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The Notion of Consent in Sexual Intercourse: the Istanbul Convention and its Implementation at National Level

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This work is dedicated to all the victims of rape and sexual violence around the world.

In memory of Professor Francesca Franconi.

“It's about time that we stop treating sexual violence as a women issue.”

Thordis Elva, 2017

Contents

List of abbreviations

APAV	Associação Portuguesa de Apoio à Vítima
CAHVIO	*ad hoc* Committee for Preventing and Combating Violence against Women and Domestic Violence
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	International Convention on the Elimination of all forms of Racial Discrimination
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FGM	Forced Genital Mutilation
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenants on Human Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
Istanbul Conv.	Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)
NGO	Non-Governmental Organizations
UN	United Nations
UNCAT	United Nations Convention against Torture
UNCRC	United Nations Convention on the Rights of the Child

Abstract

La violenza sessuale si attesta oggigiorno come un fenomeno tristemente frequente che riguarda le donne da vicino e che spesso richiede un intervento più incisivo a livello legislativo da parte dello Stato, che deve in questo modo essere capace di tutelare le vittime. L'obiettivo di questo studio è infatti dimostrare che molti paesi della regione europea non possiedono una legislazione sufficiente in materia.

Nella prima parte di questo studio verrà presentata una panoramica generale sulla Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica, nota anche con il nome di Convenzione di Istanbul, punto di partenza per l'intera analisi. In particolare, questa prima parte si basa interamente sulla disposizione contenuta nell'Articolo 36 della stessa, che impone alle parti di basare il crimine di stupro sulla mancanza del consenso della vittima. Inoltre, si provvederà alla descrizione del sistema di monitoraggio previsto dalla Convenzione.

La seconda parte di questo lavoro riguarderà invece l'analisi, più pratica, dei report-paese emessi dal sistema di monitoraggio di sei paesi scelti, il cui obiettivo sarà appunto dimostrare che il suddetto elemento della mancanza di consenso nel rapporto sessuale è assente nella legislazione attuale di questi paesi.

In primo luogo, il capitolo 1 analizza il concetto di consenso in un contesto di rapporti intimi tra individui.

Nel primo paragrafo si andranno innanzitutto ad analizzare gli stereotipi di genere e le loro origini. Si evidenzierà il fatto che tale definizione ha normalmente origine dalla stessa società, che attribuisce ruoli, mestieri, professioni, comportamenti, aspettative, etc. che, diventando normativi, si ritrovano tuttora integrati nelle società odierne, rafforzati dall'attività del settore dei media e delle telecomunicazioni e risultando quindi difficili da eradicare. Questo ragionamento sugli stereotipi verrà poi applicato alla sfera sessuale. In seguito, queste concettualizzazioni verranno collocate in un contesto sociale e in seguito legale, sia nazionale che internazionale. Inoltre, si mostrerà come tali stereotipi e miti siano necessariamente interconnessi ai fenomeni di violenza, rappresentandone così l'origine.

Dopo aver chiarito questo punto, e avendo definito lo stupro come rapporto non consenziente tra due individui, vengono distinti preliminarmente i concetti di rapporto sessuale "desiderato" e "indesiderato": questa divisione è utile per comprendere ulteriormente il concetto di consenso e per dimostrare che, anche in un rapporto che può apparire "desiderato" a prima vista, il consenso può non essere espresso a causa del fatto che la vittima spesso può assumere dei comportamenti che assecondano le azioni del suo oppressore. In questo caso, di conseguenza, assumendo questa distinzione, non è possibile parlare di libero consenso, dato volontariamente.

A sua volta, il rapporto sessuale non desiderato può essere diviso in tre categorie, forzato, volontario ed estorto. La differenza tra "forzato" ed "estorto" si evince dai metodi usati dal colpevole per arrivare ad un rapporto sessuale con la vittima: il primo tipo prevede l'uso della forza mentre il secondo forme meno violente di persuasione, come minacce, violenza psicologica, etc. In questo ultimo tipo inoltre, si farà riferimento anche ad esempi di coercizione che non provengono direttamente dall'autore della violenza ma che si originano invece dalla società e dal contesto della comunità circostante.

Il rapporto sessuale non desiderato ma volontario, ovvero dove la vittima si sottopone ugualmente all'atto sessuale nonostante questo non sia desiderato e che spesso non è nemmeno considerato come vero e proprio stupro dalle vittime, sarà approfondito prendendo in considerazione uno studio condotto nel 2015, che tenta di presentare le ragioni di tale acquiescenza da parte delle vittime. Lo studio evidenzierà quattro ragioni prevalenti di tale acquiescenza, che possono essere comunque ricondotte a forme di coercizione sociale.

Il paragrafo successivo invece analizza nel dettaglio le principali concettualizzazioni del consenso sviluppate dalla letteratura accademica, ovvero consenso come concetto fisico (o comportamentale), psicologico, morale, come forma di accordo e come sinonimo di autonomia, cercando di applicare ciascun concetto ad un'ipotetica definizione legale del crimine di stupro e di verificarne l'affidabilità e l'efficacia.

Il paragrafo 5 del capitolo 1 cerca di dare una risposta a questo dilemma in modo più pratico, ovvero di attribuire la definizione più appropriata di consenso in una relazione sessuale in un contesto legislativo, soprattutto dal punto di vista contrattualistico, applicando lo stesso ragionamento anche per quanto riguarda la Convenzione di Istanbul.

Nell'ultimo paragrafo si evidenzierà il fatto che la stesura dell'Articolo 36 della Convenzione, per quanto riguarda il concetto del consenso, è stata influenzata dal caso "*M.C. V. Bulgaria"* del 2003 della Corte Europea dei Diritti Umani. La Corte, per la prima volta, ha affrontato la questione del consenso in un rapporto sessuale in ambito legale ed è stata di enorme influenza per lo sviluppo seguente del diritto internazionale in materia, e di conseguenza anche per la Convenzione di Istanbul. Inoltre, in questo caso per la prima volta la Corte ha riconosciuto che richiedere prove di resistenza fisica a una vittima di violenza sessuale è una pratica che non permette di attestare in modo veritiero se un episodio di violenza sessuale si sia verificato o meno.

Il secondo capitolo andrà invece ad analizzare le principali caratteristiche della Convenzione: si dimostrerà che la Convenzione mira ad essere uno strumento comprensivo per la lotta alla violenza contro le donne e alla violenza domestica, unico e pioniere per la sua struttura e contenuti, e che rappresenta un modello per lo sviluppo futuro del diritto internazionale in materia. La Convenzione, come vedremo, mira a riempire il vuoto nelle norme sulla violenza contro le donne e la violenza domestica nel diritto internazionale.

Nei paragrafi 2 e 3 del Capitolo 2 verranno analizzati i punti più salienti per l'intera analisi, ovvero le definizioni, date dalla stessa Convenzione, rispettivamente di "genere" e di "violenza contro le donne". Si cercherà di dimostrare che esse sono innovative dal punto di vista della concettualizzazione, che cerca di andare oltre i miti e gli stereotipi sui ruoli di genere e sulla sessualità che ancora si trovano intrinsechi nella società moderna. La Convenzione di Istanbul, infatti, definisce il genere appunto come l'insieme dei ruoli, comportamenti, attività e attributi considerati appropriati dalla società per uomini e donne.

Per quanto riguarda la violenza contro le donne, si evidenzierà in fatto che tale definizione secondo la Convenzione racchiude al suo interno diverse manifestazioni che appartengono però allo stesso fenomeno di violenza contro le donne, come per esempio la violenza psicologica, la violenza economica, lo *stalking*, le mutilazioni genitali, etc.

Inoltre, verrà mostrato che la tradizionale classificazione di violenza sessuale e domestica come crimine privato anziché pubblico sia stata gradualmente erosa fino quasi a scomparire. La Convenzione di Istanbul si pone come uno strumento che mira ad abbattere completamente questa barriera, facendo emergere la violenza sessuale e domestica come crimini pubblici.

