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RANGE AND SCOPE OF THE DEFINITION OF STALKING FROM THE ISTANBUL CONVENTION IN NATIONAL LEGISLATION IN BiH

With the adoption of the new Criminal Code in 2017, the Republic of Srpska introduced a new criminal offence, with the aim of harmonizing criminal protection from gender-based violence with the standards contained in the Istanbul Convention. One of them is the crime of stalking. In this paper, we analyse whether formal legal protection against gender-based violence has improved in the Republic of Srpska with the introduction of this criminal offence and compare this crime with the same or similar crimes in the criminal laws of states in the Balkan region and other political-territorial units in BiH. We pay particular attention to the crimes of endangering security, and sexual harassment. We are especially interested in the Federation of BiH, given that this entity does not prescribe an adequate criminal offence in its criminal law in the light of the requirements of the Istanbul Convention (ratified by BiH), but also taking into account the fact that the Convention does not detail the essential features of the nature of the crime of stalking. Based on best comparative practices, and taking into account the jurisdiction of international forums, we will give some proposals de lege ferenda. The paper also includes a specific insight into the criminal offences of stalking and endangering security, which exist in the relevant criminal laws in Bosnia and Herzegovina, and which will serve to prove our hypothesis

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more reliably. The paper will have a strong gender-based approach, but, to the extent necessary, systemic shortcomings in the prosecution of the crime of endangering security will also be shown in auxiliary categories, e.g. vis-a-vis journalists, as the safety of female journalists is often under attack.

Keywords: Bosnia and Herzegovina, stalking, legislation, gender-based violence, Istanbul Convention.

1. INTRODUCTION

Although the occurrence itself pre-dates the period, attention has been given to „stalking“ since the 1920s (Kerović, 2021, p. 99). It is believed that the main reason for that was the murder of actress Rebecca Schafer, which was committed by her admirer Robert Bardo, after which the state of California in the United States criminalized stalking (Penal Code of California, 646.9 PC). Stalking often appears as an accompanying form of other illegal behaviours, such as domestic violence, sexual harassment and other types of violence (Miladinović-Stefanović, 2016, 143). This paper observes how the criminal law in Bosnia and Herzegovina looks at stalking.

It primarily focuses on the criminal offence of „stalking“, which already exists in one of the criminal laws (Republic of Srpska), and analyses the connection with other criminal offences. In a lot of European Union Member States,¹ the crime of stalking was commonly introduced in response to an identified legal gap, in situations where a person was not threatened nor physically attacked but was followed, put under surveillance, contacted or to whom offensive content was sent.

The development of technology has caused the definitions to include behaviours of the suspect/accused that were committed in the virtual world/online. The consequences for victims were also determined in national legislative, in terms of self-harm, psychological consequences and suicidal thoughts. Psychological violence is rarely proven and taken into account during the court proceedings for offenses of gender-based violence: however, in terms of the criminal offence of stalking, it is one of the key features of the criminal offence itself.² Speaking in general, the definition now also includes situations where the victim was not injured or felt fear, but where the perpetrator wanted to cause harm or cause fear and situations where the perpetrator knew that this would most likely be the result of his or her behaviour. The pioneer of the criminalization of „stalking“ are the United States of America (the first law was passed in 1990 in California), while in Europe those efforts were led by Denmark and the United Kingdom of Great Britain and Northern Ireland (USA and UK also have a measure of prohibition of approaching the victim as an epilogue of the

¹ Denmark is a pioneer, having criminalized stalking in 1933. The United Kingdom was the next European Member State. Until 2009 the only other European Member States that have passed laws against stalking are Belgium, the Netherlands, Germany, Malta, Ireland, Austria, and Italy.

² Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harassment, Banja Luka, United Women of Banja Luka. Available at: <http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u-RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf> (30. 8. 2022).

procedure³). The European Court for Human rights did not develop standards for stalking within its caselaw, but the issue itself was analysed under other forms of gender-based violence (domestic violence, femicide...). A typical recent example of this approach is the judgment in the case of *Tkheldze vs. Georgia* (application number 33056/17), dated 8. 6. 2021, where it was established that the victim was stalked and threatened for a certain period of time, day after day, by her extra-marital partner.

