ARTICLE 36

SEXUAL VIOLENCE, INCLUDING RAPE

Ludovica Poli

1. *Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:*
   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.*
2. *Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.*
3. *Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.*

A. INTRODUCTION

36.001 Article 36 of the Istanbul Convention requires State Parties to criminalize sexual violence, including rape. Structured into three paragraphs, this provision lists different conducts falling under the definition of sexual violence; it identifies the lack of consent as the central element of the crime and states that intimate partner and marital rape shall be prohibited and punished under domestic criminal law.

36.002 After a few preliminary remarks on the relevance of international case-law for the identification of sexual crimes as human rights violations (para B), the analysis addresses legal definitions and their critical elements (para C) and considers the phenomenon of rape in marriage (or in other intimate relations), as well as the evolution of its prosecution (para D). It finally details States' positive obligations deriving from Article 36 of the Istanbul Convention (para E).

B. PRELIMINARY REMARKS: SEXUAL CRIMES AS HUMAN RIGHTS VIOLATIONS AND THE RELEVANCE OF INTERNATIONAL CASE-LAW

36.003 The case-law of the European Court of Human Rights (ECtHR) is crucial to understand the scope of Article 36 of the Istanbul Convention, as it provides the background to identify sexual violence and rape as violations of human rights, both when committed by State representatives or perpetrated by private individuals. Since the judgment in *Aydin v Turkey* in 1997 – where the Court has addressed the case of a young Kurdish woman violated while in detention – rape has been qualified as a form of torture prohibited under Article 3 of the ECHR, whenever it is committed or threatened by State officials against people in police custody.[1] According to the Court, 'a rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim'.[2] Later on, in the landmark judgment *MC v Bulgaria*, the Court has jointly applied Articles 3 and 8 ECHR to a case of sexual violence committed by private individuals,[3] highlighting that rape has a dual dimension as serious violation of physical and mental integrity and as a severe infringement of the right to sexual autonomy.[4] This case confirms that Articles 3 and 8 ECHR require States to provide protection against interferences from private individuals.[5]

36.004 ECtHR's case-law is essential to assess the constituent elements of the crime of sexual violence[6] as well as to detail the States' relevant obligations, which are not limited to the adoption of criminal law provisions, but embrace a number of measures to respond to such crimes, including the duty to perform an effective investigation.[7] This reading is in line with Article 5 of the Istanbul Convention, which not only requires State authorities to refrain from engaging in any act of violence against women, but also imposes on them the exercise of due diligence in

1 *Aydin v Turkey,* App No 57/1996/676/866 (ECHR, 25 September 1997).

2 *Maslova and Nalbandov v Russia,* App No 839/02 (ECHR, 24 January 2008), para 107.

3 In previous cases it has considered such crime alternatively under Article 3 ECHR or under Article 8 ECHR. Article 3 ECHR has been invoked in cases of rape committed or threatened against people in police custody (*Aydin v Turkey* (n 1) para 85); *Selmouni v France,* App No 25803/94 (ECHR, 28 July 1999) or in cases of parents' longtime sexual abuse of children of which state authorities had or should have had knowledge (*Z and Others v UK*, App No 29392/95 (ECHR 10 May 2001) paras 74–5). Article 8 ECHR have been invoked mostly in case of sexual abuse of minors: *X and Y v the Netherlands,* App No 8978/80 (ECHR, 26 March 1985).

4 *MC v Bulgaria,* App No 39272/98 (ECHR, 4 December 2003).

5 *X and Y v the Netherlands* (n 3) paras 23–4 and 27.

6 Council of Europe (CoE), Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, para 191.

7 *MC v Bulgaria* (n 4) paras 151–2.

preventing, investigating, punishing and providing reparation for acts of violence perpetrated by non-State actors.

36.005 In addition to the Strasbourg case-law, the following analysis will also refer to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Historically, the meaning of their judicial activity on sexual crimes rests on the input it gave to the development of a collective conscience on the condition of women and girls as victims of violence. As a matter of fact, 'the wide media coverage and documentation of the unprecedented scope of sexual violence in the wars of the former Yugoslavia and Rwanda and the developments in international criminal law that these events prompted (…) contributed to placing gender-based violence on the human rights agenda'.[8] Additionally, the case-law of the UN *ad hoc* Tribunals provides important insights on the definition of the elements of sexual crimes. Finally, the relevance of such jurisprudence is also due to the continued applicability of the Istanbul Convention during armed conflict, as complementary to the principles of international humanitarian law and international criminal law (Article 2.3). Indeed, various forms of violence covered by the Convention do not cease during armed conflict or periods of occupation. Rather, wartime sex crimes amplify gender dynamics that pertain to sexual violence in time of peace.

C. CONDUCTS COVERED BY ARTICLE 36 AND LEGAL DEFINITIONS OF SEXUAL CRIMES

36.006 The importance of the effective prosecution of rape and sexual violence has been stressed by the Special Rapporteur on the violence against women, including its causes and consequences, since her first Preliminary Report. The document insisted on the issue of legal definitions, stressing that criminal laws might be controversial on different aspects.[9] On the one hand, the technical description of the criminalized acts is often focused on penile penetration: while this aspect easily reveals the brutality of such aggressions, it might not be sufficient to cover the wide range of possible acts of sexual violence. On the other hand, the identification of lack of consent as the qualifying element of the crime, although emphasizing the value of sexual autonomy, might perversely shape the rules of evidence to be applied in case of rape allegations, bringing them to exclusively focus on the reaction of victims.