In seguito, nel paragrafo a seguire, si spiegherà il concetto di "dovuta diligenza" come sviluppato in seno al diritto internazionale e poi applicato al contesto della Convenzione di Istanbul stessa, con le relative disposizioni in materia. Si cercherà di mostrare che gli Stati assumono degli obblighi di dovuta diligenza al momento della ratifica della Convenzione: ciò implica che gli Stati debbano rispettare obblighi sia positivi che negativi. Tali obblighi possono essere applicati anche all'Articolo 36, con tutte le implicazioni che ne conseguono. Il paragrafo seguente invece tratterà l'implementazione della Convenzione da un punto di vista più tecnico.

L'ultimo paragrafo del Capitolo 2 è dedicato alla disposizione contenuta nell'Articolo 36 sullo stupro e la violenza sessuale. Si provvederà qui ad un'esaustiva analisi, focalizzando l'attenzione agli elementi costitutivi del reato, che deve basarsi, secondo la Convenzione, sulla mancanza del consenso della persona su cui si esercita l'atto di violenza sessuale.

Inoltre, in questo paragrafo si mostrerà che, grazie a questo Articolo, non sarà più richiesto ad una vittima di violenza sessuale di mostrare prove della sua presunta resistenza fisica all'aggressione. Questa pratica infatti, è attestata frequentemente in giurisprudenza e la Convenzione mira ad eradicarla, considerato che può rappresentare un atto degradante della dignità della vittima e non costituisce un metodo sufficiente per poter stabilire o meno se il consenso della vittima è stato dato volontariamente.

Il capitolo 3 inaugura la seconda parte di questa tesi, più pratica, come si è detto, rispetto alla prima. Infatti, qui si discute invece il sistema di monitoraggio della Convenzione, composto dal Comitato delle Parti e dal GREVIO, Gruppo di Esperti per l'Azione contro la Violenza contro le Donne e la Violenza Domestica. Il processo di monitoraggio avviene attraverso l'emissione di report per ciascun paese firmatario riguardo la situazione della violenza contro le donne e della violenza domestica di quel paese e riguardo all' inottemperanza delle disposizioni della Convenzione.

Nel secondo paragrafo del capitolo si discuterà se tale sistema di monitoraggio sia efficace oppure no, evidenziando i principali punti di forza e di debolezza. Si avanzerà l'ipotesi che il sistema di monitoraggio previsto dalla Convenzione è efficace e fornisce un quadro completo sull'inottemperanza dei paesi analizzati, nonché una spinta all'implementazione futura della Convenzione.

Successivamente si analizzeranno i report del GREVIO di sei paesi scelti tra quelli firmatari della Convenzione, ovvero Italia, Portogallo, Francia, Finlandia, Danimarca e Paesi Bassi. La scelta è ricaduta su paesi rappresentativi della regione Europea, appartenenti ad entrambe le regioni settentrionale e meridionale dell'Europa.

L'analisi riguarderà solamente l'inottemperanza con l'Articolo 36 della Convenzione di ciascun paese. L'obiettivo è dimostrare che, nonostante molti paesi come la Svezia o l'Austria abbiano già modificato la

legislazione nazionale sulla violenza sessuale, i sei paesi analizzati non includono invece la mancanza di consenso nelle rispettive legislazioni come previsto dall'Articolo 36.

Nonostante alcuni cambiamenti siano comunque stati apportati alle legislazioni di alcuni di questi paesi nel tentativo di avvicinarle il più possibile alla Convenzione di Istanbul, il crimine di violenza sessuale si basa ancora su altri elementi come forza, minaccia, coercizione, sorpresa, etc. e quindi questi emendamenti non sono del tutto sufficienti a garantire una piena ottemperanza con l'Articolo 36.

Questa falla nelle legislazioni nazionali, come vedremo, deriva dai miti e dagli stereotipi sulla sessualità e sui ruoli sociali tradizionalmente associati alla donna, nonché da legislazioni con una concezione datata sullo stupro e sulla violenza sessuale, difficile da eradicare completamente.

Preface

Between July and August 2019, I had the chance to participate in an Erasmus Plus internship abroad in the context of my master's degree in Comparative International Relations. During that experience, I worked for APAV's office in Cascais, Portugal.

APAV (Associação Portuguesa de Apoio à Vítima, in English Portuguese Association of Victim Support) is a Portuguese association of public utility that provides free psychological, judicial and social support for victims of penal infractions of any kind. The association is widely spread in the territory, based in Lisbon and it is funded by local political institutions. The *modus operandi* of the association is to work individually and confidentially vis-à-vis with the victims[1].

In this setting I had the chance to work directly with victims of any kind of crimes, especially with women victims of sexual and domestic violence, which, sadly, were the most common type of crime APAV uses to deal with. In fact, between 2013 and 2018, APAV registered 5228 sexual related crimes nationally [2]. Of those cases, almost 92% of the victims were female[3] and 94% of the perpetrators were male[4].

Thanks to this experience I worked in close contact with victims of sexual violence and learnt how to deal with them, acquiring also a basic knowledge of the legal tools specifically used in Portugal. In addition, I became aware of the fact that Portugal did not comply with article 36 of the Istanbul Convention: this means that its legislation on rape does not include the non-consent of the victim as a constituting element of the crime. For this reason, a political debate on the issue that later became public was recently opened in the country. Sadly, other countries in the European region happen to have the same problem.

It is thanks to this experience that the idea for this dissertation emerged, and I wish to thank the APAV office of Cascais and my supervisor Carolina Gomes for this opportunity.

[1] Official website of APAV, found in: https://apav.pt/apav_v3/index.php/pt/a-apav/quem-somos, retrieved 13/02/20.
[2] Associação de Apoio à Vítima, (2013-2018). *Estatísticas APAV. Crimes Sexuais*, page 2.
[3] Ivi, page 4.
[4] Ivi, page 8.

Introduction

It is widely acknowledged that sexual violence, in particular against women, is nowadays a global issue. In Europe, the prevalence of physical and/or sexual intimate partner violence among ever-partnered women is 25.4%, while lifetime prevalence of non-partner sexual violence is 5.2%[5]. The aggregated data for lifetime prevalence of intimate partner violence, both physical and/or sexual or non-partner sexual violence or both among all women is 27.2%[6]. This means that in the European region roughly one woman out of three suffers some form of sexual violence at least once in her lifetime.

Sexual violence is defined as any sexual act or attempt to obtain a sexual act, or unwanted sexual comments or acts to traffic, that are directed against a person's sexuality using coercion by anyone, regardless of their relationship to the victim, in any setting, including at home and at work[7]. As we can argue, sexual violence includes a series of other violent phenomena involving the sexual sphere, resulting as being composed by multiple elements and not referred to as a single expression of violence. In this work we are going to focus mainly on rape.

Rape is widely understood as an unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception[8]. While domestic violence is acknowledged to be a violation of human rights, the sexual component of violence against women in intimate relationship is under-recognised[9].

The phenomenon of violence against women and domestic violence accounts nowadays as one of the major violations of human rights that occurs in different countries and different social groups and that possesses specific social and cultural peculiarities[10]. Particularly in Europe, domestic violence is characterized as being widespread in the whole territory and by the presence of a deep bond between victim and perpetrators, often partners, ex partners or relatives, acquittances and so forth[11]. Victims and perpetrators might belong to any social, cultural and economic classes.

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[5] World Health Organization. (2013). *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence*. World Health Organization, pages 17 and 19.

[6] Ivi, page 20.

[7] SVRI (Sexual Violence Research Initiative), found at: https://svri.org/research-methods/definitions, retrieved 01/09/20.

[8] Merriam-Webster Online Dictionary, found in https://www.merriam-webster.com/dictionary/rape, retrieved 31/08/20.

[9] De Vido, S. (2020). Violence against women's health in international law. In *Violence against women's health in international law*. Manchester University Press, page 39; Randall, M., & Venkatesh, V. (2015). The right to no: The crime of marital rape, women's human rights, and international law. *Brook. J. Int'l L., 41*, 153, page 155.