Further, we will show the degree of abstraction in the definitions of this criminal offence in the legislations of the countries of the region, and also evaluate whether these definitions are in accordance with the one given in the Istanbul Convention. The aim of the paper is to show the differences and similarities between the countries of the region when it comes to the definition of the criminal offence of stalking and to try to draw some general conclusions. In the following chapters, we will describe the definition of stalking in the Istanbul Convention, analyse the definition in the countries of the region, and make a special review of the regulation of the criminal act of persecution in the criminal laws of the countries of the region.

2. THE DEFINITION OF „STALKING“ IN THE ISTANBUL CONVENTION

The Council of Europe Convention on preventing and combating violence against woman and domestic violence (hereinafter: the Istanbul Convention) was signed in Istanbul on May 11th 2011. On November 7th 2013, Bosnia and Herzegovina became the sixth member state of the Council of Europe to ratify the Convention,⁴ thereby making a commitment to undertake a series of measures, which, among others, include the creation of a legal framework for prevention and punishment of violence against women and the protection of violence victims. The Agency for Gender Equality of Bosnia and Herzegovina adopted the Framework Strategy for implementation of the Istanbul Convention in Bosnia and Herzegovina, where one of the main goals is to ensure a consistent and high quality implementation of the Convention, especially through the adjustment of relevant legal and institutional frameworks.

The Convention contains certain substantive-law provisions. This is an improvement compared to the period before its entry into force, when a lot of social relations covered by the Convention were either regulated by non-binding norms or were „soft“ law.⁵ The

³ In 2020, Government of UK gave police new powers to protect victims of stalking. New Stalking Protection Orders (SPOs) came into force of 20 January 2020. They allow courts in England and Wales to move quicker to ban stalkers from contacting victims or visiting their home, place of work or study. The Orders will usually last for a minimum of 2 years, with a breach counting as a criminal offence that can result in up to 5 years in prison.

⁴ Konvencija Vijeća Evrope o prevenciji i borbi protiv nasilja nad ženama i nasilja u porodici, *Službeni list BiH*, br. 15/13.

⁵ In 2002, the Council of Europe Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence was adopted. A Europe-wide campaign, from 2006 to 2008, to combat violence against women, including domestic violence was organized. The Parliamentary Assembly of the Council of Europe has also adopted a number of resolutions and recommendations calling for legally-binding standards on preventing, protecting against and prosecuting the most severe and widespread forms of gender-based violence.

Convention obliges the member states to take measures to implement its provisions aimed at preventing and combating violence against women. Within these substantive legal provisions, there is also a provision that contains an imperative legal norm: “Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at an other person, causing her or him to fear for her or his safety, is criminalised“ (Art. 34 of the Convention). It is evident from this that the Convention does not precisely specify the characteristics of the criminal offence of stalking (Paunović, 2019, p. 21). The Istanbul Convention in particular apostrophizes that there must be a consequence i.e. that it is not enough only that acts of threatening behaviour were undertaken, but also that the victim was infused with a sense of fear (actions of stalking must have been undertaken intentionally and with the special purpose of causing a feeling of fear in the victim).⁶ It follows that the consequence should be appreciated from the subjective feeling of the victim (proved with expertise/expertise report) and not from the average citizen (e.g. as in the United Kingdom).⁷