1. The description of the actus rei and the need for a gender-neutral definition of a gender-based crime

36.007 International criminal law offers partially different definitions of rape, elaborated by the UN *ad hoc* Tribunals. A 'conceptual definition' is predominant in the ICTR's case-law. In particular, in

8 Ivana Radačić, 'Rape' in Paulus Kaufmann, Hannes Kuch, Christian Neuhaeuser, Elaine Webster (eds), *Humiliation, Degradation, Dehumanization. Human Dignity Violated* (Springer 2011) 119–22.

9 Special Rapporteur on violence against women, its causes and consequences, Preliminary report, UN Doc. E/CN.4/1995/42, (1994), para 179.

the *Akayesu* judgment, overcoming the definition contained in the amended indictment,[10] the ICTR Trial Chamber referred to a general 'physical invasion of sexual nature'.[11] Accordingly, in subsequent decisions, the ICTR has confirmed a preference for a general definition, stressing that 'the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion'.[12] While the ICTY – in line with the principle *nullum crimen sine lege* – opted for a precise, mechanical description of the *actus rei*, searching for principles of criminal law common to the major legal systems of the world. Therefore, in *Furundžija* and in *Kunarac* the Trial Chamber has specified a detailed list of material conduct, focusing on penetration.[13] Nevertheless, the ICTY had clearly stated that 'international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration'[14] and, on the other hand, the ICTR Trial Chamber has pointed out 'the Akayesu [i.e. conceptual] definition and the Kunarac elements [i.e. mechanical description] are not incompatible or substantially different in their application. Whereas Akayesu referred broadly to a "physical invasion of a sexual nature", Kunarac went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.'[15] While embracing different approaches to the definition of the *actus rei* of rape, the two Tribunals clearly converged on the need to efficiently prosecute any form of sexual violence.

36.008 As far as domestic law systems are concerned, the Special Rapporteur on violence against women noted in 1994 that many jurisdictions recognized rape only in case of penile penetration of the vagina, clearly discounting that the offender might differently penetrate a victim or force her/him to perform other sexual acts.[16] Some feminist scholars have stressed the limits of such a description (in which sex is 'expressed in male genital terms'),[17] as it does not properly take into consideration the full range of sexual violations commonly experienced by women and underestimates the physical and psychological effects on the victim of other violent acts of a sexual nature. The Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict has pointed out how 'the historic focus on the act of penetration

10 *Prosecutor v Akayesu*, Case No. ICTR-96–4-I (ICTR Amended Indictment, 13 February 1996): 'acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity'.

11 *Prosecutor v Akayesu*, Case No. ICTR-96–4-T (ICTR Trial Chamber, 2 September 1998).

12 *Prosecutor v Musema*, Case No. ICTR-96–13-A (ICTR Trial Chamber, 27 January 2000) paras 220–9, 225; *Prosecutor v Niyitegeka*, Case No. ICTR-96–14-T (ICTR Trial Chamber, 16 May 2003), para 456. Differently: *Prosecutor v Semanza*, Case No. ICTR-97–20-T (ICTR Trial Chamber 15 May 2003), paras 344–6 and *Prosecutor v Kajelijeli*, Case No. ICTR-98–44A-T (ICTR Trial Chamber, 1 December 2003), paras 910–6.

13 Listing acts constituting a 'physical invasion of sexual nature': *Prosecutor v Furundžija*, Case No. IT-95–17/1T (ICTY Trial Chamber, 10 December 1998), para 185; *Prosecutor v Kunarac et al*, Case No. IT-96–23-T and IT-96–23/1-T (ICTY Trial Chamber, 22 February 2001), para 437.

14 *Prosecutor v Furundžija* (n 13) para 186.

15 *Prosecutor v Muhimana*, Case No. ICTR- 95–1B-T (ICTR Trial Chamber, 28 April 2005), para 550.

16 Special Rapporteur on violence against women, its causes and consequences (n 9) para 180.

17 Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 172, quoted in Noëlle Quénivet, *Sexual Offences in Armed Conflict & International Law* (Transnational Publishers 2005) 12.

largely derives from a male preoccupation with assuring women's chastity and ascertaining paternity of children'.[18]

