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## **THE CRIME OF RAPE IN THE LEGAL SYSTEM OF BOSNIA AND HERZEGOVINA IN COMPARATION WITH COUNTRIES OF REGION AND CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS**

*The main idea for this topic came as a reflection of the recent happenings that shocked the entire Region, especially Serbia. Actresses from Serbia, after several years, gathered courage and told the whole world how they survived rape. The cases were investigated, and some of them had a criminal proceeding as the epilogue. This paper will contain three chapters. The first chapter will give the definition of the "sexual assault" with special emphasis on consent, which is the key element that connects several sexual offences such as crimes "sexual harassment" and "raping". The second chapter will provide an overview of European Court of Human Rights practice considering the crime of rape and the effect of ECtHR case law on national legislation. Finally, the final chapter will present the legislation regulating the "crime of rape" in Bosnia and Herzegovina, Serbia and Croatia. This chapter is important for showing the difference between the definition, processing and the punishment for raping a person. It is well known that, for example, in 2019, Serbia adopted "Tijanas law" which implies life imprisonment for the most serious crimes : aggravated murder of a child, rape with a fatal consequence, sexual intercourse with a helpless person with a fatal consequence, sexual intercourse with a child with a fatal consequence, sexual intercourse with a child with abuse of position with a fatal consequence. Finally, in the conclusion of the paper the authors will try to answer several questions, for example to what extent the courts respect the Strasbourg principles, why*

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*rape victims find it difficult to dare to press criminal charges, what should states improve in the judicial system when it comes to the crime of rape.*

*Keywords: gender equality, sex offences, rape, Istanbul Convention, European court for the human rights.*

## 1. INTRODUCTION: UNDERSTANDING GENDER AND SEXUAL-BASED VIOLENCE

One of the forms of discrimination<sup>268</sup> and violation of the basic rights and freedoms of the victim is gender-based violence or violence that disproportionately affects persons of one gender and is noticeable in a wide range of sexual violence acts (rape, sexual harassment, and abuse), human trafficking, slavery, forced marriages, the so-called “Crimes of honor” and in numerous variations of other forms of harmful conduct. It can be said that sexual violence, along with domestic violence, is among the most common forms of gender-based violence. Sexual violence is the use of force, coercion, or imbalance of power, to engage a person in sexual activity without his or her consent. In most cases, the perpetrator of sexual violence is a man. Sexual violence can happen to anyone of any gender. However, women,<sup>269</sup> children, LGBTI people, people with disabilities, and people of different skin color are more likely to be victims of sexual violence than others. Victims are most often harmed by crimes against sexual freedom and morals, or crimes against marriage, family, and youth. Criminal offenses falling under these two categories can be committed only with intent (Petrović, Jovašević, Ferhatović, 2016, p. 149). There is often a problem in defining this form of violence, and in connection with it, in characterizing some form of behavior as a sexual offense. The reasons lie in the very cultural, social but also traditional understandings of what values should be protected by criminal legislation, as well as in ingrained patriarchal values. Sexual violence, as one of the most brutal forms of violence against women, in many cases goes unpunished due to inadequate and scientifically inaccurate legal definition of this crime and prevalence of frequent stereotypes and myths about rape. In defining the concept of sexual violence, the legislator has a complex task, and should be comprehensive and precise - but at the same time monitor the development of society and perceptions of sexuality. One of the basic definitions of sexual violence is given by the World Health Organization (WHO), reading: “Sexual violence is any sexual act, attempted sexual act, unwanted sexual comment or suggestion directed against a person and his sexuality, which can be committed by another person regardless of the relationship with the victim or the situation in which they find

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<sup>268</sup> Considering the rights contained in the Universal Declaration of Human Rights, which represent a common standard to which every society should strive, as well as the individual who makes up society, and which states that all human beings are born free and equal in dignity and rights (article 1), to achieve real equality, it is necessary to provide equal opportunities for the exercise of all rights, as well as the effective sanctioning of all forms of gender inequality. The prohibition of discrimination based on sex and gender is defined in numerous international documents and instruments, and the European Convention on Human Rights and Fundamental Freedoms itself establishes the obligation of the state to respect human rights, as well as to enable their enjoyment and protection.

<sup>269</sup> <https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women>, 30 August 2021.

themselves. It is characterized by the use of force, threats, or blackmail to endanger the welfare and/or life of the victim or persons close to her.”<sup>270</sup> However, the definitions of sexual violence in law, both as a war crime and as a crime against humanity, have shortcomings and are unjustifiably narrow due to the anticipation of an additional and unnecessary essential feature, requiring that these acts be committed with “use of force or threat of use of force”.