3. STALKING IN THE LEGISLATION OF THE COUNTRIES IN THE REGION

In the Criminal Code of Republic of Serbia⁸ stalking is defined as a criminal offence in Article 138a. Unlike the criminal offence of sexual harassment, the criminal offence of stalking does not need to have an emotional or sexual connotation. This criminal offence is committed by a person who, during a certain period of time, persistently and unauthorized follows or undertakes other actions with an aim to get closer to another person against her or his will. This criminal offence can also be committed when a person establishes direct contact (e.g. waiting in front of a building), through a third person (by contacting a friend or a neighbour to speak about the victim), or through social networks (Viber, WhatsApp, Facebook, etc.). However, following through social networks (e.g., sending a friend request on Facebook) does not constitute this criminal offence. For a conviction, it is necessary for a conviction to prove that the goal is to get physically closer to that person (e.g. finding the work address or a friend’s home address). Additionally, it is also necessary for the perpetrator to have undertaken several actions (not just one) over an extended period of time (it is necessary that there is a continuity between two actions), in an aggressive manner or in such a way that it can affect the life of a stalked person. The main reason to demand continuity in the criminal offence of stalking is that only when stalking actions are observed collectively, they can constitute this criminal offence based on the feelings of psychological insecurity and anxiety of the victim (Roberts, 2018, p. 274). This is because one-time and short episodes of stalking can hardly cause fear and anxiety in the victim (Pittaro, 2017, p. 191). Nevertheless, case law shows that stalking

⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence – 2011. Available at <https://rlr.iup.rs/wp-content/uploads/2020/10/RLR-instructions-to-authors.pdf> (30. 8. 2022).

⁷ Protection of Freedoms Act, 2012, Section III, paragraph 2A.

⁸ Krivični zakonik, *Službeni glasnik RS*, br. 85/2005, 88/2005 - ispravka, 107/2005 – ispravka, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

can take place within one day – in this case, the accused followed a woman for a period of time and followed her into two cafes; afterwards, the person drove away with friends and then, during the same day she saw the accused by, her house standing in the street.⁹ It is explicitly prescribed that stalking is committed by unauthorized following, given that criminal prosecution authorities can follow a person with authorisation, i.e. when taking certain measures in accordance with the law. If the contact between persons was voluntary and had ended, then the other person should make clear that further contact is unwanted in order for this criminal offence to exist. The following three paragraphs can be contested. Namely, paragraph 3 of Article 138 prescribes that this criminal offence can be committed by misusing the personal data of another person or a person close to him/her for the purpose of ordering goods or services. Paragraph 4 prescribes that stalking is a threat of attack on life, body or freedom of another person or a person close to her/him. As for paragraph 3, this formulation is very similar to the criminal offences of fraud, false representation or unauthorized collection of personal data (the most controversial part is “for the purpose of ordering goods or services”). Paragraph 4 is similar to the criminal offence of “Endangering safety” and differs from it in the consequence and extended protective object (in accordance with the formulations for two criminal offences in the Criminal Code of the Republic of Serbia, one threat of death would be endangering safety, while several of them would be stalking). In accordance with paragraph 5 of Article 138, the criminal offence of stalking will also exist when any other actions are taken in a manner that can significantly endanger the private life of a person against whom the actions are taken. This formulation is too general and unusual for criminal legislation. The theory proposes here the formulation of “undertaking another action of persistent stalking” or “other action of persistent harassment” (Škulić, 2016, p. 20). In a relation to the consequence, two more qualified forms of the criminal offence, with a stricter punishment are prescribed. The consequence consists in causing danger to the health, body or life of the victim as well as in causing the death of the victim due to an illness resulting from stalking or suicide (which is the most serious form of this criminal offence). In Serbia, there is some progress when it comes to prosecution, but even though there a number of court decisions were passed, and even though the sanctions are strict, the penal policy is mild. Research of court practice for the period from 2017 - 2020 in Serbia¹⁰ shows that cases of stalking are reported and prosecuted, but the data also show that in almost 70 per cent of the judgments (a total of 193 cases) a suspended sentence was imposed. Prison sentences and house arrest were recorded in 17 per cent of cases, while fines were imposed in almost 13 per cent of judgments for persecution. Individual cases of court reprimands, work in the public interest, and educational measures were also recorded.

Even before the ratification of the Istanbul Convention, the Republic of Croatia had a criminal offence of Intrusive behaviour in its criminal legislation, but also a number of other criminal offences which can overlap with the definition given in the Convention, such as threat or coercion (Gudelj, 2019, p. 66). In the Republic of Croatia, the criminal

⁹ Supreme Court of Cassation of Serbia, no. Kzz 70/2019 of February 6, 2019.