[10] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica (Convenzione di Istanbul)*, n. 85, edited by CeSPI (Centro Studi di Politica Internazionale), n.85, page 1.

[11] Ivi, page 1.

A source reports that sexual violence and rape are means often used to exercise power and control by an abusive partner over a victim, expected to occur also after break-up[12]. Violence against women represents a menace to the health, social well-being and economic prosperity of women[13], it might prevent women from the correct and rightful realisation and enjoyment of their full rights and preclude their participation in community life[14].

The consequences of such violence might be visible psychologically, physically, and sexually and they can be manifest in the short or in the long term, negatively influencing the general well-being of women and limiting thereby their full participation in the society in which they live, till depriving them of life itself in the most extreme cases[15]. It does not cause only harm manifested as bodily injuries, fear and psychological pressure, but also lead to a change in the behaviours of the victim that might reflect a limit of its own autonomy, causing a second cycle of harm[16]. For example, many women who have been raped adjust their behaviour because they fear being raped again and suffer therefore a new form of harm[17]. It is then to be considered as a double harm: the harm of rape, and the harm caused by the consequences of rape, that might be, as seen, psychological, physical, and so forth[18].

This phenomenon has a negative impact not only on women directly involved in it, but also on their families and communities, reverberating in this way on national balances and thereby on the general process of development, due to the huge human, social and economic costs resting on the shoulder of families, communities, States and society[19].

The individual right to health is increasingly becoming a national public health issue, and, considering the international community as a network of actors, combating violence against women is becoming a global public issue that implies national and international efforts alike[20].

Incidentally, it is to be mentioned the fact that in the international context, especially within the UN, the attention is gradually shifting to this important issue. However, we can affirm that legislative steps to protect women against violence have been more successful on a regional level: the Council of Europe Convention on Preventing

[12] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011, page 33.

[13] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 9.

[14] Ibidem.

[15] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 3.

[16] De Vido, S. (2020). Violence against women's health in international law, page 137.

[17] Eriksson, M. (2011). *Defining rape: emerging obligations for states under international law?*. Brill, page 60.

[18] De Vido, S. (2020). Violence against women's health in international law, page 137.

[19] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 3.

[20] De Vido, S. (2016). The ratification of the Council of Europe Istanbul Convention by the EU: a step forward in the protection of women from violence in the European legal system. *Eur. J. Legal Stud.*, *9*, 69, pages 85-86.

and Combating Violence against Women and Domestic Violence (hereafter, the Istanbul Conv.) is in fact the most recent treaty directly addressing the issue of violence against women in Europe[21].

This dissertation focuses solely on sexual violence in peacetime performed by non-state actors in the context of countries that ratified the Istanbul Convention[22]. In particular, this work will analyse the reports of six representative countries emitted by the monitoring body of the Convention, the Group of Experts on Action against Violence against Women and Domestic Violence, known as GREVIO. The analysis will focus on the nonfulfillment of those countries with Article 36 that specifically entails sexual violence. We will argue that those countries are not in line with Article 36 since they do not include the lack of consent as a founding element of the crime of rape and sexual violence and that the current legislation of those countries reflects an outdated conception of the offence of rape. The whole analysis therefore focuses specifically on national laws.

The study is divided into two parts: the first one concerns a more detailed description of the implications of the inclusion of the concept of consent in sexual intercourse in legislation on sexual violence, as well as of the Istanbul Conv. as a whole and of Article 36 on sexual violence, while the second part is dedicated to the practical analysis with the support of GREVIO reports of compliance of six selected countries that ratified the Istanbul Convention.

Chapter 1 is dedicated to the attempt to properly delineate the concept of consent in a sexual intercourse.

In first instance, we will discuss the role that gender stereotypes play in delineating sexual related crimes. We will briefly describe their origins, showing that they can be traced back to society and history. Furthermore, we will try to apply them in a social context and in a legislative context, both national and international, showing, again, their influence, often unconscious, in policies and laws.

After stating that rape is defined as non-consensual intercourse between two individuals, we will draw a distinction between wanted and unwanted sexual intercourse in chapter 1.3., that is useful to further define what is genuine consent and what it is not.

In addition, we will draw a further distinction of unwanted sexual intercourse between forced, willing and coerced. Forced and coerced unwanted sexual intercourses differ from one another in the different ways in which sexual intercourse is extorted: force in the former and nonviolent means in the latter, such as psychological violence, threats and social coercion. The latter deserves here a special attention. Conversely, we will base the analysis of the category of unwanted willing sexual intercourse on a study on sexual violence carried out in 2015 in order to determine the reasons why women often acquiesce to unwanted sexual intercourse and arguing that in these instances it is impossible to speak about freely given consent.

Then, in 1.4, we will present how consent is conceptualised by the main authors of literature on the topic, analysing consent as a physical (or behavioural) concept, a psychological concept, a moral concept, a form of

[21] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women. *Australian Law Journal*, *89*(9), 619-627, page 1.

[22] For what concerns sexual violence during armed conflicts, we deliberately chose not to include this issue since the whole work's focus wants to be sexual violence as framed in national laws of the six analysed countries, therefore considered during peacetime.

agreement and a synonym of autonomy. In addition, for each concept we will also try to establish whether it might or might not be applied in a context of a legislation on rape.

In 1.5 we will try to better apply the conclusion reached in 1.4. for what concerns attributing an appropriate definition of consent to a law on sexual violence and rape: we will discuss a definition under a contractualist perspective and from the point of view of philosophy of law. This discussion will be brief and will serve solely as a background for what comes next since this is not the appropriate context to exhaustively provide for a complete explanation of this kind.

Chapter 1.6. argues instead that the introduction of consent in international law has been heavily influenced by the case of *M.C. v. Bulgaria* of the European Court of Human Rights, which for the first time dealt with a case of insufficient national legislation on rape. The case for the first time assessed that evidences of resistance of the victim are not to be demanded in trials, representing in fact an outdated method of assessing a case of sexual violence. We will argue therefore that this case has been pioneer in the introduction of the concept of lacking consent in sexual related crimes and that it constitutes a model for further development of international law.

Chapter 2 will present in first instance a general overview on the Istanbul Convention. In the course of the chapter we will describe in detail what the Convention means for "gender" (Chapter 2.2.) and "violence against women" (2.3), including also the reasons why those definitions provided by the Convention itself can be considered as innovative compared to the common conception of them originated from society, myths and stereotypes and the needs that pushed the drafters of the Convention to include them in such way.

In addition, we will also deal with the concept of sexual violence, describing the characteristics and extent of the phenomenon and also its inclusion within the Istanbul Conv. as one of the main manifestations of violence against women.

Afterwards, we will deal with the concept of due diligence envisaged by the Convention, and by other international covenants, in order to demonstrate that the States that ratified the Convention are bounded by both negative and positive obligations towards the rights envisaged by it. In chapter 2.5, the practical process of implementation of the Convention is described in detail.

In the last paragraph of Chapter 2 we will deal with Article 36 on sexual violence and rape which prescribes the inclusion of the notion of non-consent as founding element of the crime of rape. This paragraph represents the core of the whole work: we will explain the importance and innovation of a provision of this kind in an international covenant, and also the implications on ratifying states, for example the eradication, prescribed by the Istanbul Conv. itself, of the practise to require in trials proves of the physical resistance to sexual violence by victims. In addition, we will attempt to individuate which concept of consent within those we enlisted in paragraph 4 of chapter 1 the Istanbul Conv. seems to apply for its provision on rape.

Starting from Chapter 3 we enter instead into the second part of the dissertation: the chapter deals with the monitoring system of the Istanbul Conv.: its functioning is described in 3.2. and in 3.3. we present the main arguments in favour and the critiques to the monitoring system, asking the question whether it is an effective or ineffective system.

Afterwards we will attempt to demonstrate that the positive obligations envisaged by the Istanbul Conv. are not fulfilled by some countries for what concerns sexual violence.