It should be noted that in Bosnia and Herzegovina, every form of sexual violence is regulated by law, and represents a broad category that includes not only sexual harassment, but also rape, fornication, trafficking in women and other crimes. In this context, it is important to mention criminal offenses such as sexual intercourse with a disabled person, sexual intercourse with abuse of position, forced sexual intercourse, sexual intercourse with minor, lewd acts, sexual blackmail, sexual harassment, and satisfaction of lust in front of a minor. These offenses should certainly be mentioned as they fully correspond to the offenses described in Article 36 (Sexual Violence, including Rape) of the Istanbul Convention.<sup>271</sup>

Rape is the most severe form of sexual violence that leaves long-lasting consequences; it causes extremely severe traumatic experiences for the victim. Rape has long been recognized as a crime in society, but it should be noted that there were significant differences in its incrimination and sanctioning in different legislations, depending on the cultural and traditional values of the given societies and their level of human rights development – hence, there is no single definition of the crime. Even the Istanbul Convention itself does not provide a precise, unique definition of rape. Rather, it defines sexual violence, which includes rape, as: a) “engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; b) engaging in other non-consensual acts of a sexual nature with a person; c) causing another person to engage in non-consensual acts of a sexual nature with a third person.”

Sexual consent means actively accepting sex with someone. Consent lets someone know that sex is desirable. Sexual activity with someone without consent is rape or some other form of sexual violence (e.g., sexual harassment).<sup>272</sup> Also, how far one can go, what one wants or does not want, must be checked first. Without consent, any sexual activity (at least

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<sup>270</sup> World Health Organization (2002) ‘Report on Violence and Health’, Geneva, p. 149.

<sup>271</sup> Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Europe, 11. 05. 2011. year, Istanbul.

<sup>5</sup> For the elements that can be taken to constitute the definition of rape, we suggest those given by 70 authors, leading experts in various fields, in 189 determinants in the excellent book Encyclopedia of Rape (2004), edited by Merril D. Smith.

<sup>272</sup> Sexual harassment in Bosnia and Herzegovina as a criminal offense was regulated by the Law on Gender Equality („Official Gazette of BiH”, No. 16/03, 102/09) in 2003. It is also prescribed as a criminal offense by the Criminal Code of the Republika Srpska. It is also a form of discrimination, which, following the Law on Prohibition of Discrimination of BiH, is resolved in civil proceedings and administrative proceedings/administrative disputes. Labor law also contains norms on combating sexual harassment. When defining sexual harassment, it is usually stated that it includes all those unwanted sexual behaviors that may or may not involve physical contact. Certain behaviors that represent sexual violence are criminalized by Article 29 of the BiH Law on Gender Equality, which defines “any unwanted form of the verbal, non-verbal or physical behavior of a sexual nature which seeks to violate the dignity of a person or group of persons, or which achieves such an effect, especially when it creates frightening, hostile, degrading or offensive environment.” Thus, such unwanted

one activity - oral sex, touching the genitals, vaginal or anal penetration) is rape or sexual violence. Consent is never implied by past behaviour, the clothes being worn, where one goes out ...<sup>273</sup>. Consent is always clearly stated, and silence never signifies consent.

The past must never be given significance in assessing consent. This also applies to couples who have been in a relationship for a long time and have had sexual intercourse many times. Each state has norms that regulate who can give consent. It is a generally accepted fact that people who are under the influence of alcohol, drugs or are unconscious, cannot consent to sex. Additionally, states regulate the minimum age of consent for minors.

## 2. LEGAL FRAMEWORK IN THE COUNTRIES OF THE REGION

### 2.1. Bosnia and Herzegovina

In the legal system of Bosnia and Herzegovina, rape, as the most specific criminal offense of this type, is prescribed in criminal law (entity criminal laws and the criminal law of Brčko District), and it refers to vaginal, anal, or oral penetration with a penis and/or objects. The criminal law of both entities and Brčko District define rape as a sexual intercourse/act/relation which arises under the threat of the use of force and an attack on the life or body of that person or another person close to him or her. The act of committing is forcing on sexual intercourse or sexual activity equalized with it by using force or threatening to directly attack the life or body of that person or a person close to him or her, i.e., it is directed immediately towards the passive subject or implicitly towards a person close to him or her. Thus, according to the favourable legislation of Bosnia and Herzegovina, rape exists only provided there is a direct threat of physical violence, due to which the victim is forced to agree to the demands of the rapist. Under previous provisions of criminal law (criminal laws until the year 2003), only a man could commit rape. The positive substantive law in Bosnia and Herzegovina is gender-neutral, i.e., it does not distinguish between crimes committed by men or women, which, if done, would unnecessarily narrow the range of crimes that can be the subject of criminal prosecution. In the legal system of Bosnia and Herzegovina, the primary form of rape, as a criminal offense, is punishable by imprisonment from one to ten years, i.e., three to ten years. It is defined as coercion to intercourse or some other sexual act by using force or threat to the life or body of the victim or a person close to her. Criminal law also prescribes

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sexual behaviors include various types of conduct, such as verbal suggestions (sexual offers), unwanted sexual remarks and comments about the body and sexuality, unwanted physical touches (kissing, hugging, touching), inappropriate sexual attention, various physical gestures, and similar behavior. Unlike gender-based harassment, sexual harassment is characterized by compromising a person's sexual integrity because it puts a person in an awkward and humiliating position, causes a sense of shame and creates a hostile, humiliating, or offensive environment. Although many years have passed since the adoption of the Law on gender equality, the case law for sexual harassment is underdeveloped.