¹⁰ Zbog proganjanja donete 282 presude – Serbia 2022. Available at: <https://www.politika.rs/sr/clanak/496662/Zbog-proganjanja-donete-282-presude> (30. 8. 2022).

offence “Intrusive behaviour” was introduced in the Criminal Code in 2013¹¹ in Chapter XIII “Criminal offences against personal freedom”. Paragraph 1 of Article 140 of the Criminal Code defines it as persistently and over a long time following or stalking another person or trying to contact or establishing an unwanted contact or intimidating in some other way intimidates thereby causing anxiety or fear for such person’s safety or safety of persons close to him/her, which is punishable by imprisonment of up to one year. In case the offence was committed in a relation to a close person, a person with whom the perpetrator was in an intimate relationship or to a child, the perpetrator can be sentenced to imprisonment of up to three years. It is obvious that it is very important to determine whether the perpetrator and the victim were in a relationship because that information makes a difference between the basic and the qualified form of a criminal offence. The criminal offence is prosecuted by proposal¹² except when it is committed against a child or a close person. As well as the Criminal Code of Serbia, the Criminal Code of Croatia requires a long period of stalking and following (“persistently and over a long time”). In Croatian case law, there was a case where the accused was acquitted because the intrusive behaviour lasted only three days, during which the accused called the victim 37 times on the mobile phone and 31 to the landline phone.¹³ The Supreme Court of Croatia established that perseverance and time duration are elements that are valued in every specific case.¹⁴ In this case, the court took the position that, for the evaluation of the length of time that the acts of unwanted behaviour were committed, an important question was whether the victim was brought in a state of anxiety or fear for his/her personal safety at a certain time, not the number of days during which the criminal offence was committed. Of course, other elements should always be considered in order to conclude that a criminal offense exists – persistence, as well as the effects left on the victim. The actions of the accused can be disturbing, constitute stalking or unwanted contact, but still not amount to a criminal offence. An example of actions that represent intrusive behaviour can be found in the judgment of the Supreme Court of Croatia, where the accused was convicted because he sent messages to the victim that he would like for her „to be his wife and that she was more beautiful than the moon“.¹⁵ The quantity of fear and anxiety is determined in each individual case, where a specific person is taken as an example, and not an average, reasonable person under the same conditions. The flaw of the Croatian solution is that it does not contain the norming of stalking in the virtual space, which means that if a person undertakes actions through information and communication technologies, that will not constitute stalking. It is good that cases of stalking committed by a person close to the victim and the one committed against a child are marked as more difficult. Croatia has also recorded one case where a

¹¹ Krivični zakon Republike Hrvatske, *Narodne novine* br. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

¹² A certain number of criminal acts can be prosecuted by proposal, which means the attitude of the injured party towards the criminal prosecution of their perpetrators must also be taken into account, since they affect the personal sphere of his/her life in a special way.

¹³ County Court in Bjelovar, no. Kž-131/2017-4 of September 14, 2017.

¹⁴ Supreme Court of the Republic of Croatia, no. III Kr 132/14-6 of February 12, 2015.

¹⁵ Supreme Court of the Republic of Croatia, no. I Kž 161/2016-4 of August 31, 2017.

public person was the victim of stalking. The case concerned a singer who was stalked by a retiree for two years; the stalker was sentenced to eight months imprisonment with a three-year probation.¹⁶ Also, the Municipal Court in Zagreb sentenced him to a measure of mandatory psychiatric treatment and a three-year prohibition on approaching and disturbing the singer, because, among other things, he stalked the singer from Zagreb to Hvar and sent her letters and songs.