The analysis of the compliance of Article 36 of the Istanbul Conv. of six selected countries will be carried out, respectively Italy in 3.4., Portugal (3.5.), France (3.6.), Finland (3.7.), Denmark (3.8) and the Netherlands in 3.9.

For each country we will also show that, despite the fact that many attempts to amend the legislation have been made by said countries, those changes are still not enough in order to fully comply with the requirement of introducing the lack of consent as a founding element in the legislation on rape and sexual violence. Some concluding remarks about the previous analysis will follow afterwards: we will show that, although some countries analysed by GREVIO do comply with Article 36 such is the case of Sweden and Austria, the six analysed countries are not in line with this provision, still at the time of writing.

1. The Concept of Consent in a Sexual Intercourse

1.1. Introduction to the chapter

The preliminary question that emerges when speaking about sexual violence is what we exactly mean by "freely given consent" in a sexual intercourse. An attempt to answer this question will be provided in this first chapter. Before drawing conclusions about freely given consent in sexual crimes we have first to analyse the concept of consent itself: here we will present an attempt to research a suitable explanation for it, after developing a deeper analysis and try as well to draw a connection with the Istanbul Convention.

The definition of sexual violence stating that an individual A commits a sexual offense when a second individual B says no or when B does not positively agree to sexual intercourse[23] can be completed by affirming that any indication of agreement does not represents authentic consent if the individual B is coerced or forced into saying yes, or when A abuses an authority position, or if consent is extorted through deception or intoxication through alcohol or other substances[24].

Broadly speaking, consent for a sexual act must be voluntary and freely expressed, specific for every act and freely revocable in any moment[25]. The absence of consent might be expressed through any mean, such as verbally, in a non-verbal way, gestures, expression of fear or repulsion, and so forth and it should not be combined with physical act of resistance or opposition[26]. The notion of consent presumes in general positive acts and collaboration, or an active behaviour, while on the other side silence cannot be identified as consent[27]. In this context, silence originates from fear and from the state of fright of the victim, from the dissociation of the personality that paralyses him or her, or from the consciousness of the uselessness of any reaction[28].

Sexual violence cannot be defined solely as sexual intercourse that lacks consent without engaging a deeper examination of the meaning (or meanings) of consent[29]. The boundaries of the definition of sexual consent are nowadays vague and undefined. There exists a range of definitions that shape different shades of meaning of this concept. It is undoubtedly true that often times, consent is a concept that is taken for granted and often defined in a superficial way: we can affirm that within academic literature on sexual consent, there is still no agreement on what it is exactly, and different opinions diverge[30].

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[23] Wertheimer, A. (2000). What Is Consent? And Is It Important? *Buffalo Criminal Law Review*, *3*(2), 557-583, page 558.
[24] Ibidem.
[25] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género. *Ex aequo*, (31), 105-121, page 110.
[26] Ibidem.
[27] Ibidem.
[28] Ibidem.
[29] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature. *Feminism & Psychology*, *17*(1), 93-108, page 106.
[30] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 93; Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence. *Trauma, Violence, & Abuse*, *16*(2), 111-135, page 118.

In this chapter we will try to give a definition of this concept based on the work of different scholars.
In the first paragraph we will attempt to exhaustively define gender stereotypes and to identify their origin, demonstrating that they come from society and history. In addition, we will try to establish the connection that they have in relation to sexuality, sexual related crimes, society and legal discourses (both from a national and international point of view).
After stating that lacking consent in a sexual intercourse is essential in order to attest an episode of rape, in paragraph 1.3., the separation of the concept of wanted and unwanted sexual intercourse is discussed, explaining also the consequences that this separation might have on the overall definition of criminalisation of consensual or non-consensual sexual acts.
Furthermore, the concept of consent will be analysed from the point of view of the literature on sexual discourses (1.4.) and from a legal perspective (1.5.). This latter paragraph is connected to paragraph 1.6. on the case *M.C. v. Bulgaria.* In fact, the case is considered to be a pioneer in the introduction of consent in international legislation about sexual violence and thereby it is important also due to the influence it had on the drafting of Article 36 of the Istanbul Conv, this last argument better discussed in chapter 2.

1.2. The Relationship between Gender Stereotypes and Sexual Violence in Society, Domestic and International Law

Generally speaking, gender inequalities expressed in the attribution of constructed gender roles to women and in the creation of patriarchal stereotypes created and still create favourable conditions for or are even cause of the phenomenon of violence against women[31]. As a scholar highlighted, "gender is embedded into sexual scripts that specify the who, when, where, how, and why of sexual behaviour"[32], highlighting in this way the strong normative codes that gender roles encrypt.
It is important to consider also the range of different kinds of masculinities and femininities present in our cultures and how they influence and are influenced by our conception of gender hierarchy and power when we make a distinction between sex, which is a biological structure, and gender, which is instead socially constructed[33]. The form in which gender is designed depends, according to a scholar, on a series of "societal influences and messages[34]".
The question arising is to what extent is our choice of gender self-determined and whether it is easy or not to resist to expectations of society of gender conformity[35]. In the words of an author, in a social construction of

[31] De Vido, S. (2016). *Donne, violenza e diritto internazionale: la Convenzione di Istanbul del Consiglio d'Europa del 2011*. Mimesis, page 31.
[32] Walker, S. J. (1997). When "no" becomes "yes": Why girls and women consent to unwanted sex. *Applied and Preventive Psychology*, *6*(3), 157-166, page 161.
[33] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes. *Violence against women*, *8*(11), 1271-1300, page 1273.
[34] Ibidem.
[35] Ibidem.

gender, it does not matter what men and women do or behave or even if they do the same thing; what actually matters is the fact that what they do is substantially different or perceived as such[36].

In order to better understand this concept, we can pose as examples the roles that in many cultures, including western societies, are exclusively and traditionally ascribed to women. The examples are countless and widely acknowledged among society: to cite the most evident forms, we can speak about the expectation for women to stay home, cook, do housework, raise and educate the children. The separation of the male and female gender follows that, apart from biological gender, we also found genders that we can define as "societal", characterized by being socially constructed and by including roles, behaviours, attributes, activities, professions, even colours (think about blue and pink attributed to new-borns) that are expected to belong to one or the other gender[37]. For example, since childhood, fairy tales have inculcated in the mind of girls the images of the beautiful and non-aggressive princess in contrast to the ugly and powerful witch[38]: the former to be considered as a positive example to follow, the latter as the negative model to avoid, as well as having framed some normative behaviours to adopt in social life.

The media and the telecommunication sector massively contribute to the enforcement of said stereotypes[39] (think for example to advertisement). Moreover, an appropriate way of being feminine is still dominant in society, and is usually associated with "beauty, nurturance and self-sacrifice"[40]. The same can be argued about an appropriate way to be "masculine", which in turn implies for example ideals of strength, virility, power and domination.

The male and female genders often visibly distinguishes in the following, drastic way: the male gender, culturally defined in its manhood, often needs to reject the female gender, itself culturally defined in its womanhood, through distinguishing itself as strong, powerful, controlling, and often aggressive and also violent[41]. Strong men are supposed to take control, and weaker women are to be rescued and protected[42]. This belief in the antiviolent nature of women can be reconnected to pre-existing prejudices about female nature, in particular that women are caring and peace-loving individuals, unable to do any harm to others[43]. In this view, women themselves tend to associate powerlessness with innocence[44].

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[36] Lorber, J. (1994). *Paradoxes of gender*. Yale University Press, page 26.

[37] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 8.

[38] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1287.

[39] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica,* page 22.

[40] Walker, S. J. (1997). When "no" becomes "yes", page 161.

[41] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1274.

[42] Ivi, page 1276.

[43] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1292.

[44] Ibidem.

Gender polarity then occurs when the duality masculine-feminine is built around rigid boundaries[45]: this means that the two gender and the respective roles and expectations are divided by strong boundaries created by society and history itself that cannot be overcome in any way and that make gender inequality even strongest.