<sup>273</sup> "Common myths are: Only a certain type of woman is raped (those who are promiscuous or those who have poor judgment); women provoke being raped by the way they dress or the way they flirt; men rape women because they are sexually aroused or because they have not had sexual activity for a long time (in fact, men rape women to control and humiliate them)": Council of Europe doc. 11038, Report of the Committee on Equal Opportunities for Women and Men, 2 October 2006, fn 1

qualified forms of crime, which include extremely cruel or degrading ways of committing the crime, the diversity of committed acts, the fact that the crime resulted in death, grievous body harms, pregnancy, the fact that the crime is committed due to ethnic, racial, religious or linguistic animosity to the victim or the fact that the victim is minor.

In the Criminal Code of Federation Bosnia and Herzegovina and Brčko District, the criminal offense of rape is classified under the group of criminal offenses against sexual freedom and morals. Conversely, in the Criminal Code of Republic Srpska, the criminal offense of rape falls under the group of criminal offenses against sexual integrity. The following lines will give more details on the normative solutions to the crime of rape. The criminal offense of rape is defined in the Criminal Code of Federation Bosnia and Herzegovina as follows: *“Whoever forces another person, by using force or threatening to directly attack the life or body of that person or a person close to him or her, to engage in sexual intercourse or other sexual act equalised with intercourse, will be punished by imprisonment from one to ten years.”* (Article 203, paragraph 1 of the Criminal Code of Federation Bosnia and Herzegovina). The Criminal Code of Republic Srpska determines rape with the following statement: *“Whoever forces another person to engage in sexual intercourse or a sexual act equalized with it by using force or threatening to attack the life or body of that person directly, or a person close to him or her, will be punished by imprisonment from three to ten years.”* (Article 165, paragraph 1 of the Criminal Code of Republic Srpska). In the Criminal Code of Brčko District of Bosnia and Herzegovina, the criminal offense of rape is regulated in paragraph 1 Article 200 of the Criminal Code of Brčko District Bosnia and Herzegovina: Whoever forces another person *“to engage in sexual intercourse or a sexual act equalized with it by using force or threatening to directly attack the life or body of that person or the life or body of a person close to him or her, will be punished by imprisonment from one to ten years.”*

Both entity laws and the law of Brčko District define the crime of rape as forcing (using the force or threatening to attack the life or body of the person being raped or the life or body of a close person) to engage in sexual intercourse or a sexual act equalized with it. The difference between the three laws lies in the prescribed statutory minimum of imprisonment. In the Federation of Bosnia and Herzegovina the minimum sentence of imprisonment is one year. Conversely, in the Republic of Srpska and Brčko District, the statutory minimum is three years. All three provisions prescribe a statutory maximum of ten years of imprisonment for committing the crime of rape.

In addition to the basic offence all three laws also have qualified i.e. aggravated offences, such as:

- If the criminal offense of rape is executed in a particularly cruel or degrading manner;
- If more than one sexual intercourse or sexual acts equalized with it have been committed against the same victim by several persons;
- If the criminal offense of rape was committed against a minor;
- If the criminal offense of rape was executed as a hate crime;
- If the criminal offense of rape has caused severe injury, serious impairment of health, or pregnancy of a raped female person;
- If the rape victim has died as a result of the criminal offense of rape being committed.

The legal minimum for committing a qualified form of the criminal offense of rape is three years in the Criminal Code of Federation Bosnia and Herzegovina and the Criminal Code of Brčko District. In comparison, the legal minimum in the Criminal Code of Republic Srpska is higher and amounts to five years. The legal maximum is set equally in all three laws, and amounts to 15 years. The distinction regarding the penalty of imprisonment mainly concerns the qualified offence for the criminal offense of rape – causing death of a rape victim. The Criminal Code of Republic Srpska prescribes a statutory minimum of ten years for this form of crime. Nevertheless, it does not determine the legal maximum that could be pronounced for this aggravated form of rape.

The Centre for Judicial and Prosecutorial Training of the Federation of Bosnia and Herzegovina analysed the case law connected with the criminal offense of rape from courts across Bosnia and Herzegovina. Seventy-four judgments, submitted to the Center by the courts (passed in the 2010- 2021 period), were analysed. Fifty-two of the judgments are first instance, 17-second instance, and five from the entity Supreme Court. Decisions were made for about 83 persons, of which 73 persons were convicted, while ten persons were acquitted.. Judgments were based on a plea agreement concerning two persons, while evidentiary procedure was led concerning others. As a rule, penalties of imprisonment were pronounced, and in one case, prison sentence was replaced with a fine. In one case, based on a plea agreement, the court pronounced imprisonment of six months, which is below the statutory minimum.