Montenegro also introduced the criminal offence of stalking into the Criminal Code.¹⁷ Articles 9, 12 and 15 of the Law marked the completion of harmonization with the Istanbul Convention, which Montenegro ratified and signed. The harmonization was affected by introducing criminal offences such as: Female Genital Mutilation, Forced sterilization, Stalking. Also, responsibility for an attempt of the criminal offence of Abuse and the new incrimination i.e. a new form of the criminal offence of rape was prescribed. The criminal offence of stalking was introduced by Article 168a of the Code within Chapter XIV Criminal offences against life and body. According to Article 12 whoever persistently stalks another in a way that significantly endangers his/her life, health, body or way of life will be punished with a fine or imprisonment of up to three years. The special value of this solution is emphasizing the word „persistent“, which underlines the special relation of the perpetrator with the actions taken i.e. that he/she is constantly causing significant changes in the performance of the victim's daily activities through continuous actions. Another important characteristic is the reference to „sensibly/noticeable“, which means that the actions taken produced significant changes in the victim's life. If this criminal offence is committed against a former spouse or an extramarital partner, the perpetrator will be punished with imprisonment from three months up to five years. The same sentence is prescribed for the perpetrator who commits this criminal offence against a minor, a pregnant woman or a person with a disability. According to the Law, it is considered that someone is persistently stalking another person when, during a certain period of time, he/she is: following or undertaking other actions with the aim of physically approaching that person without authorization, tries to establish contact with that person directly, through a third party or means of communication; abuses the personal data of that person to order goods or services; threatens by an attack on the life, body or freedom of that person or a person close to him/her; takes other similar actions towards that person. The comments made with regards to paragraphs 3, 4 and 5 of Article 138a of the Criminal Code of Serbia are also valid vis-a-vis the same solutions in the Criminal Code of Montenegro (Article 168a, paragraph 6, point 3), 4) and 5)). The last current case from Montenegro was the one where the accused was sentenced by the Basic Court in Nikšić to imprisonment of three months for stalking an RTV Montenegro journalist (sending her threatening messages via his Instagram profile).¹⁸

¹⁶ Zbog uhođenja Nine Badrić, penzioner dobio osam mjeseci zatvora – Croatia 2021. Available at: <https://radiosarajevo.ba/vijesti/regija/zbog-uhodenja-nine-badricpenzioner-dobio-osam-mjeseci-zatvora/436520> (30. 8. 2022 of August).

¹⁷ Krivični zakonik Crne Gore, Službeni list CG, br. 70/2003, 13/2004 – ispr. 47/2006 i Službeni list CG, br. 40/2008, 25/2010, 32/2011, 64/2011 – dr. zakon, 40/2013, 56/2013 – ispr., 14/2015, 42/2015, 58/2015 – dr. zakon, 44/2017, 49/2018, 3/2020.

¹⁸ Osuđen na tri meseca zatvora zbog proganjanja novinarkе iz Crne Gore – Montenegro 2022. Available at: <https://www.021.rs/story/Info/Region-i-svet/304103/Osudjen-na-tri-meseca-zatvora-zbog-proganjanja-novinarke-iz-Crne-Gore.html> (30. 8. 2022).

4. SPECIFICITY OF REGULATING THE CRIMINAL OFFENCE OF STALKING IN THE CRIMINAL LAWS OF BOSNIA AND HERZEGOVINA

In Bosnia and Herzegovina efforts were made to harmonize the provisions of the law with the requirements of the Istanbul Convention, but that was done partially, in certain political-territorial units and time distanced from each other. The legislator in the Republic of Srpska was the first and only one¹⁹ to effect this harmonization. This is not surprising, given the amount of political will, speed of legislative process (mechanism of decision making is not complex in the legislative body of the Republic of Srpska) and the territorial organization of the authorities in it. In this regard, the introduction of criminal offences which are followed by appropriate sanctions that will have a deterrent effect was initiated. The Criminal Code of the Republic of Srpska entered into force in 2017²⁰ (the legislator decided to codify the entire criminal law matter). One of the goals of the new criminal legislation was to harmonize it with the Istanbul and Lanzarote Conventions. Pursuant to the Istanbul Convention, new criminal offences which were introduced into the Criminal Code of the Republic of Srpska are within the framework of Chapter XII – Criminal offences against life and body, criminal offences of Female Genital Mutilation (Article 133) and forced sterilization (Article 134), within the Chapter XIII Criminal offences against the freedom and rights of the citizens, criminal offence of persecution/stalking, (Article 144), within the Chapter XIV Criminal offences against sexual integrity, criminal offence of sexual blackmail (Article 166), and sexual harassment (Article 170) and within the Chapter XVI Criminal offences against marriage and family the criminal offence of forced marriage (Article 183). By introducing these criminal offences into the legal system, the Republic of Srpska created the conditions for improving the formal legal protection of women from various forms of gender-based violence through court proceedings against the perpetrators of violence, as well as for stricter application of mechanisms that already exist within the framework of criminal proceedings with the aim to protect basic human rights, safety and access to justice for women who survived violence.²¹