If we apply the concept of normative gender roles in sexuality, we find men as those entitled to be the initiators in a sexual situation, more inclined to the physical dimension of the relationship[46], while women are associated with passivity, emotionality, submission, dependence and action directed at limiting a man's sexual advances are seen as positive[47]. As a consequence, sexual activities of men are considered tolerable and always permitted, even when disputable, while female sexuality is restricted to a smaller range of action, controlled and often censured[48] or transformed into superstitions or taboos.

The woman, in a sexual context, is considered as the object that provokes men's sexual arousal, which is presumed to be natural and unquestionable[49]. A woman therefore excites the natural desire of men, and she is entitled to attempt to yield this force[50].

As a result, sexual violence is in part the product of the fictitious instability of gender polarity, the aim of which is to "enforce and reinforce what only appears to be buckling[51]". This means that masculinity, femininity, gender, power, control, sexuality, and violence are all artificial and constructed concepts, based on assumptions, myths, and stereotypes about men and women[52].

The stereotype is consequently transferred to rape: women's sexuality as well has been considered traditionally as a property of men[53]. Therefore, the offence of rape was not committed against the woman but conversely against the father, the husband, the brother and so forth, which were men entitled to possess the sexuality of the woman or who had some sort of direct right upon it. As already argued, when women are considered as a property belonging to men, this stereotype acts in favour of male sexuality and allow sexual exploitation of women through sexual assault and violence[54]. Violence has been seen as a constructed domain of men: visible physical aggressions are a result of the masculine representation[55]. Accordingly, the more subtle and indirect forms of aggression used by the female counterparts grant upon them some traits considered as not appropriate, such as hysteria, manipulation, cunning, anger and so one[56]. As a commentator noticed, the same myth of the

[45] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1281.
[46] MacCorquodale, P. (1989). Gender and sexual behaviour. *Human sexuality: The societal and interpersonal context*, 91-112, page 103.
[47] Walker, S. J. (1997). When "no" becomes "yes", page 161.
[48] MacCorquodale, P. (1989). Gender and sexual behaviour, page 100.
[49] Hare-Mustin, R. T. (1994). Discourses in the mirrored room: A postmodern analysis of therapy. *Family process*, *33*(1), 19-35, page 24.
[50] Walker, S. J. (1997). When "no" becomes "yes", page 162.
[51] Jack, D. C. (2009). *Behind the mask: Destruction and creativity in women's aggression*. Harvard University Press, page 261.
[52] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1281.
[53] De Vido, S. (2020). Violence against women's health in international law, page 37.
[54] Ivi, pages 37 and 38.
[55] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1291.
[56] Pearson, P. (1997). *When she was bad: violent women & the myth of innocence*. Viking Press, page 21.

foundation of Europe as well is based on a gender stereotype[57] and on an episode of rape and violence, that can be traced back to the Greek mythology.
Modern societies and their members might or might not be aware of how pervasive the assumptions, myths, and stereotypes about women and gender are as direct result from beliefs that can be traced back into our historical past[58].

The way in which individuals in society talk about women and the use of violence has important implications for the development of policies and criminal justice concerning women[59].
Even though not intentionally, states may cause or create favourable conditions for the further development of violence against women, because their systems encourage the perpetuation of patterns of discrimination rooted in the society through policies and laws, even when it seems that these measures have been adopted for the benefit of women themselves[60] . In the words of a scholar, said intention to discriminate might be systematic without however being conscious, and thus intentional[61]. As we will see in the course of this work, some international legal tools such as the Istanbul Convention aim at dismantling said repeating circles of violence through policies that directly recognise the structural discrimination of women in society.
As remarked by a scholar, due to the conceptualisation of sex and gender as a dichotomy, women have always been depicted as more vulnerable subjects with respect to men and in need of protection[62]. They also have been represented as the main object of international treaties, which only focus on their weaknesses[63]. Aggression is a primary marker of the difference between the masculine and the feminine, and conceiving women's aggression as unnatural helps hiding the political character of gender inequality, namely of gender itself[64].
Another commentator attempted to overcome the divide between masculine and feminine by "conceiving sex and gender as a fully social and performative category[65]". This implies that sex and gender can easily be reconfigured by international human rights law as a dynamic concept possessing different delineations[66], as we will argue it is the case of the Istanbul Conv.

To resume, we report a commentator that argue that "the meaning of gender and gender identity for any individual" is created by "an individual, personal creation and a projective emotional and fantasy animation of

[57] De Vido, S. (2020). Violence against women's health in international law, page 11.
[58] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1283.
[59] Ivi, page 1271.
[60] De Vido, S. (2020). Violence against women's health in international law, pages 5-6.
[61] Ivi, page 6.
[62] Ivi, page 10.
[63] Otto, D. (2010). Women's rights. *International human rights law*, 345-364, page 311.
[64] Grindstaff, L., & McCaughey, M. (1996). Re-membering John Bobbitt: Castration anxiety, male hysteria, and the phallus. *No angels: Women who commit violence*, 142-160, page 150.
[65] De Vido, S. (2020). Violence against women's health in international law, page 10.
[66] Otto, D. (2013). International human rights law: Towards rethinking sex/gender dualism. *The Ashgate Research Companion to Feminist Legal Theory*, 197-216, page 211.

cultural categories"[67], recognising in this statement the reflection of culture in the personal system of values of an individual that might influence his own judgement on reality: the same discourse is valid not only for sexuality but as well for many others moral values.

Having explained how sex and gender stereotypes are deeply interconnected with sexual violence, we now have to enter a deeper discussion of how the boundary between legitimate sexual intercourse and rape is overcome passing to constitute rape. In order to do so, we have to introduce in detail the core element of this work, namely the concept of freely given consent in a sexual intercourse, which absence constitutes an instance of rape.

We will demonstrate that the issues and debates about a proper definition of this consent are to be as well traced back to those same stereotypes and myths discussed above, and that a proper and clear definition has not been agreed yet, neither in the academic nor in the legal environment.

1.3. Wanted and unwanted sexual intercourse

As a preliminary analysis, in order to give a thorough definition of consent, the dynamics that surround the issue of sexual relations and sexual intercourses are to be analysed in order also to attempt to achieve a deeper understanding of the concept. Consent within sexual discourse is a still vague concept and the definition changes according to the academic point of view taken into consideration (e.g. philosophical, moral, legal, psychological and so forth).

Many scholar warn us by arguing that it is often assumed that sexual violence is a form of sexual assault and it is synonymous of unwanted sexual intercourse[68]: in normative sexuality, sexual coercion is so frequent that leads to consider sexual intercourse and sexual assault as identical[69]. However, this does not always correspond to reality and the two concepts need to be clarified and distinguished in first instance.

In this context we are adopting the distinction between wanted and unwanted sexual intercourse, and in this paragraph, we will deal exclusively with sexual intercourses under the "unwanted" category.

Unwanted sexual intercourses are defined as sexual activities that are performed regardless the unwillingness of one of the partners. Using the image[70] below as a reference, unwanted sexual acts fall in the obscure region that corresponds to the less visible forms of sexual violence: despite the fact that the fatal sexual assault on the top of the pyramid can be classified as lacking consent, as shown there is still a "grey" area in which the concept of consent is challenged and that still needs to be properly researched[71].