36.009 The first paragraph of Article 36 of the Istanbul Convention refers to penetration, but also considers other forms of sexual violence. It lists three different conducts that shall be outlawed: sexual violence involving vaginal, anal, or oral penetration with a bodily part or an object (para 1.a), other acts of a sexual nature which fall short of penetration (para 1.b), and situations in which the victim is caused to perform acts of a sexual nature with or by a person other than the perpetrator (para. 1.c). The Istanbul Convention, therefore, adopts a very broad perspective on the description of the *actus rei*, classifying as sexual violence even situations in which the perpetrator does not take active part in the physical abuse, but coerces other people to perform sex. This finds an important precedent in the international case-law in the *Delalić* case, where the ICTY Prosecutor had charged three accused, under their position as superiors, with grave breaches and violations of the laws or customs of war for different inhumane acts, including forcing two brothers to commit *fellatio* on each other.[19] The Trial Chamber recognized that such episode represented an inhuman act and stated that it 'could constitute rape for which liability could have been found, if pleaded in the appropriate manner'.[20] The aim of such kind of violence has been duly stressed by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, stating that, when two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner, '[s]uch crimes are often intended to inflict severe humiliation on the victims and when others are forced to watch acts of sexual violence, it is often intended to intimidate the larger community'.[21]

36.010 Worthy of mention is the wording of Article 36 of the Istanbul Convention, providing a gender-neutral definition of sexual violence, including rape. Despite some feminist scholars considering the notion of rape as '*gender linked*'[22] or '*gender-specific to women*',[23] the evolution of the notion, under many domestic legal systems, as well as under international criminal law, encourages gender neutrality in rape statutes, better reflecting current understandings of the nature and dynamics of sexual violence.[24] Gender neutral definitions are not only responsive to male victimization – including, but not limited to, conflict situations[25] – but are also in line with the genuine purpose of the criminalization of sexual violence: namely, the protection of sexual autonomy of any person.

---

18 Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, Final report, UN Doc. E/CN.4/Sub.2/1998/13 (1998), para 24.

19 *Prosecutor v Delalić et al*, Case No. IT-96–21-A (ICTY Indictment, 9 March 1996), counts 44 and 45.

20 *Prosecutor v Delalić et al,* Case No IT-96–21-T (ICTY Trial Chamber, 16 November 1998), para 1066.

21 Special Rapporteur, Final report (n 18) para 22.

22 Quénivet (n 17) 14.

23 Krishna R. Patel, 'Recognizing the Rape of Bosnian Women as Gender-Based Persecution' [1994] *Brooklyn Law Review* 929–32.

24 Philip N.S. Rumney, 'In Defence of Gender Neutrality Within Rape' [2007] *Seattle Journal for Social Justice* 481.

25 As recognized in the Preamble of the Istanbul Convention, men and boys can be victims of domestic violence, including sexual abuses.

36.011 However, despite the need for a gender-neutral approach in legal definition, rape and sexual violence do not lose their nature of gender-based crimes,[26] as they are rather solidly founded on gender roles and stereotypes (including on masculine and feminine sexuality) and on social implication of sexual victimization. Additionally, there is an unequivocal gender disproportion, as statistically most victims are women, while most of perpetrators are men. Therefore, as recommended by UN Handbook for Legislation on Violence against Women, domestic law should combine gender-neutral and gender-specific provisions to both reflect the specific experiences and needs of female victims of rape, while allowing the prosecution of sexual violence against men and boys.[27]

2. The qualifying element of the crime: lack of consent or situation of coercion?

36.012 Unlike most other crimes, in case of sexual violence, the same act can be enjoyable and lawful, or fierce and illegal: individual consent to sexual contacts draws the line between these two options. Unsurprisingly, therefore, lack of consent is common to the definition of rape and sexual violence and represents the cornerstone for their criminalization under most domestic laws. Framing the case *MC v Bulgaria* under both Articles 3 and 8 ECHR, even the Strasbourg Court has emphasized the centrality of consent in the definition of sexual assault as a human rights violation. Sexual intercourse 'can be considered a violation of physical integrity under Article 3, only in so far as it is non-consensual, i.e. a violation of sexual autonomy under Article 8'.[28] Article 36 of the Istanbul Convention confirms the relevance of this notion, stating that all forms of criminalized sexual acts must be carried out intentionally and performed on another person without her or his freely given consent.

36.013 However, the definition of consent is rather controversial.

36.014 First, 'consent' *per se* covers a very wide spectrum of states of minds: 'from actual desire at one hand to reluctant acquiescence on the other'.[29] Additionally, as some scholars pointed out, in situations of generalized inequality, 'the presence of consent does not make an interaction equal. It makes it tolerated, or the less costly of alternatives out of the control or beyond the construction of the one who consents'.[30] Therefore, approval does not always represent an easily traceable element and/or a component sufficient to understand dynamics of the context in which a sexual intercourse takes place.

---

26 Catherine A. MacKinnon, 'Rape Redefined' [2016] *Harvard Law & Policy Review* 431, 432–3.

27 UN Women, UN Handbook for Legislation on Violence against Women, United Nations Entity for Gender Equality and the Empowerment of Women (2012), 12.

28 Cesare Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in *M.C. v Bulgaria*' [2005] *Journal of International Criminal Justice* 447–58. As stated by other Authors, respect for individual's autonomy is also functional to support gender equality: 'by referring to Articles 3 and 8, the Court may be understood as emphasizing the relationship between dignity and equality and as underlining the discriminatory nature of rape': Beate Rudolf and Andrea Eriksson, 'Women's Rights under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence' [2007] I•CON 507–12.