As stated earlier in this paper, currently the criminal offence of stalking exists only in the Criminal Code of the Republic of Srpska, where paragraph 1 of Article 144 prescribes that “whoever persistently and for a long time follows or stalks another person or tries to establish or is establishing unwanted contact with him/her directly or through a third person or otherwise causes that person to change his/her lifestyle, anxiety or fear for his/her personal safety or the safety of his/her close persons shall be punished by a fine or imprisonment up to two years.” Paragraph 2 of the same Article contains the imperative norm that the perpetrator will be punished with imprisonment from six months to three years if the offence from paragraph 1 of this Article was committed in a relation

¹⁹ At the level of Bosnia and Herzegovina, Federation of Bosnia and Herzegovina and District of Brčko of Bosnia and Herzegovina did not.

²⁰ Krivični zakonik Republike Srpske, *Službeni glasnik RS*, br. 64/2017, 104/2018 – odluka US, 15/2021, 89/2021.

²¹ Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harassment, Banja Luka, United Women of Banja Luka. Available at: <http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u-RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf> (30. 8. 2022).

to a current spouse or extramarital partner, a person with whom the perpetrator was in an intimate relationship or towards a child (a qualified form of the offence). What this criminal offence includes and in what way it can be committed is prescribed by the law itself (Kerović, 2021, p. 106) and it is up to the case law to specify the details. The reference to unwanted contact can be disputed in practice, because it is not stated that the offence can be committed in the virtual world – through the means of communication (phone, social networks, etc.). It is commendable that this provision includes an element of persistence in undertaking enforcement actions. The time interval for stalking is specified because it is limited to taking actions over a longer period of time. In case law, we already have judgments in which it was established that stalking was committed over a longer period (February 2018-September 2018²², July 2017-February 2019²³ ...), but also in a somewhat shorter period (April 5, 2018 - April 18, 2018²⁴). It is encouraging that the subjective conception is respected. In one of the finalised cases, the court took the position that the consequence does not have to be determined by expertise/expert's report, but must be assessed according to the circumstances of the specific case (as found by the first instance court).²⁵ The object of protection is the personal safety of a person or a person close to him/her, and the perpetrator can be any person, and he/her must act with direct intent.

In the case law of the Republic of Srpska, different acts of committing the criminal offences of stalking have already been determined. On May 27th 2019, the basic court passed a judgment in the first instance proceedings against the accused who committed the criminal offence of stalking from Article 144, paragraph 2, in connection with paragraph 1 of the Criminal Code of the Republic of Srpska. The accused was found guilty and sentenced to six months in prison, with a one-year probation. In the same judgment, the accused was sentenced to a security measure of prohibition of approaching and communicating with the victim (Article 79, paragraph 1, Criminal Code of the Republic of Srpska) for a period of one year. In the second instance judgment upon appeal, the district court confirmed the first-instance judgment, and it became final on July 25th, 2019. The judgment indicates that in the period from April 5 to 18, 2018, the accused persistently stalked a woman with whom he had previously been in an intimate relationship, trying to make unwanted contact with her directly. The accused committed the more severe form of the criminal offence of stalking, since he had previously been in an intimate relationship with the victim. The detailed statement of the victim²⁶ is not common or often visible in court judgments for

²² Basic Court of Bijeljina, no. 80 0 K 101358 18 K, of December 12, 2018.

²³ Basic Court Prijedor no. 77 0 K 095424 19 K of April 18, 2019.

²⁴ Basic Court of Bijeljina, no. 80 0 K 097525 18 K of May 27, 2019.

²⁵ District Court of Bijeljina, no. 80 0 K 097525 19 Kž of July 23, 2019.