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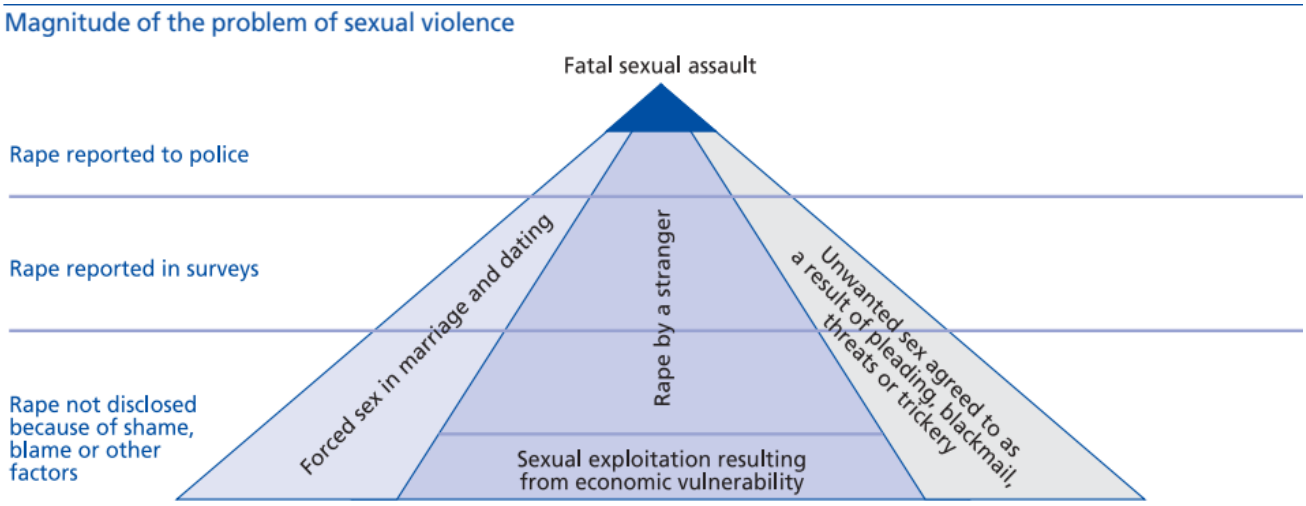
[67] Chodorow, N. (1999). *The power of feelings: Personal meaning in psychoanalysis, gender, and culture*. Yale University Press, pages 69-70.

[68] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 126.

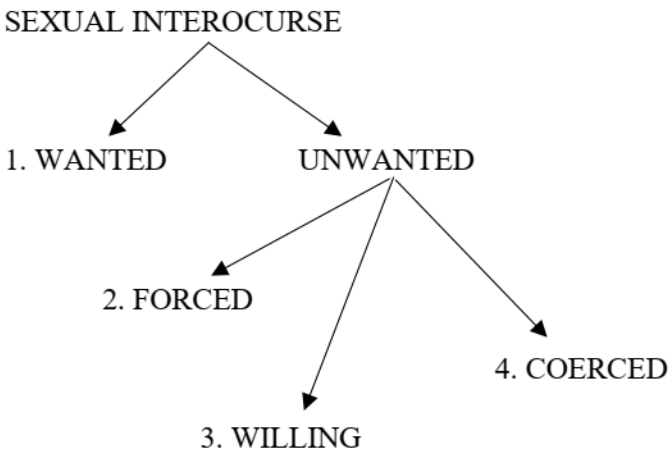
[69] Hakvåg, H. (2010). Does yes mean yes? Exploring sexual coercion in normative heterosexuality. *Canadian Woman Studies, 28*(1), page 122.

[70] Credits for the image: Krug, E.G., Dahlberg L.L., Mercy J.A., Zwi A.B. And Lozano R. (2002), *World Report on Violence and Health*, World Health Organization, page 150.

[71] Walker, S. J. (1997). When "no" becomes "yes", page 157.



As far as concerns unwanted sexual activities, we can further accept the definition given by different group of scholars, which classified them in three categories: forced, coerced and willing[72].



As specified by many scholars, the concept of wantedness and consent should be considered as separated and independent from each other: in fact, when taken together, the risk is that the concepts would be rendered as categorical and unequivocal, while it would actually be more correct to define them as being on a *continuum*[73], less likely to be defined under one single specific label: in other words, we do not always find the two concepts as completely separated or completely meshed, but instead they occur in different degrees in different contexts. The general context of the relationship between the two individuals involved, or of a case when speaking about a legal procedure, affects the way in which consent is assessed as being freely given or for some reason contaminated[74]. This kind of distinction introduced so far serves to the purpose of capturing more subtle forms

[72] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent: The hidden role of coercion in experiences of sexual acquiescence. *Journal of interpersonal violence*, *30*(11), 1828-1846, page 1829.
[73] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 116.
[74] Ibidem.

of sexual violence, including the less evident ones and those that at first glance can even not being considered as proper violence[75].

As shown, unwanted sexual activities are further divided into three categories. The second category shown in the image above, forced unwanted sexual activity, is categorised as a sexual activity which involves the use of force on an unwilling partner, while in the fourth category, coerced unwanted sexual activity, the coercion is expressed via non-physical forms of force, for example psychological manipulation, economic violence, threats and so forth.

By including coercion in the definition of unwanted sexual intercourse and consequently of sexual violence, it would ease the analysis of more subtle forms of the phenomenon[76]. In this latter type of unwanted sexual intercourse, one possible cause that leads alleged victims to perform the act is that they consider himself or herself not being able to refuse or not having other choice. This can be easily explained by the fact that, historically, female sexuality has been conceived as being passive[77], as remarked in the preceding paragraph.

In a context of previous consensual sexual activities between two partners, thereby in a long-lasting relationship, it is more difficult to assess whether sexual intercourse had been wanted (consensual) or unwanted (non-consensual)[78]. This can be explained by the fact that is more difficult to express non consent in a context of previous past sexual intercourses or in a long-lasting relationship, and on the other hand it is easier to non-consent to a sexual act with an acquaintance or with an individual someone is not familiar with[79].

Coercion here is intended as being not only exerted from a possible perpetrator (therefore defined as interpersonal coercion[80]) but as well produced within society. Telling lies, making empty promises, threatening to end the relationship, threatening to spread rumours, and as we shown, using authority (from a boss or a teacher for example) account as instances of interpersonal coercion[81]. Women are more likely to be subjected to interpersonal coercion than men, and in turn men are more likely to exert interpersonal coercion on women[82]. This is a demonstration that, nowadays, sexual interpersonal coercion is considered an acceptable and normalized behaviour[83] and that can enjoy impunity.

Social coercion is conceptualized by some scholars[84] as the pressure to individuals to comply with role obligations ascribed to biological sex in an intimate relationship, provided also that there exist a certain social

[75] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 116.
[76] Ivi, page 115.
[77] Gavey, N. (2013). *Just sex?: The cultural scaffolding of rape*. Routledge, page 145.
[78] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 116.
[79] Hakvåg, H. (2010). Does yes mean yes?, page 122.
[80] Gavey, N. (1997). Feminist poststructuralism and discourse analysis. *Toward a new psychology of gender*, 49-64.
[81] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 115.
[82] Struckman-Johnson, C., Struckman-Johnson, D., & Anderson, P. B. (2003). Tactics of sexual coercion: When men and women won't take no for an answer. *Journal of sex research*, *40*(1), 76-86, pages 80-81.
[83] Hakvåg, H. (2010). Does yes mean yes?, page 122.
[84] Finkelhor, D., & Yllö, K. (1987). *License to rape: Sexual abuse of wives*. Simon and Schuster.

and cultural expectation of sexual roles[85]. Sexual choices are supported by socialized attitudes towards gender and sexuality[86]. Social coercion is not something of public dominion or readily quantifiable, but the pressure to meet certain sexual expectations and fulfil societal roles is heavily present in many social structures around the world[87].

For example, one reason of complying with unwanted sex, especially from the side of women, is the belief that sex with the partner or the spouse is a responsibility[88], due to the view that women have about their own relationship[89] and leading to a more general distortion of the notion of relationship or marriage embedded in society. This kind of behaviour can in turn be considered as an instance of social coercion[90]. Both types of coercion, social and interpersonal, problematise the notion of consent and the difference that distinguishes one from the other lies in the fact of the possibility or impossibility for a national legal system to punish the perpetrator[91].

The third type of unwanted sexual intercourse deserves a deeper analysis since it is more frequent to find, but more complicated to assess, define or denounce. It is defined as a willing participation in sexual activity despite the lacking desire and in absence of external pressure and here, abstention of declared consent (or non-consent) added to lack of resistance are instead assumed to be expression of willing consent[92]. It can also be defined as sexual compliance or sexual acquiescence.