29 Quénivet (n 17) 21.

30 'Intrinsic to consent is the actor and the acted-upon, with no guarantee of any kind of equality between them, whether of circumstance or condition or interaction, or typically even any interest in inquiring into whether such equality is present or meaningful, at least in the major definition of the most serious crime': MacKinnon (n 26) 440.

36.015 Second, excessive focus on consent might have an adverse effect on the rules of evidence to be applied in case of rape allegations. Considering that lack of consent can be shown in different ways (and that only the victim can authentically attest specific approval to sexual intercourse), this qualifying element risks to be translated, in terms of judiciary assessment, in the different requirement of manifest dissent. Indeed, definitions of sexual assault based on lack of consent often produce secondary victimization of the survivor, urging the prosecution to prove – beyond reasonable doubt – that the victim did not consent to the sexual intercourse.[31] In this regard, as stressed by the Special Rapporteur on violence against women: 'research from all jurisdictions indicates that any woman who has to prove that she did not consent will face enormous difficulty unless she shows signs of fairly serious injury. She will face particular difficulty if she knows or has had a sexual relationship with the man in the past.'[32]

36.016 In order to avoid secondary victimization, several jurisdictions have therefore attempted to move the focus from lack of consent to a general situation of coercion, in which the victim is incapable of giving genuine approval to the sexual intercourse. Nonetheless, even the situation of coercion needs to be correctly and widely defined. Coercion should embrace a concept of threat not limited to menaces of physical force, but including other intimidatory conducts, 'in circumstances where the victim could not reasonably be expected to resist the threat'[33] and properly taking into account, 'the imposition of the other person's position of authority over, or professional or other trusting relation to the victim'.[34] It is worth noting that, as in case of 'consent-based' definition of rape and sexual violence, 'coercion-based' models of defining rape allow to highlight the sexual independence of the victim: 'although [the safeguard of sexual choice] may be achieved by centralizing the concept of consent within definitions of rape, the protection of sexual autonomy requires an appreciation of the range of behaviours, beyond physical force, that may undermine autonomy and thus constitute rape'.[35]

36.017 The dualism between lack of consent and situation of coercion has clearly emerged under international criminal law. The need to focus on the absence of the victim's consent has been stressed for the first time by the ICTY Trial Chamber in the case *Kunarac et al.*[36] The judgment is crucial, as it insists on the protection of the victim's sexual autonomy and points out that, in addition to force and coercion, other elements may feature a sexual intercourse as an act of violence. Still, some commentators have argued that the reference to a generic situation of coercion, rather than the explicit inclusion of non-consent among the elements of the crime, would be preferable, especially for warfare sexual assault. As a matter of fact, rape in war is not 'just' undesired sex: 'it seems more appropriate to speak of "sexualized violence" which, in addition to seriously infringing upon sexual autonomy, violates the victim's physical wellbeing'.[37] However, the *ad hoc* Tribunals have always paid due attention to the circumstances surrounding episodes

31 UN Women, UN Handbook for Legislation on Violence against Women (n 27) 27.

32 Special Rapporteur, Preliminary report (n 9) para 182.

33 *Ibid.*, para 183.

34 *Ibid.*

35 Eithne Dowds, 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force' [2020] *The Modern Law Review* 35–62.

36 *Prosecutor v Kunarac et al* (n 13) para 457.

37 Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' [2007] AJIL 121–27.

of rape. The Appeals Chamber in the case *Kunarac et al.*, for example – once confirmed that the absence of consent is a *conditio sine qua non* of the crime – concluded that the factual circumstances were so coercive as to negate any possibility of genuine consent by the victims.[38] Additionally, the ICTR Appeals Chamber stated that '*the* Prosecutor can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible'.[39] Lastly, the ICC Elements of Crimes describes the qualifying element of rape in the broadest terms, mentioning the use and threat of force against the victim or a third person, the recourse to a situation of coercion (which might be caused *inter alia* by fear of violence, duress, detention, psychological oppression or abuse of power), the taking advantage of a coercive environment and the situation in which the victim is unable of giving genuine consent, because affected by natural, induced or age related incapacity.[40]

36.018 In line with such international case-law, paragraph 2 of Article 36 of the Istanbul Convention states that 'consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances'. Therefore, consent must be evaluated in a twofold dimension: not only as expression of the autonomy of the person, but also in view of the specific conditions in which the acts of sexual nature take place. This requires national law to take into consideration the multifaceted nature of non-consensual participation to a sexual act, pondering elements such as the relations between the victim and the perpetrator, the environmental context, the conditions of special vulnerability of the victim, etc. Indeed, the circumstances in which acts of sexual violence occur are crucial to understand its genuine nature. As pointed out by the World Health Organization (WHO), '[a]lthough sexuality and aggression are involved in all forms of sexual violence, sex is merely the medium used to express various types of non-sexual feelings'.[41] As many studies confirm, the main driving forces behind and the motivations for rape are power, anger, dominance and control, rather than pure sexual desire.[42]

D. INTIMATE PARTNER OR MARITAL SEXUAL VIOLENCE

36.019 According to paragraph 3 of Article 36 the duty to criminalize is applicable also to acts of sexual violence between spouses or in other similar intimate relations between the victim and the perpetrator.