Among the rape victims, most of them are minor girls, followed by women, while the elderly are in the third place. There are no LGBTI persons as rape victims in the received judgments. There are also no rape victims among the prison population (in world statistics, that population dominates among perpetrators and victims of same-sex rape, men-men, woman-woman). There is just one judgment (later confirmed in the second instance) in which the criminal offense of rape was committed as a hate crime. To summarize, analysing the received judgments of the courts in Bosnia and Herzegovina, the following was noted:

- There are more convicting judgments for perpetrators of the criminal offense of rape than acquitting judgments;
- Most perpetrators of the criminal offense of rape have a lower level of education (having completed or even not completed primary or secondary school);
- Most perpetrators are unemployed;
- A large number of rape cases were committed within the family;
- There is a large number of cases in which minors or disabled persons are rape victims;
- The courts most often imposed a criminal sentence of imprisonment higher than the one determined in the law, especially when a minor is the rape victim, and
- There is a negligible number of cases where the criminal offense of rape was committed as a hate crime.

Furthermore, based on the analysis of the received judgments, a positive practice of the Supreme Court of the Federation of Bosnia and Herzegovina can be identified. Namely, in most cases, the Supreme Court of the Federation of Bosnia and Herzegovina, rejected

the appeals lodged by the perpetrators and upheld the appeals of the prosecution service, and increased the imprisonment sentence imposed by the first instance court.

It is also important to note that the most frequent reason for the judgment of acquittal is that the court could not establish physical coercion in the criminal offense of rape, contrary to the definition of rape in the Istanbul Convention and the “Strasbourg” standard. In one judgment, it has been noted that the accused was acquitted because it was proven that he was in an intimate relationship with the rape victim.

Earlier court practice for the criminal offense of rape in Bosnia and Herzegovina showed that courts, in some cases, especially in the 2004-2007 period, did not apply the “Strasbourg” standards (the condition of resistance was rejected in international court opinions/reasoning). Nevertheless, it was used in certain judgments of the Supreme Court of Bosnia and Herzegovina. This was followed by a period where the entity and Brčko District courts began to apply the concepts of coercion and coercive environment, under international standards. This tendency of increased compliance with the international standards can also be seen in some cases where the courts tried to apply the said international standards, but failed to overcome the unnecessary focus on the use of force and resistance.<sup>274</sup>

## 2.2. Republic of Serbia

In the Republic of Serbia law, the criminal offense of rape is classified as one of criminal offenses against sexual freedom. The basic form of the criminal offense of rape is regulated in paragraph 1 of Article 178 of the Criminal Code of Republic of Serbia<sup>275</sup>, and is determined as follows: “*Whoever forces another to sexual intercourse or an equal act by use of force or threat of direct attack against the body of such or other person, shall be punished with imprisonment from five to twelve years.*” A particular form of the criminal offense of rape can be found in the provision of paragraph 2 of this Article, in which coercion consists of blackmail or other grave evil. That is a lighter form of the criminal offense of rape and is in fact a modification of the former criminal offense coercion to sexual intercourse<sup>276</sup> or wrongful fornication (Škulić, 2017. p. 417). A more severe form of a criminal offense of rape exists when the basic form is committed with certain alternatively prescribed qualifying circumstances. Professor Milan Škulić states them as follows: “1. Occurrence of a more serious consequence - if the act of committing the rape causes grievous bodily harm of the rape victim, 2. Acquisition of perpetrators – if several persons committed the crime of rape, 3. Tough manner of execution – if the act

<sup>274</sup> „Figthing against Impunity for Sexual Violence in Armed Conflict in Bosnia and Herzegovina: achieve progress and challenges”, Analysis of Criminal Proceedings before the courts of the Federation of Bosnia and Herzegovina, Republic Srpska and Brčko District of Bosnia and Herzegovina in the Period from 2004. to 2014., OSCE Mission to Bosnia and Herzegovina, June 2015, pp. 25-31.

<sup>275</sup> Official Gazette of Republic of Serbia, no. 85/2005, 88/2005 - correction, 107/2005 - correction, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019

<sup>276</sup> Judicial practice in Serbia followed the practice of the European Court of Human Rights, even at the time of the validity of the “classic” definition of rape (as forced sexual intercourse) in the criminal legislation of Serbia. It is a matter of “latent coercion”, where the rape victim got into the car in which the criminal offense

was committed in a particularly cruel or particularly degrading manner, 4. The attribute of a passive subject – if the rape was committed against a minor or 5. The occurrence of a special consequence – if the rape resulted in pregnancy of the victim.” (Škulić, 2017, p. 418). As in the entity and Brčko District laws of Bosnia and Herzegovina, the Republic of Serbia criminal law envisages death of a passive subject as a qualifying factor for the existence of aggravated form of the criminal offense of rape. The most severe form of rape exists if the act resulted in the death of a passive subject or if the act was committed against a child, i.e., a person who was not 14 years old at the time the crime was committed.