It is possible that in a situation of willing sexual activities, individuals that perform them might decide to engage passively without opposing or to give explicit consent as a result of direct or indirect interpersonal coercion from the partner[93]. In fact, a coercive control exerted on the partner could undermine the autonomy or the decision-making process of the victim, giving more license to the second partner[94]. In intimate relations, resistance from the part of the victim is reportedly less common[95]. It follows that greater relationship control by one partner over the other is usually related to more frequent acquiescence to sexual activity by women[96]: it can

[85] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1829.
[86] Walker, S. J. (1997). When "no" becomes "yes", page 157.
[87] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1829.
[88] Ivi, page 1831; Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 98.
[89] Walker, S. J. (1997). When "no" becomes "yes", page 160.
[90] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1831.
[91] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 99.
[92] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, pages 1829-1830 and 1831.
[93] Ivi, page 1830.
[94] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 113.
[95] Ivi, page 112.
[96] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1838.

be in fact argued that the basis of a violent relationship is coercive control, and in this context sexual consent is nullified[97].

Some scholars highlighted the fact that many individuals claim to have engaged in a sexual intercourse that was not pleasant, but it was consensual, nonviolent and non-coercive[98]. Although sexual compliance could easily take place without any kind of pressure or coercion, it does not necessarily mean that the experience that derives would not be felt as coercive by the individual[99]. Therefore, not every instance of consensual sexual intercourse is by definition good or pleasant[100]: the consent in fact can be given for a different range of reasons that lead the victim to concede it in order to avoid, for example, some negative consequences that could derive if not given[101] (like bartering, blackmail and so forth).

Often times, the same distorted definition, perception and practice of sexual intercourse present in many societies lead as well to a wrong or undefined conception of consent: individuals do not ask themselves what is consent or if they had given it before a sexual intercourse. As a consequence, victims often do not personally consider a negative sexual experience as indeed negative.

Remarkably, it is frequently assumed that men's consent is never contested and ever-present and therefore it does not need to be questioned or investigated[102]. This leads women to react to masculine desire, and they become those that have to set limits on sexual activities[103]. This process made the idea of men being "creatures devoted only to sex" to spread in modern society, and women to seek a series of strategies that serve to limit men's action concerning sexual activities. Pressure to consent in unwanted sexual intercourse can as well be originated by the fact that men's sexual arousal in a partner relationship is considered as being justifiable and unstoppable[104], meaning that any attempt to prevent or to refuse an upcoming sexual intercourse could give no results and lead to perform the sexual act anyway, even without full consent of the woman.

Said phenomenon can be connected, again, to the macro issue of gender: gender roles as defined by society might have the effect of modifying how sexuality is viewed by single individuals through a process of internalization of sexual stereotypes that results difficult to eradicate[105]. Both men and women, however,

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[97] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 122.

[98] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 95; Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent; Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 116.

[99] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1830.

[100] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 95.

[101] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 116.

[102] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 97.

[103] Ibidem.

[104] Walker, S. J. (1997). When "no" becomes "yes", page 158.

[105] Ivi, page 160.

internalize certain cultural ideas about sexuality and gender[106]. The constant emphasis on male control of sexual sphere encourages a sense of entitlement by men to sexual intercourses with women and a normalization of any wrongful action from the side of men[107]. This can be considered as structural subordination, which is expressed through the control of sexuality exercised over girls through FGM but also in the subjugation of women in rape and domestic violence[108].

As an example, we report the case of rape in *Vertido v. The Philippines* of 2008, in which a women was raped by her senior colleague in the Philippines: the national court of the Philippines acquitted the defendant agreeing on the fact that it was unclear why the applicant had not fled from her perpetrator since apparently, she have had many chances to do so[109]. In this case as well we notice the practise of national courts and the regretfully common stereotype of the woman that has to demonstrate some kind of resistance or non-consent to the unwanted sexual intercourse[110]. The case was then brought to the CEDAW committee, which outlined the fact that the judiciary has to intervene in order to avoid creating inflexible standards on the behaviour of women or girls in a situation of rape based on the "preconceived notions" of the elements defining a victim of rape or of gender-based violence[111].

As a further example, women often perceive female sexuality and femininity as aiming to please others[112], in this case the partner. Again, we found an evidence of a distorted perception of sexual relations and sexuality. The analysis of sexual compliance must therefore take into consideration also the element of gender[113].

In conclusion, in an unwanted sexual circumstance, the whole definition of freely given consent is indeed challenged and dismantled: since it is indeed unwanted, the reasons behind the decision to perform a sexual intercourse or activity are to be better clarified[114].

In order to understand the reasons behind an unwanted willing sexual activity and its frequency, in the study realized by Conroy, Krishnakumar and Leone in 2015, it has been showed that almost two thirds (88, 64%) of participants in the research had acquiesced to unwanted sexual activity[115]. This study involved a sample of 139 undergraduate females ranging from 18 to 27 years of age from a mid-sized private university in Central New York that were or had been in a sexual relationship of some sort[116]. Participants were asked to indicate whether

[106] Hakvåg, H. (2010). Does yes mean yes?, page 123.
[107] Walker, S. J. (1997). When "no" becomes "yes", page 162.
[108] De Vido, S. (2020). Violence against women's health in international law, page 138.
[109] Ivi, pages 145-146.
[110] Ivi, page 146.
[111] Karen Tayag Vertido v. The Philippines, Communication No. 18/2008, 16 July 2010 (CEDAW), para. 8.4.
[112] Small, S. A., & Kerns, D. (1993). Unwanted sexual activity among peers during early and middle adolescence: Incidence and risk factors. *Journal of Marriage and the Family*, 941-952, page 948.
[113] Walker, S. J. (1997). When "no" becomes "yes", page 160.
[114] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1831.
[115] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1836.
[116] Ivi, page 1834.

they were coerced or forced to engage in four different types of sexual activity[117]: in this work we will analyse only the occurrences of vaginal intercourse. Here follow the main reasons that lead to sexual compliance that appeared as answers to the online survey prepared by the researchers:

- promoting partner pleasure was most frequently reported (76%-89% of the answers) for each of the four sexual activities as the main reason for women to acquiesce to the unwanted sexual intercourse, immediately followed by promoting intimacy of the couple (33%-51%).
- the third most common reason for complying with unwanted vaginal intercourse was to prevent the partner to lose interest in the relationship (38%).
- Among the participants who acquiesced among others to vaginal activity, 18% to 21% of women did so because they considered it as a responsibility, showing thus a proof of social coercion.
- Remarkably, 11% to 19% of participants who acquiesced to sexual activity affirmed to did so in order to avoid an argument with their partner[118].

Regarding promoting partner pleasure or couple intimacy, another study found that many women consent to sexual intercourse because they consider it as a mean to maintain an important relationship[119]. The fear of losing the partner is therefore a strong motivation to comply with sexual acts[120].

The study of Conroy, Krishnakumar and Leone demonstrated thereby that the reasons behind accomplishment to unwanted sexual activity can be traced back to some form of social coercion[121]. It is interesting for the sake of this analysis to note another important feature of this study: it stresses the fact that lack of resistance is qualitatively different than explicit consent[122]. In fact, 93% of the interrogated participants declared to have acquired a passive acquiescence to unwanted sexual activity, with only 4% of them proved to have reported explicit consent: it follows that the large majority of women that participated in the survey never gave explicit consent to perform an unwanted sexual activity[123]. Therefore, this kind of sexual acquiescence is far to be willing and, as a consequence, the scholars argued that this passive participation of women in sexual activities has to be considered as a different concept from passive consent, where they are instead willingly performing a desired sexual activity with no proof of coercion[124]. If the given consent to unwanted sexual intercourses is conditioned by forms of social coercion or by the fear of negative consequences affecting the woman, it follows that the

[117] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1835.
[118] Ivi, page 1837.
[119] Muehlenhard, C. L., & Cook, S. W. (1988). Men's self-reports of unwanted sexual activity. *Journal of sex research*, *24*(1), 58-72.
[120] Walker, S. J. (1997). When "no" becomes "yes", page 158.
[121] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1837.
[122] Ibidem.
[123] Ivi, page 1838.
[124] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1838.

consent is not voluntary, and the two concepts are not overlapping[125]. It has been argued thereby that sexual acquiescence is to be considered as normative behaviour in intimate relations[126]: this means that it is recognised by society as being a typical behaviour occurring in sexual relations.