36.020 Sexual intercourse within marriage has been historically considered as a right of the man against his wife, being tantamount the application of his right of possession over her. Indeed, reluctance to criminalize and prosecute marital rape has derived from traditional and/or religious concepts of marriage, structural gender inequalities, as well as from misconceptions about

38 *Prosecutor v Kunarac et al.*, Case No. IT-96–23 and IT-96–23/1-A (ICTY Appeal Chamber, 12 June 2002) paras 129–32.

39 *Prosecutor v Gacumbitsi,* Case No ICTR-2001–64-A (ICTR Appeals Chamber, 7 July 2006) para 155.

40 International Criminal Court Elements of the Crimes, Articles 7 (1) (g)-1 para 2; 8 (2) (b) (xxii)-1 para 2; 8 (2) (e) (vi)-1 para 2.

41 World Health Organization Guidelines for medico-legal care for victims of sexual violence (2003) 9–10.

42 *Ibid.*, 11.

female sexuality.[43] Victims themselves show serious difficulties in recognizing the true nature of the violation they suffer: 'people's perceptions of the prevalence, seriousness, and consequences of sexual violence are clearly linked to the relational context in which it takes place. The closer the relationship between perpetrator and victim, the more diminished the clarity about its wrongfulness.'[44] As it has been pointed out, 'underreporting and social stereotyping of women has made marital rape one of the most misunderstood crimes of the modern era'.[45]

36.021 Thanks to the efforts made by women's movements, some countries began to criminalize marital rape from the 1970s, either abolishing statutory exemptions from the definitions of rape, or framing specific offences under criminal law. Mostly, these changes have firstly appeared in case-law and later been translated into specific legislative provisions.[46]

36.022 The provision of Article 36 para 3 of the Istanbul Convention finds important precedents in the ECtHR case-law. In *S.W. v United Kingdom*[47] and in *C.R. v United Kingdom*[48] the European Court rejected complaints by two applicants – found guilty of raping their wives – who claimed that their conviction constituted retrospective punishment in breach of Article 7 ECHR. Both applicants alleged that the general common law principle that a husband could not be found guilty of rape upon his wife was still in force when they committed the acts which led to the charge of rape. Worthy of mention, in *S.W. v United Kingdom*, the applicant admitted that his conduct would have constituted rape within the meaning of the statutory definition applicable at that time, had the victim not been his wife.[49] The European Court of Human Rights considered that the decisions held by the Court of Appeal and the House of Lords in both cases confirmed 'a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife'[50] and that such 'evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law'.[51] Holding that there has been no violation of Article 7.1 of the Convention, the Court stressed that abandoning the unacceptable idea of immunity for marital rape was not

43 Fus analyses three separate theories applied to justify marital exemption as a legal doctrine, mainly in common law countries: the implied consent theory, the unities of person theory, and the property theory. See Theresa Fus, 'Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches' [2006] *Vanderbilt Journal of Transnational Law* 481, 482–3. De Vido refers to the late condemnation of marital rape in particular in Italy as well as in Great Britain: Sara De Vido, *Donne, Violenza e Diritto Internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011* (Mimesis 2016) 88. For a historical perspective, an analysis of ideological underpinnings of marital rape exception and a comparative study on marital rape exemption in different legal systems, see Vasanthi Venkatesh and Melanie Randall, 'Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and Historical Perspective', in Melanie Randall, Jennifer Koshan and Patricia Nyaundi (eds), *The Right to Say No. Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing 2017) 41.

44 Melanie Randall and Vasanthi Venkatesh, 'The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law' [2015] *Brooklyn Journal of Inernational Law* 159.

45 Melisa J. Anderson, 'Lawful Wife, Unlawful Sex – Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland' [1998] *Georgia Journal of International & Comparative Law* 139.

46 Fus (n 43) 484–5.

47 *S.W. v United Kingdom,* App No 20166/92 (ECHR, 22 November 1995).

48 *C.R. v United Kingdom,* App No 20190/92 (ECHR, 22 November 1995).

49 *S.W. v United* Kingdom (n 47) para 41.

50 *Ibid.,* para 43; *C.R. v United Kingdom* (n 48) para 41.

51 *S.W. v United Kingdom* (n 47) para 43; *C.R. v United Kingdom* (n 48) para 41.

only in line with 'a civilized concept of marriage' but also, and above all, dictated by the very essence of the Convention, namely, the respect for human dignity and human freedom.[52]

36.023 While there has been significant progress in last decades, several States still do not explicitly criminalize sexual assault in intimate relations.[53] Additionally, under many domestic jurisdictions, even where marital exemption has been eliminated, intimate partner rape is still punished less harshly than stranger rape, while procedural and evidentiary requirements are usually higher in cases of marital rape allegations. In general terms, the scope of the sexual component of domestic violence against women in close relations is significantly underrecognized.[54] Unfortunately, domestic violence has been conceived for many years as a merely private matter, on which State authority was not allowed to intervene. Moreover, marital rape is still seen as an extremely intimate aspect of relationships between single individuals, and public powers struggle to see their key role.