²⁶ In the explanation of the judgment, the court focused considerable attention on the testimony of the victim, which allowed her to present all the details not only regarding the actions of the accused focused on stalking, but also the nature of the intimate relationship that the victim had with the accused, her attempts to end the relationship even before his going to serve the sentence of imprisonment for another criminal offence, as well to justify her feelings of anxiety, fear for her life and her own safety and changes in life habits that were caused by the actions of the perpetrator after his release from prison, when his continuous phone calls started, followings on the street and at work, ringing and banging on the door and windows of the apartment, calling and insulting. Due to these circumstances, the victim was not able to live a normal life or move on the street and go to work normally, she felt devalued as a person and constantly feared for her life and safety.

acts of gender-based violence, although it represents a key segment of the argumentation of the existence of characteristics of acts of violence, not only in cases of this criminal offence but also with regards to other offences similar offences.²⁷ On March 19th, 2019 the basic court in the proceedings against the accused for the criminal offence of stalking, from Article 144, paragraph 1 of the Criminal Code of the Republic of Srpska, based on a plea agreement, passed a convicted judgment in which the accused was found guilty and sentenced to a fine of 600 Bosnia and Herzegovina convertible marks. However, there was also a case²⁸ where it was evident that both the prosecutor and the court had failed to recognize the qualified, more serious form of this criminal offence, which also entails a stricter sentence.²⁹

In the Criminal Code of the Federation of Bosnia and Herzegovina,³⁰ the criminal offence closest to stalking is Endangering Safety.³¹ It is prescribed in Article 183, paragraph 3 of, reading: “Whoever, by sneaking in, frequently following or harassing in any other way, endangers the safety of a spouse, a person with whom he/she lives in an extramarital union, the parents of his/her child or another person with whom he/she maintains or has maintained close relations, shall be punished by a fine or imprisonment of up to one year”. Currently, the process of harmonizing the Criminal Code with the Istanbul and Lanzarote Conventions in the Federation of Bosnia and Herzegovina is underway, and it is expected that the criminal offence of stalking will be expressly prescribed. The draft law was adopted in one of the chambers of the Parliament of the Federation of Bosnia and Herzegovina, but it has not yet been promulgated. What the draft provision does not contain, compared to solutions from Serbia, Croatia and Montenegro, is primarily the circle of persons who may be harmed (especially since the victim must be a person with whom the potential perpetrator maintained close relations), and the prescribed sentence (imprisonment can be replaced by a fine). This is enough to conclude that out of all criminal legislation, victims

²⁷ Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harassment, Banja Luka, United Women of Banja Luka. Available at: <http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u-RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf> (30. 8. 2022).

²⁸ It is obvious from the judgment that, during the period from May 2018 to February 2019, the accused tried to establish unwanted contact with the victim, with whom he was in an emotional relationship, and stalked her by approaching her on the street and trying to talk with her in various ways, threatened that she was his or God's. The accused created several fake profiles on social networks, from which he sent insulting messages to the victim, and published photos of the injured party with offensive text captions on those profiles, which caused the victim to leave the city on several occasions and go to another place where she stayed with a friend. During two days in February 2019, the accused harassed the victim and her friends with phone calls and messages with offensive content related to the victim and told the victim's father, whom he had encountered on the street, that he would publish photos that compromised her if she reported him to the police. These actions caused changes in the victim's lifestyle, grievance, anxiety and fear for her own safety, which is why she reported him to the police. From the description of the actions of the criminal offence in the judgment, it undoubtedly follows that the accused committed the actions of the criminal offence of stalking.

²⁹ Petrić, A. 2019. Analysis of court verdicts in Republika Srpska for criminal acts of Persecution and Sexual Harassment, Banja Luka, United Women of Banja Luka. Available at: <http://unitedwomenbl.org/wp-content/uploads/2020/01/Analiza-presuda-sudova-u-RS-for-criminal-acts-Persecution-and-Sexual-harassment.pdf> (30. 8. 2022).

³⁰ Krivični zakon Federacije Bosne i Hercegovine, *Službene novine FBiH*, br. 36/2003, 21/2004 – ispr., 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016, 75/2017.