In the year 2014, the Republic of Serbia was shocked by a horrific crime. A fifteen-year-old girl T.J. was kidnapped and murdered near the Vojvodina village Bajmok. Her body was found after a thirteen-day search, and a butcher D.D. was identified as the perpetrator of the crime. The case of the minor T.J. was the motive for establishment of the Foundation named after her. The Foundation submitted a national initiative to the National Assembly for amendments to the Criminal Code of the Republic of Serbia. One hundred fifty-eight thousand four hundred sixty citizens of the country supported the initiative. The initiative proposed the introduction of life imprisonment for the most severe crimes against life and body and crimes against sexual freedom in cases which resulted in the death of a child, minor, pregnant woman, or helpless person. A possibility of conditional release in these cases was excluded with the same initiative.<sup>277</sup> The National Assembly of the Republic of Serbia adopted the initiative. Amendments to the Criminal Code of the Republic of Serbia had direct implications in the case of “Malčanski berberin”. Namely, the multiple rapist N.J. was sentenced to life imprisonment for raping a twelve-year-old girl; the first judgment passed after the amendments to the Criminal Code were adopted.<sup>278</sup>

### 2.3. Republic of Croatia

According to paragraph 1 of Article 153 of the Criminal Code of the Republic of Croatia<sup>279</sup>, the crime of rape is defined as follows “*Whoever engages sexual intercourse or equal sexual act with another person without his or her consent or induces another person to have sexual intercourse or an equal act with a third person without his or her consent or to commit a sexual act equalized with sexual intercourse on himself/herself*

of rape was committed, without any physical coercion, and which she could not leave of her own free will. No injuries were found on her body. The three defendants were found guilty. See: case of the High Court in Belgrade K. 509/11 of 3 November 2012. The first-instance verdict was confirmed by the decision of the Court of Appeals in Belgrade - KŽ1 2099/2013 of 3 July 2013, and by the verdict of the Supreme Court of Cassation (Kzz 622015 of 28 January 2015).

<sup>277</sup> The impossibility of conditional release in these cases caused criticism from the professional public. It was pointed out that only a small number of Council of Europe member states do not have the possibility of conditional realase. <https://www.slobodnaevropa.org/a/dozivotni-zatvor-kazne-srbija/29905316.html>, August 30th 2021.

<sup>278</sup> So far, there have been only two final judgments for life imprisonment in the Republic of Serbia. The second relates to the crime of aggravated murder.

<sup>279</sup> Criminal law of Republic of Croatia, Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

*without consent will be punished with imprisonment from one to five years". Paragraph 2 of the same Article determines a punishment of imprisonment between three and ten years for committing the act referred in paragraph 1 by using force or threat of a direct attack on life or the body of a rape victim or another person. The perpetrator who was in a reversible delusion regarding the existence of consent determined in paragraph 1 of Article 153 of the Criminal Code of the Republic of Croatia, will be punished with imprisonment for a term not longer than three years, while the perpetrator who was in an inescapable delusion regarding the existence of consent determined in paragraph 2 of Article 153 of the Criminal Code of Republic of Croatia will be punished with imprisonment for a term between one and five years. The Croatian law provides a precise definition of consent in paragraph 5 of Article 153 of the Criminal Code, prescribing that that consent from paragraph 1 exists "if a person decides to have sexual intercourse or equal sexual act of own will and if such person was able to make and express such a decision. It is considered that such consent does not exist particularly if sexual intercourse or equal sexual act was committed by use of threat, fraud, abuse of position towards a person who is dependent from the perpetrator, exploitation of the person's condition due to which he/she was unable to express refusal or over a person who was unlawfully deprived of liberty." Before, the legal definition of rape did not refer to consent or absence of consent, but in their practice Croatian courts did consider whether there were indications of victims consent.<sup>280</sup> Consent must refer to a future act or omission while subsequent consent has no effect (Radačić, 2012, p. 40).*

### 3. THE CRIME OF RAPE IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

#### 3. 1. The impact of ECtHR practice on national legislation

Rape is always a subject of criminal protection and the state has several positive obligations in this regard. Andrew Clapman suggested that "rethinking states" human rights obligations specifically requires "reconfiguring traditional approaches to violence against women" (Clapman, 2006). All elements of the case-law of the European Court of Human Rights have been incorporated into the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention),<sup>281</sup>

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<sup>280</sup> Eg. Judgment of the Supreme Court of the Republic of Croatia, I Kž 390 / 07-7 of 10 July 2007, which is significant because the Court found that the behavior of the victim, who in the night tram approached the perpetrator she did not know and went with him to the park, recklessly, but still does not give the perpetrator the right to conclude that she thereby gave her consent to sexual intercourse or a sexual act equated with it.