36.024 Instead, the fight against such odious forms of violence against women should be a priority and the elimination of marital rape exemptions and other factual obstacles to a proper prosecution is of paramount importance. As a matter of fact, marital rape exemption had serious implications for women's sexuality, but also for their legal personhood[55] and, more in general, for gender (in-)equality. Criminalizing sexual assault in intimate relations contributes to dismantling traditional social norms that confer upon men 'unmitigated rights of sexual access to women who are their spouses'[56] and promote a full recognition of sexual autonomy for women.

E. STATES' OBLIGATIONS

36.025 According to Article 36 of the Istanbul Convention, State Parties 'shall take the necessary legislative or other measures' to ensure the criminalization of the conducts listed under para 1. Positive obligations deriving from the mentioned provision, therefore, are not limited to the adoption of a normative framework coherent with the provided definition of sexual violence, but they also include due diligence obligations. The nature and scope of such obligations can be drawn from the ECtHR case-law, but also the jurisprudence of the CEDAW Committee provides some interesting elements to be taken into consideration.

1. Criminalization and proper rules of evidence

36.026 State Parties to the Istanbul Convention are required to criminalize acts of sexual violence, even when they are perpetrated in marriage or in the context of other intimate relations. More specifically, Article 36 requires national definitions of rape and sexual violence to be in compliance with standards set out in the provision and, in particular, with the key element of

52 *S.W. v United Kingdom* (n 47) para 44; *C.R. v United Kingdom* (n 48) para 42.

53 As of 2015, more than half of the world's countries, as mentioned by Randall and Venkatesh (n 44) 154.

54 *Ibid.*, 155.

55 Melanie Randall and Vasanthi Venkatesh, 'Why Sexual Assault in intimate Relationships Must Be Criminalized as Required by International Human Rights Law: A Response to the Symposium Comments' [2016] AJIL UNBOUND 342.

56 *Ibid.*, 347.

consent. Lack of consent characterizes the crime as a violation of the victim's autonomy and self-determination in an extremely personal and intimate sphere. Therefore, also in line with Article 42 of the Istanbul Convention, States shall refrain from classifying these misconducts as crimes against honour or morality. Not only, in fact, framing them under similar labels does not suitably reflect their violent nature, but it might also 'affect the number of cases reported, prosecuted and successfully convicted'.[57]

36.027 As clarified in the Explanatory Report, while States must adopt criminal legislation which encompasses the lack of 'freely given consent' to the sexual acts listed under Article 36.1, it is left to the Parties both to choose the specific wording and to identify factors deemed to preclude free will, also in view of surrounding circumstances.[58] However, States should refrain from any rigid approach in the definitions adopted, for example avoiding to require proof of physical opposition by the assaulted in all cases. The Explanatory Report significantly refers to *MC v Bulgaria*, where the ECtHR has stated that positive obligations under Articles 3 and 8 of the Convention require 'the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim'.[59] In its 2021 Report, GREVIO mentions – among other promising domestic practices – the criminalization under Swedish law of any sexual act with a person 'who is not participating voluntarily' which renders victim's passivity not sufficient to exclude the perpetrator's responsibility for rape.[60] However GREVIO has also noted that a significant number of State Parties continue to recognize the use of violence, coercion, compulsion, threat, intimidation etc., as essential elements of the offence and states that this approach is at odds with 'the realities of women experiencing sexual violence and their coping mechanisms to such violence, which includes, reactions such as flight, fight, freeze, flop or befriend'.[61]

36.028 The need to avoid any strict reference to the victims' reaction is not limited to the legal definition of the crime but has a major application in evidentiary rules. As the ECtHR has confirmed in *E.B. v Romania*: '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 jeopardizing the effective protection of the individual's sexual autonomy'.[62] Indeed, as precisely underlined in the Explanatory Report, prosecution of rape and sexual violence requires a 'context-sensitive assessment of the evidence', aiming at ascertaining the survivor's free will on a case-by-case basis. Such evaluation must consider very different reactions to sexual violence and shall refrain from assumptions of typical behaviour in similar situations.[63] As noted by GREVIO, the Swedish introduction of the offences of 'negligent rape' and 'negligent sexual abuse' contribute to properly shift the onus on the perpetrator to make that any

57 Equality Now, *The world's shame. The global rape epidemic* (2017) 22.

58 Explanatory Report (n 6) para 193.

59 *MC v Bulgaria* (n 4) para 166: the two rapists weren't prosecuted since it could not be established that the applicant had resisted or called for help.

60 GREVIO, Mid-term Horizontal Review of GREVIO Baseline Evaluation Reports, 10 May 2021, para 362.

61 *Ibid*., para 365: notably, Albania, Andorra, Finland, France, Italy, Monaco, the Netherlands, Serbia and Spain.

62 *E.B. v Romania,* App No 49089/10 (ECHR, 19 March 2019) 56.

63 Explanatory Report (n 6) para 192.

sexual act is voluntary, rather than focusing on the victim's behaviour, including appearance and actions before, during and after the act.[64]

2. Due diligence obligations

36.029 Along with the duty to adopt an adequate legal definition of the crimes and appropriate rules of evidence applicable in case of sexual violence allegations, Article 36 of the Istanbul Convention poses additional due diligence obligations.