³¹ This is the reason why this criminal offence will be analysed here, although it exists in other legislations as well.

of stalking have the weakest protection under the Criminal Code of the Federation of Bosnia and Herzegovina.³²

Also, the suspects in these cases are most often interrogated by the police, not the prosecutor. Moreover, in practice (as indicated in the previous two paragraphs where the practice concerning the criminal offence of endangering safety was outlined), the prosecutor's office files an accusation only if the suspect does something (hits the victim, walks around the building frequently, waits for her/him, comes to the workplace...), carries out a threat (this can also happen according to this paragraph ("jeopardizes safety in another way"), given the fact that case-law has already constructed the position in interpreting all three paragraphs of Article 183 that the threat must be real and serious, not conditional. This is a particular problem for journalists, where endangering safety is the most frequently reported criminal offence, which would be more efficiently prosecuted if the criminal law of the Federation of Bosnia and Herzegovina included the criminal offence of threats or the criminal offence of stalking (as confirmed in the Montenegro example elaborated above).

5. CONCLUSION

It is positive that stalking has finally found its place in most former Yugoslavia criminal leg-islations and that it is being considered in the spirit of the Istanbul Convention. In Serbia, paragraphs 3, 4 and 5 of Article 138 and in Montenegro points 3, 4 and 5 of paragraph 6 of Article 168a of the Criminal Code should either be worded differently or transferred to other criminal offences or such incrimination should be abandoned altogether, for the reasons we elaborated in section 3 of this paper. Our position is supported by the fact that similar criminal offences are already prescribed, which leads to problems with the qualification of the criminal offence in practice. We consider that both the basic form of this criminal offence and the more severe form are adequately regulated by criminal law in the Serbian and Montenegrin criminal codes. It is important that, formally and legally, in most countries, adjustments have been made to the definition from the Istanbul Convention, which is narrow and does not provide precise answers to the numerous questions which were left to the national legislators. The Istanbul Convention, for example, did not solve the issue of how to evaluate the condition of repetition of the action whereby the act is committed.

As a result, the state determines that time frame within their laws and jurisprudence, and it happens that the same set of actions is punishable in one state and not in another. This is problematic, especially considering how small the area of the former Yugoslavia is, and even more so in the case of Bosnia and Herzegovina, which has four criminal laws. The Federation of Bosnia and Herzegovina and the District of Brčko need to harmonize their criminal codes with the Istanbul Convention as soon as possible to ensure the relevant protection of victims in these cases. Countries do not have to regulate every possible act that could fall within the scope of the definition of stalking in the Istanbul Convention (e.g., no country has taken over acts of vandalism towards pets). The time period in which the

³² This is also the case in the Criminal Code of Brčko District of Bosnia and Herzegovina, where almost everything that is written for the Criminal Code of the Federation of Bosnia and Herzegovina is valid; this offence by its nature cannot be in the Criminal Code of Bosnia and Herzegovina.

stalking should be carried out is not determined by laws, but is left to practice to create on a “case by case” basis. It would certainly be difficult to accept, where it is not prescribed that stalking is committed for a “longer period“ that the period in question could be just a few hours, regardless of how heightened the sensibility of people in modern society is today.

When it comes to case law, where criminal offences are similarly or identically prescribed, we believe those general conclusions cannot yet be drawn. In connection with the punishment of the perpetrators of criminal offences of stalking and other forms of gender-based violence, the courts should make efforts to pronounce stricter sentences instead of a lenient approach to sentencing noted so far. In addition to directly punishing and preventing the perpetrators of violence from committing the same or similar crimes in the future, sanctions have an important impact on the social perception of these forms of violence to which women are predominantly exposed, while conversely, milder sentencing contributes to their additional marginalization and invisibility, and influences the victims to believe they will not be able to achieve protection and safety by reporting. In the countries of the region, there is progress when it comes to prosecution, but even though a number of court decisions have been pronounced, despite the envisaged rather strict sentences, in practice, the penal policy is mild, as demonstrated by research and the case law presented in the paper.

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