<sup>281</sup> In November 2013, Bosnia and Herzegovina ratified the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) and thus took on the obligation to harmonize domestic legislation with the provisions of the Convention. Article 36 of the Convention defines sexual violence, including rape in the following way "1. The Parties shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalized: a. vaginal, anal, or oral penetration of a sexual nature by any part of the body or object into the body of another person without the consent of that person; b. other acts of a sexual nature with another person without the consent of that

which is binding on all states that have ratified this Convention. The European Court of Human Rights has established certain criteria, which the Member States should respect when creating their legislative policy. Thus, the shortcomings of the substantive law can also be manifested in the failure of the legislator to ensure its effective protection through an appropriate definition of a criminal offense (Batistić Kos, 2008, p. 59). The most significant example is the judgment in the case *M. C. v. Bulgaria*,<sup>282</sup> in which Court, based on current trends in European law, concluded that the requirement to prove physical resistance in all circumstances to establish rape is a risk that may result in impunity for certain types of rape. The Court, therefore, found that the positive obligations of States parties under Articles 3 and 8 of the Convention required the punishment and effective prosecution of the perpetrator of any sexual act without the consent of the victim, including a case of lack of physical resistance from the victim. The European Court of Human Rights, in a series of judgments (*XIY v. The Netherlands*, *Aydin v. Turkey*, *M. C. v. Bulgaria*, *Maslova and Nalbandov v. Russia*, *P. M. v. Bulgaria*, *I. G. v. Moldova*, *M. and Others v. Italy and Bulgaria*, *P. and S. v. Poland*, *O'Keefe v. Ireland*, *W. v. Slovenia*, *M. A. v. Slovenia and N. D. v. Slovenia*, *S. Z. v. Bulgaria*, *I.P. v. the Republic of Moldova*, *Y. v. Slovenia*, *B. V. v. Belgium*, *E. B. v. Romania*, *E. G. v. the Republic of Moldova and J. L. v. Italy*) relating to rape and sexual abuse found insufficient protection in the legal systems of specific states.

The crime of rape and the rape of a child are among criminal offenses for which life imprisonment can be imposed in the states that have incorporated it into the criminal law. The European Court of Human Rights has taken the position that member states can prescribe in criminal laws the sentence of life imprisonment, provided they, in addition, prescribe three other important segments regarding the introduction of life imprisonment. First, the legislation of the Member States must provide for a period of time during the serving of the sentence after which there is a possibility to reconsider the sentence. Second, the Member States must establish a procedure for revising it. In addition, detention must be organized in such a way as to enable life-sentenced prisoners to progress towards their rehabilitation. The key judgment of the European Court of Human Rights to date, in the case of *Vinter and Others v. The United Kingdom*,<sup>283</sup> states that it is inconsistent with

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person; c. the influence that another person, without his or her consent, engages in acts of a sexual nature with a third person. 2. Consent must be voluntary as a result of the free will of the person, which is assessed according to the circumstances of the case. 3. The Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed to the detriment of former or current spouses or partners, as recognized by domestic law." We can conclude that there is a discrepancy in defining the crime of rape in Bosnia and Herzegovina, Serbia and Croatia with the provisions of the Convention. Namely, in the criminal legislation of Bosnia and Herzegovina and Serbia, rape implies coercion to sexual intercourse by force or threat to the life or body of the victim or the life or body of a person close to him, while "the Convention requires only the absence of consent" (Čengić, N. et al., 2017, p. 29). It is important to point out that now only the Criminal Code of the Republic of Croatia in Article 153 of the Criminal Code precisely defined what is considered consent, which brought it closest to the harmonization of the law with the Convention. According to an Amnesty International analysis, only 12 of Europe's 31 countries have laws that define rape as consentless sex: Belgium, Croatia, Cyprus, Denmark, Germany, Greece, Iceland, Ireland, Luxembourg, Malta, Sweden and the United Kingdom.

<sup>282</sup> Application no. 39272/98, the judgment of 4 December 2003

<sup>283</sup> Application no. 66069/09, 130/10, and 3896/10, the judgment of 09.07.2013 (see in particular para. 121).

human dignity, and therefore contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to deprive a person freedom without allowing her to regain that freedom one day.

The minimum period a prisoner must serve before being able to take parole varies from state to state.<sup>284</sup> In the United Kingdom of Great Britain and Northern Ireland, the law does not set a minimum period of imprisonment; rather, such period is set by a judge when sentencing. Several states<sup>285</sup> do not envisage parole when it comes to prisoners sentenced to life in prison. In practice, in Iceland and Liechtenstein, life imprisonment was never imposed. Some states do not have a sentence of life imprisonment.<sup>286</sup> Bosnia and Herzegovina is the last country to introduce this punishment. This was not done at the state level of government (in the Criminal Code of BiH), but it was done by the entity of the Republic of Srpska in February 2021, following the example of the introduction of this punishment in Serbia in 2019.