36.030 Some of them are common to other violations of human rights and are solidly founded in the ECtHR's case-law. They consist, in particular, in the duties to perform effective investigations[65] and to assure a reasonable length of the criminal proceedings.[66] Indeed, as the Court recurrently stresses, Article 3 of the European Convention gives rise to the obligation to conduct official investigations,[67] not only in cases of ill-treatment by State agents, but also when violence by private individuals is at stake.[68] Similar positive obligations derive from the right to private life, guaranteed under Article 8 ECHR: while deterrence against serious violations of crucial aspects of private life requires adequate criminal-law provisions,[69] the State's obligation to safeguard the individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation.[70] Finally, the Court has pointed out that ineffectiveness of investigations and unreasonable delay in criminal proceedings in case of rape allegations might sometimes represent a systemic violation of the Convention, requiring proper general measures to prevent other similar failures in protection.[71]

36.031 In some cases, the mentioned positive obligations are detailed in view of the specific nature of sexual violence and rape. For example, as effective investigation in these cases implies a medical examination of the victim, this must be performed 'with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination'.[72]

---

64 Mid-term Horizontal Review (n 60) para 362.

65 In *Maslova and Nalbandov v Russia* (n 2) paras 92–7, the Court has noted that, despite a notable and unequivocal body of evidence in support of the applicant's version of events, the authorities had committed several procedural errors leading to the stalemate in the criminal proceedings against the allegedly implicated officers. Other relevant cases include: *I.G. v the Republic of Moldova,* App No 53519/07 (ECHR, 15 May 2012); *B.V. v Belgium,* App No 61030/08 (ECHR, 2 May 2017); *M. and others v Italy and Bulgaria,* App No 40020/03 (ECHR, 31 July 2012); *I.P. v Moldova,* App No 33708/12 (ECHR, 28 April 2015).

66 *P.M. v Bulgaria,* App No 49669/07 (ECHR, 24 January 2012); *W. v Slovenia,* App No 24125/06 (ECHR, 23 January 2014); *M.A. v Slovenia,* App No 3400/07 (ECHR, 15 April 2015); and *N.D. v Slovenia,* App No 16605/09 (ECHR, 15 January 2015).

67 *Assenov and Others v Bulgaria*, App No 90/1997/874/1086 (ECHR, 28 October 1998) para 102.

68 *Opuz v Turkey,* App No 33401/02 (ECHR, 9 June 2009) paras 160 ff; *TM and CM v Moldova*, App No 26608/11 (ECHR, 28 January 2014) paras 36–49.

69 *E.B. v Romania,* App No 49089/10 (ECHR, 19 March 2019) para 55.

70 *Osman v United Kingdom*, App No 87/1997/871/1083 (ECHR, 28 October 1998) para 128; *MC v Bulgaria* (n 4) para 150; *Khadija Ismayilova v Azerbaijan*, App No 65286/13 and 57270/14 (ECHR, 10 January 2019) para 117.

71 *S.Z. v Bulgaria,* App No 29263/12 (ECHR, 3 March 2015).

72 *Aydin v Turkey* (n 1) para 107: in the domestic proceedings the Public Prosecutor has ordered three medical examinations in rapid succession to ascertain whether the applicant had lost her virginity, rather than to establish whether she was

Gynaecological examination of young girls, in particular, has been considered in the case *Yazgül Yılmaz v Turkey*, in which the applicant, at age of 16, was subjected to a pelvic inspection while she was in police custody, in order to ensure, according to the authorities, that she had not been sexually assaulted in detention. The Court recognized that both the examination and the inadequate investigation concerning those responsible represented a violation of the prohibition of inhuman treatment under Article 3 ECHR, underlining that, unlike other medical examination aimed at assessing visible signs of physical violence, a pelvic examination can constitute an additional trauma for the survivor and that, when it comes to the gynaecological examination of a minor, it seems necessary to consider additional guarantees compared to those provided for adults.[73]

36.032 Furthermore, the extremely sensitive issues at stake, in cases of sexual abuses, require special care during any phase of the judicial proceeding. In *Y. v Slovenia* the applicant – a young woman who had denounced a family friend for having repeatedly sexually assaulted her, while she was a minor – has complained that she had been traumatized by having been cross-examined by the defendant during the criminal proceedings. The Court has recognized, alongside the infringement of the procedural limb of Article 3 ECHR for the unreasonable delay in the proceedings, also a violation of Article 8 ECHR, noting that 'the pre-existing relationship between the applicant and the defendant and the intimate nature of the subject matter, as well as the applicant's young age (…) – were points of particular sensitivity which called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue'.[74] The Court stated that the fact that the applicant had been questioned directly, in detail and at length by the man she accused, 'substantially exceeded the level of discomfort inherent in giving evidence as a victim of alleged sexual assaults, and accordingly cannot be justified by the requirements of a fair trial'.[75]

36.033 Lastly, as detailed in the Explanatory Report of the Istanbul Convention, prosecution of rape cases needs not to be not guided by stereotypes and false myths about male and female sexuality.[76] As a matter of fact, gender stereotypes contribute to legitimize *per se* violence against women. Whenever bias and preconceptions are confirmed in judicial decisions, they determine the victims' strong distrust in criminal justice, fueling the vicious circle of violation and impunity.

