory response from the state authorities to her complaints. In considering the applicant's position as a foreign mother, the Committee underlined that "*discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them*".<sup>25</sup> In *HH, IH and YH v. Georgia* the Committee found that the victim, Khanum Jeiranova, an ethnic Azeri woman living in an ethnic Azeri village in rural Georgia suffered "*intersecting discrimination related to ethnicity and stereotypical attitudes of the police and judicial authorities*".<sup>26</sup>
27. The Convention of Belém do Pará also considers gender-based violence through an intersectional approach, requiring States parties to "*take special account of the vulnerability of women to violence because of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom*".<sup>27</sup> Similarly, the Inter-American Commission on Human Rights, in its report on access to justice for women who have been victims of sexual violence, highlighted the particular risk that girls, Indigenous women, women with a disability, and women affected by armed conflict have of their human rights being violated.<sup>28</sup>

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<sup>24</sup> General Recommendation No. 35, at 12

<sup>25</sup> No. 46/2012, at 5.8

<sup>26</sup> No. 140/2019, at 7.6

<sup>27</sup> Article 19

<sup>28</sup> IACHR, "Report on Access to Justice for Women Victims of Sexual Violence: Education and Health" (2011), 19, <<https://www.oas.org/en/iachr/women/docs/pdf/sexualviolenceeduhealth.pdf>> (accessed September 24, 2024).



## Recognising the multiple layers of gender discrimination

28. It is well established by this Court that gender discrimination manifests not only in the motive of the perpetrator, but is also often evidenced in the inaction and attitudes of law enforcement officials who respond to reports of gender-based violence.<sup>29</sup> For example, in *Tkheldidze v Georgia*,<sup>30</sup> *A and B v Georgia*,<sup>31</sup> and *Gaidukevich v Georgia*,<sup>32</sup> under simultaneous examination, the Court found violations of the State's procedural obligations under Article 2 together with Article 14 of the Convention arising from the failure to investigate the inaction and discriminatory attitudes of law-enforcement officials who responded to reports of domestic violence, prior to the killings or deaths of the victims. In *Tkheldidze*, the Court emphasised that “there was a pressing need to conduct a meaningful inquiry into the possibility that gender-based discrimination and bias had also been a motivating factor behind the alleged police inaction.”<sup>33</sup> In *A and B*, the Court noted: “*indices pointing to possible gender-based discrimination as at least partly informing the response of law enforcement to the complainant and the complaints*”, which underlined the “*pressing need to conduct a meaningful investigation into the response of law enforcement and their inaction, which might have been motivated by gender-based discrimination*” (emphasis added).<sup>34</sup> In *Gaidukevich*, the Court also pointed to the indices of discrimination in the response of law enforcement including systemic discriminatory attitudes of the latter reported by GREVIO.<sup>35</sup> It is submitted that the Court's simultaneous examination of the Article 2 and 14 complaints in these cases (and others)<sup>36</sup> was fundamental to identifying the multiple layers of discrimination on the part of the authorities as well as the perpetrator, inherent in these examples of gender-based violence.

29. Discrimination by the authorities in the investigation and prosecution of sexual violence is widely documented and results in further re-traumatisation in the process of pursuing legal accountability.<sup>37</sup> In Georgia, this is evidenced in, for example, the use of discriminatory investigative practices (such as invasive forensic examinations and confrontations between

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<sup>29</sup> See for example, *Identoba v Georgia* (No. 73235/12) and *Aghdgomelashvili and Japaridze v. Georgia* (No. 7224/11)

<sup>30</sup> *Tkheldidze v. Georgia* (No. 33056/17)

<sup>31</sup> *A & B v. Georgia* (No. 73975/16)

<sup>32</sup> *Gaidukevich v. Georgia* (No. 38650/18)

<sup>33</sup> *Tkheldidze v. Georgia*, para. 60.

<sup>34</sup> *A & B v. Georgia*, para. 44. See also *Gaidukevich v Georgia*, para 64

<sup>35</sup> *Gaidukevich v Georgia*, para 64.

<sup>36</sup> See for example, *Identoba v Georgia* (No. 73235/12) and *Aghdgomelashvili and Japaridze v. Georgia* (No. 7224/11)

<sup>37</sup> See for example, Equality Now, Roadblocks To Justice: How The Law Is Failing Survivors Of Sexual Violence In Eurasia ([https://equalitynow.org/resource/roadblocks\\_to\\_justice/](https://equalitynow.org/resource/roadblocks_to_justice/)).

suspects and victims in court proceedings)<sup>38</sup> and discriminatory stereotypes used by investigators, prosecutors and judges to assess the credibility of victims/survivors.<sup>39</sup>

### **Developing the Court's approach to examining sexual violence cases**

30. Violations of Article 14 of the Convention may be considered if there is an important legal purpose to determining whether the applicant has suffered discrimination, or if inequality of treatment is a fundamental aspect of the case.<sup>40</sup>
31. Recalling the standards cited above (paras 19-27 above), it is submitted that inequality of treatment of women victims/survivors of gender-based violence and, in particular, sexual violence, is intrinsic to this form of abuse. Female victims/survivors are attacked because they are women and this form of abuse affects women disproportionately.<sup>41</sup>
32. Further, it is submitted that there are at least two clear legal purposes for routinely examining Article 14 in this context:
  - c. identifying and addressing the multiple layers of discrimination inherent in gender crimes (paras 28-29 above); and
  - d. exposing and remedying the impact of intersecting vulnerabilities which facilitate and perpetuate these crimes, where relevant (paras 25-27 above).
33. Adopting this approach would also give meaning to the Court's existing stance that "[s]ubstantive gender equality can only be achieved with a gender-sensitive interpretation and application of the Convention provisions",<sup>42</sup> which, it is submitted, necessarily requires examination of Article 14 (including of the Court's own motion).

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<sup>38</sup> CEDAW/C/GEO/CO/6: Concluding observations on the sixth periodic report of Georgia; Grevio Baseline Evaluation Report Georgia. Effectively Investigating, Prosecuting and Adjudicating Sexual Violence Cases: A Manual for Practitioners in Georgia; see paras 11-15 above.

<sup>39</sup> Ibid

<sup>40</sup> *Dudgeon v United Kingdom* (No. 7525/76, 22 October 1981), § 49, *Chassagnou and Others v France* ((Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999), *Aziz v Cyprus* (No. 69949/01, 22 December 2004).

<sup>41</sup> CEDAW Committee General recommendation No. 19

<sup>42</sup> *Volodina v Russia*, no. 41261/17, at 111