The concept of life imprisonment was introduced in the 1990's in many Council of Europe member states following the ratification of Protocol 6 to the European Convention on Human Rights, which abolished the death penalty. Although it was never pronounced, nor was it known to the criminal legislation of the Republic of Srpska, death penalty was enshrined in the Constitution of this Bosnian entity. In 2019, such sentence formally ceased to exist, given that the said provisions of the Constitution of the Republic of Srpska were repealed by the Constitutional Court of BiH. Today in Europe the death penalty exists only in Belarus.<sup>287</sup> The last execution in a member state of the Council of Europe took place in 1997. A moratorium on the death penalty has been introduced in the Russian Federation.<sup>288</sup>

### 3.2. ECtHR as a mechanism of justice for rape victims

Sexual violence, as a form of gender-based violence, violates women's human rights. It also manifests itself on a range of human rights and freedoms of any individual, and thus has far-reaching negative consequences for any society.<sup>289</sup> State responses are often inappropriate and do not provide effective remedies to victims (Radačić, 2015, p. 127). Criminal proceedings are often traumatic for victims, because not only do they have to "go through" the details of the attack all over again, but they often face gender stereotypes. Three stereotypes about women's sexual behaviour are particularly prevalent: that women enjoy being sexually obsessed over regardless of the circumstances; they lie that they

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<sup>284</sup> The lowest is 12 years (e.g. Denmark and Finland), then 15 years (e.g. Austria, Belgium, Germany, Switzerland), and the highest is 40 years (e.g. Turkey, in the case of multiple offenses). In most countries where long-term imprisonment can be imposed, the period is between 20 and 30 years.

<sup>285</sup> Netherlands, Ukraine, Moldova, and Malta.

<sup>286</sup> Eg. Andorra, Montenegro, Croatia, Portugal, San Marino, Slovenia, and Spain.

<sup>287</sup> Amnesty International- Document- Commonwealth of Independent states: Belarus- the last executioner.

<sup>288</sup> It was established implicitly by Boris Yeltzin in 1996, and the Constitutional Court of the Russian Federation explicitly in 1999, which was reaffirmed in 2009. In this country, the death penalty has not been carried out since 1996.

<sup>289</sup> UNGA (2006) 'Indepth Study on All Forms of Violence Against Women: Report of the Secretary General', UN Doc. A / 61/122 / Add.1, paras 171–81.

have been raped; and they are responsible for their victimization (Edwards, Turchik, Dardis, Reynolds, & Gidyez, 2011; Radačić, 2014a; Temkin, Krahé, 2008). Based on these stereotypes, the definition of “actual” rape was, roughly, that it was a “violent attack on a ‘respectable’ victim who suspects nothing and who resists to the maximum”. The application of such gender stereotypes in the legal proceedings of the member states of the Council of Europe has been recognized by the European Court of Human Rights in a number of its judgments, and in the following lines, we will present three such judgments that we think best illustrate the rape stereotype.

In *Aydin v. Turkey*,<sup>290</sup> the European Court of Human Rights held that rape could constitute torture.<sup>291</sup> The case concerned a 17-year-old who was as raped by a member of the Turkish security forces. Sukran Aydin was detained, allegedly as a part of security operations, to obtain information from her and other members of her family about alleged terrorist activities or sympathies. Her imprisonment lasted for three days, during which time she was beaten several times, sprayed with water while she was naked, and raped after being blindfolded. This is the first time Aydin has had sexual intercourse and long after that, she suffered from psychological consequences. Only two years after the first discovery of torture (*Aksoy v. Turkey*),<sup>292</sup> the Court was asked to consider whether the conduct, including rape, constituted torture under Article 3 of the European Convention, which provides: “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*”. The court concluded that the rape of detainees by a civil servant must be considered a particularly severe heinous form of abuse given the ease with which the perpetrator can exploit the victim’s vulnerability and weakened resistance, and that rape leaves deep psychological scars on the victim that do not respond as quickly as other forms of physical and mental violence.<sup>293</sup> The Court continued that, in addition to the damage caused by the rape, other acts against her produced “a series of particularly frightening and humiliating experiences”, in particular taking into account her „gender and youth and the circumstances in which she was held.”<sup>294</sup> Moreover, the suffering inflicted on her by the security forces was „for a purpose“ - namely to gather information.<sup>295</sup> Accordingly, the Court found the accumulation of acts of physical and mental violence inflicted on the applicant and the particularly cruel act of rape to which she had been subjected constituted torture in violation of Article 3 of the Convention. The Court would reach the same conclusion if considered any of these grounds separately.<sup>296</sup>

Another seminal judgments of the European Court of Human Rights is the one in the M. C. v. Bulgaria case from 2003. In it, the European Court of Human Rights took the

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<sup>290</sup> Application no. 23178/94, the judgment of 25 September 1997.

<sup>291</sup> Shortly after the verdict in *Aydin v. Turkey*, the International Criminal Tribunal for Rwanda (ICTR) issued its significant verdict in *Prosecutor v. Akayesu*, on which responsibility for genocide and war crimes of rape is based: *Prosecutor v. Akayesu*, Case no ICTR-96-4-T, 2 September 1998.

<sup>292</sup> Application no. 21987/93, the judgment of 18 December 1996

<sup>293</sup> *Aydin v. Turkey*, para. 83.

<sup>294</sup> *Aydin v. Turkey*, para. 84.

<sup>295</sup> *Aydin v. Turkey*, para. 85.