36.034 An interesting precedent affirming States' legal liability for judicial stereotyping in rape trials is *Vertido v Philippines*, decided by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee). The Author of the communication to the CEDAW Committee had alleged that the acquittal of her rapist breached the right to non-discrimination, the right to an effective remedy, and the freedom from wrongful gender stereotyping, in violation of Articles 2(c), 2(d), 2(f) and 5(a) of the Convention on the

---

a rape victim. According to the Court this contributed to make the investigation deficient and such failure undermined the effectiveness of any other remedies, including the pursuit of compensation and represented a violation of Article 13 ECHR.

73 *Yazgül Yilmaz v Turkey,* App No 36369/06 (ECHR, 1 February 2011) para 47.

74 *Y. v Slovenia,* App No 41107/10 (ECHR, 28 May 2015) para 114.

75 *Ibid.*

76 Explanatory Report (n 6) para 192.

Elimination of All Forms of Discrimination against Women (CEDAW). The woman was an employee of the Davao City Chamber of Commerce and Industry in the Philippines and was raped by a former President of the Chamber in 1996. The case remained at the trial court level for eight years, before the Regional Court of Davao City acquitted the defendant in 2005. In her communication, Ms. Vertido has pointed out several myths and stereotypes on rape victims that vitiated the proceedings against her rapist.[77] She mentioned, in particular, that rape allegations are often seen with suspicion, since women are considered likely to fabricate false accusations:[78] in particular, women are supposed to physically resist sexual assault, thus their failure to try escaping from an alleged attacker prove that there was no rape.[79] She also referred to preconceptions such as the ideas that perpetrators of sexual assaults are strangers rather than victim's acquaintances[80] and that men of a certain age are unable to commit rape.[81] The CEDAW Committee recognized the alleged violations and confirmed that the decision of the Regional Court contained 'several references to stereotypes about male and female sexuality being more supportive for the credibility of the alleged perpetrator than for the credibility of the victim'.[82] It is certainly not easy to identify what States are actually required to do in order to avoid judicial stereotyping, as it implies a complex change in cultural attitudes, but the CEDAW Committee's views made clear that, since 'stereotyping affects women's right to a fair and just trial', the judiciary 'must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general'.[83]

36.035 Judicial stereotypes in prosecuting sexual crimes have also been addressed by the European Court of Human Rights. In *J.L. v Italy*, the Court recognized a violation of Article 8 ECHR stating that the respondent State had failed to protect privacy and dignity of a young woman who had reported being raped by seven men. According to the ECtHR, the Italian Court of Appeal's sentence of acquittal was featured by a guilty and moralizing language that substantiates secondary victimization and discourages victims' trust in the judicial system.[84] Strasbourg judges have considered totally unjustified and inappropriate the references to the applicant's personal and intimate life, including comments on her bisexuality, to the romantic relationships and occasional sexual relations she had before the events, to the lingerie she was wearing that evening and to her assumed 'ambivalent attitude towards sex' and 'non-linear life'.[85] The ECtHR clearly stresses that the faculty for national judges to freely express themselves in decisions, as a manifestation of their discretion and independence, is nevertheless limited by the obligation to protect privacy and dignity of individuals.[86] It also points out that the wording

77 *Karen Tayag Vertido v Philippines,* Comm. No. 18/2008 (Committee on the Elimination of Discrimination against Women View, 22 September 2010) paras 3.5.1–3.5.8.

78 *Ibid.*, paras 2.9, 3.5.8.

79 *Ibid.*, paras 3.5.1 and 3.5.5.

80 *Ibid.*, para 3.5.4.

81 *Ibid.*, para 5.5.7.

82 *Ibid.*, para 8.6.

83 *Ibid.*, para 8.4.

84 *J.L. v Italy,* App No 5671/16 (ECHR, 27 May 2021) para 141.

85 *Ibid.*, para 136.

86 *Ibid.*, para 139.

used by the national authorities in this case reveals a widespread sexist culture destined to affect all women who suffer violence: language and arguments developed by the Court of Appeal convey prejudices on the role of women existing in Italian society and are likely to prevent the effective protection of the rights of victims of gender-based violence, even in the presence of a satisfactory legislative framework.[87]

F. CONCLUSIONS

36.036 Article 36 of the Istanbul Convention aims at harmonizing domestic law and filling legislative *lacunae*, with the aim to facilitate the fight against a crime that seriously offends psychophysical integrity and individual self-determination, while reinforcing discrimination and gender inequalities. Legislative provisions *per se* are not sufficient to eradicate rape and other forms of sexual assault: a broader agenda is needed to promote a solid change in social and cultural conditions that fuel this form of gender violence.[88] However, the presence of an appropriate normative framework, along with efforts to promote a judicial system free from stereotypes, may efficiently contribute to a gradual change in the perception of this serious human rights violation, primarily affecting women and girls.

87 *Ibid.*, para 140.

88 Randall and Venkatesh (n 55) 343.