<sup>296</sup> *Aydin v. Turkey*, para. 86.

position that the lack of consent to sexual activity must be a basic element of the definition of criminal offenses of sexual violence and rape. Punishment of any involuntary sexual act is a standard of the European Court of Human Rights, and is established by Article 36 of the Istanbul Convention. The victim, a 14-year-old, claimed she was raped by two men, but an investigation that followed found that there was not enough evidence that the girl was forced to have sex. The investigation established that no force was used and that therefore no rape occurred. Therefore, before bringing the case before the European Court of Human Rights, the victim argued that Bulgarian law did not protect her because in it, committing rape required force, a higher standard than in other countries, where, for example, only non-consent was required.<sup>297</sup> She also challenged the thoroughness of the investigation. The ECtHR found that Bulgaria had violated its positive obligations under Articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Bulgaria was ordered to pay the victim non-pecuniary damage and expenses.

The latest important judgment of the European Court of Human Rights is that in the case *J. L. v. Italy*,<sup>298</sup> in which the ECtHR condemned an Italian court for “reproducing sexist stereotypes” after referring to women’s red underwear and bisexuality as a sign of her “ambivalent attitude towards sex”, releasing six people accused of gang rape. The case dates to 2008, when a woman, then a student, claimed to have been raped by seven men in Florence. In its verdict, the court in Florence pointed out inconsistencies in her story. The European Court did not challenge the verdict, but it did criticize the court in Florence for using language that violated a woman’s right to privacy. In its ruling, the ECtHR stated the language “conveyed prejudices in Italian society regarding the role of women that could be an obstacle to providing effective protection of the rights of victims of gender-based violence, despite a satisfactory legislative framework.” The European Court specifically pointed out that the comments on the “red underwear” shown by the applicant during the evening were unjustified, and the same applied to the comments concerning her bisexuality, relationships and casual sexual relations before the events in question.” The ECtHR also ordered the Italian state to pay the woman 12,000 euros in damages.

#### 4. CONCLUSION

In the most legislations in the region, the definition of rape is based on the use of force and not on lack of consent, although the Istanbul Convention provides otherwise, a norm that stems from the case law of the European Court of Human Rights. The Convention explicitly requires that States change the definition of the criminal offense of rape in the way that any act of sexual penetration, committed against a person who has not given his or her consent, is punishable, regardless of the form and nature of the act. Consent, as emphasized

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<sup>297</sup> This assumption is followed by the decision of the CEDAW Committee, in the case of *Vertido v. Philippines* (communication number 018/2008), adopted on 16 July 2010. The Committee considers that the Philippine State Court erred in relying on gender-based myths and stereotypes about rape and rape victims in the victim’s case, and stressed that there should be no presumption in law and practice that a woman gives her consent where she has not physically resisted unwanted sexual behavior.

<sup>298</sup> Application no. 5671/16, the judgment of 27 May 2021.

in the Convention, must be given freely, which will be appreciated in the context of each individual case. In November 2013, Bosnia and Herzegovina was the sixth Member State of the Council of Europe to ratify the Istanbul Convention, thus overtaking the obligation to incorporate in its legislation a lot of instruments provided in this Convention aiming to establish the most efficient system for preventing and combating violence against woman and family violence. When it comes to the area of sexual violence, which this analyses deals with, in the period from November 2013 to November 2017, only the Criminal Code of Republic Srpska went through the process of harmonization with the provisions of the Istanbul Convention. However, this was only a partial effort. Namely, during these changes, the opportunity was missed to provide a precise definition of consent and to address the issue of marital sexual violence, as well as to clearly define the terms used to describe the criminal offense of rape and other sexual violence in Bosnia and Herzegovina. Of particular concern is the fact that similar amendments of the Criminal Code of Federation Bosnia and Herzegovina and the Criminal Code of Brčko District are even not under preparation. Currently, the legal solutions from the Criminal Code of Republic Croatia are most coherent with the provisions of the Istanbul Convention (e.g. we have seen that the definition of "consent" is precisely given in the Criminal Code of Republic Croatia) and can serve as an example of a positive practice and basis for similar changes in Bosnia and Herzegovina. Nevertheless, it is obvious that, for regulating numerous issues, it is necessary to change the entity and Brčko District laws and harmonize them with the Istanbul Convention. More precise regulation of consent in other criminal laws could also encourage victims to report a crime. During the writing of this paper and analysing the court practice, we came to the conclusion that perpetrators of the criminal offense of rape often appear as returnees, even if they committed the acts in different countries. This would mean that a unique register of the persons convicted of the criminal offense of rape (register of rapist) should be established for the countries in the region. The register of rapists would not be public - it would be available only to judicial and police authorities. Analysing the rape case law in Bosnia and Herzegovina (we have not analysed other legal systems in terms of systematic insight into a number of cases) we discovered a mild penal policy (usually the sentence of imprisonment from one to two years). In this respect, consideration should be given to increasing the prescribed sentences for the criminal offense of rape, perhaps even the introduction of the sentence of life imprisonment, like in the Criminal Code of the Republic of Serbia (noting that this country should also harmonize the Criminal Code with the "Strasbourg" standards and to introduce the possibility of parole).

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