The study of Conroy, Krishnakumar and Leone showed that sexual compliance's understanding requires a deep research of the roots and causes that undergo different contexts, reaching also the broader context of society[127]. The ultimate finding of the study is that about 6 out of 10 women had acquiesced to some form of sexual activity at least once[128] and that therefore sexual compliance extorted under external pressure or threat is more frequent than commonly thought. In fact, consent appears to be largely taken for granted when speaking of sexual relations[129]. Moreover, we already argued that in order to define the limits of the concept of consent it is necessary to take into consideration the context of the intimate relation[130].

In conclusion, in order to resume the findings of the cited study and of other scholars, the reasons that might arise from willingly consent to an unwanted sexual act are:

- Avoid an argument;
- Social coercion (which includes a series of other different attitudes and social expectations);
- Prevention from losing interest from partner;
- Promoting partner pleasure;
- Avoid negative consequences.

Aiming at an ideal world in which sexual relations should take place exclusively with the mutual consent of the parts involved[131], scholars outlined the importance of seeking a positive, clear and willing response from one's partner in order to avoid misleading assumptions about willingness in engaging in sexual intercourse[132]: basically, the researches claim partners to openly ask for consent and not simply to suppose it. However, a simple yes/no question posed to women is often not sufficient[133], and it does not go to the roots of the problem of lack of choices from the side of women[134]. Furthermore, a verbal permission risks to impose a heavy and unnatural formality in a context that does not require it in normal circumstances and in which it may seem

[125] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1838.
[126] Ivi, page 1841.
[127] Ivi, page 1839.
[128] Ibidem.
[129] Ivi, page 1840.
[130] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 113.
[131] Conroy, N. E., Krishnakumar, A., & Leone, J. M. (2015). Reexamining issues of conceptualization and willing consent, page 1829.
[132] Ivi, page 1842.
[133] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 125.
[134] Hakvåg, H. (2010). Does yes mean yes? Exploring sexual coercion in normative heterosexuality, page 125.

inappropriate[135]. The issue of consent is not a problem in terms of a positive or negative answer to the question, but instead it requires a deeper analysis of "who is asking, who is consenting (or not), and for what reason[136]". Insofar, as we argued, a proper definition of consent as not yet been given. In the next paragraph we will further analyse the existing literature in order to delineate a thorough definition of consent and then attempt to better understand it in the context of the Istanbul Convention.

1.4. Definition of consent in literature

As shown, more than one scholar reported that current definitions of consent in a sexual context are not yet been developed properly, and consent thereby often remains something latent. Understandings of consent diverge widely: some defines it as being implicit while we found other definitions that are better articulated[137].

It is possible to individuate two main components of consent[138]. First, a clear understanding of what an individual is consenting to, namely the object of consent: this implies, in a sexual context, a knowledge of the other person's sexual intentions and expectations[139]. Second, as already mentioned, a constituent and intrinsic characteristic of consent is that it should be given voluntarily and free from any kind of coercion or contamination[140].

In this paragraph we will take into consideration the various forms in which consent has been described in literature about sexual relations and we will deal with consent as:

- Physical (or behavioural) concept;
- Psychological concept;
- Moral concept;
- A form of agreement;
- Synonym of autonomy.

In addition, we will also attempt to determine which definition might hypothetically suit a legal provision on sexual violence and rape.

An interesting debate around consent's definition in literature concerns the dilemma remarked by many commentators[141] about the classification of consent as psychological act or physical act.

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[135] Schulhofer, S. J. (1998). *Unwanted sex: The culture of intimidation and the failure of law* (Vol. 99). Cambridge, MA: Harvard University Press, page 272.

[136] Hakvåg, H. (2010). Does yes mean yes? Exploring sexual coercion in normative heterosexuality, page 125.

[137] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 95.

[138] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 122.

[139] Ibidem.

[140] Ibidem.

[141] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 99; See also Bryden, D. P. (2000). Redefining rape. *Buffalo Criminal Law Review*, *3*(2), 317-479.

Consent as a psychological act implies a focus on individuals' mental processes and desires, while if we classify it as physical act, the attention is stressed on behaviours that could possibly express consent, both verbal and non-verbal[142].

Reportedly, non-verbal behaviours are used more frequently than the expression of explicit consent to communicate consent[143]. We can therefore argue that consent could indeed be defined both as physical and psychological concept. On one side, if we agree on the behavioural version, we accept that some behaviours can account as consent, but in doing so the risk is to delineate a situation that falls in the category of sexual acquiescence, where, we remember, one of the partners acquiesce to sexual intercourses for different reasons, even when he or she is not willing to engage in any of them, hence contaminating the freely given consent.

If we accept this interpretation, we need a framework of "information or standards about which behaviours indicate consent[144]" to which we can refer to for comparisons and that can be provided by the law for instance, or by psychology. Unfortunately, to assess said framework is of course unthinkable: it would be required to enlist a series of behaviours embedded in human actions that indicate consent or non-consent[145]. A creation of such list implies an imposed change at the level of society as well: it would require it to mould itself to the new recategorization of behaviours showing consent and subsequently to ask individuals to acquire a new perception and awareness about consent, in other words a new sex education. Such important change is of course not attainable, especially in some societies still surrounded by stereotypes and myths about sexuality. A possible list would indeed ease decisions in trials, but on the other hand it would as well simplify too much the complex world of sexual relations[146], rendering them less flexible to interpretations. It follows that by using narrow measures of sexual violence, other secondary aspects would be neglected, e.g. the psychological consequences it might have on victims[147].

Therefore, many scholars agreed on a more flexible definition of consent that may be based also from a psychological point of view[148]: the approach towards such definition must be focused on the explicit intent from the side of one partner to engage in sexual activity with the other, an interpretation of the act occurred and the potential harm caused [149], whether physical or psychological.

However, once more we found a situation in which it would be difficult for one partner to readily assess the freely given consent of the other. A further drawback of this interpretation that could be negatively exploited during trials is that it gives free space for judges to analyse and trace the sexual history of the victim by imposing

[142] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 99.
[143] Ivi, page 104.
[144] Ivi, page 99.
[145] Ivi, page 100.
[146] Ibidem.
[147] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 115.
[148] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 100.
[149] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 115.

questions that aims to assess those behaviours considered typical marks of consent[150]. In fact, the response of the victim to threats or to violence might be valid indicators of the absence of consent but they do not constitute the only possible explanation of it[151].

Therefore, it is not possible to establish a list of behaviours describing evidence of consent in an exhaustive way, taking also into account that different behaviours might have different meaning and interpretations in different contexts[152]. Thereby, such definition of consent is not effective from a legal point of view, although it is possible indeed to adopt a definition which includes the behavioural aspect only partially and includes also the psychological aspect of the problem[153]. Again, this conceptualization has many pitfalls.

The third configuration of consent that we are taking into consideration in this paragraph is consent as a moral concept. In sexual contexts, consent has in fact the power to become "morally transformative" since it can render someone's actions morally permissible[154] that otherwise would not be licit. When an individual gives his or her consent, he or she is affirming that the other individual is crossing and is allowed to cross what in absence of consent would be considered as a moral boundary[155].

As a result, consent may be viewed as a moral concept[156]: in fact, it is certainly morally wrong to engage in a sexual intercourse when the other part does not consent[157]. This acquires importance when, in a sexual situation, a moral implication could lead for instance to an interruption of the sexual intercourse because of different contextual reasons[158]: if the interruption is demanded it means that consent had lost its validity, and the other partner is morally obliged to stop. Therefore, in this case, an individual commits a criminal offence if he or she fails to obtain a valid consent from the alleged victim and if he or she continues to engage in the sexual activity[159]. Thus, we can argue that the very fact that an individual does not stop once that the consent had lost its authentic meaning can be fully considered as sexual violence.

A commentator is convinced that the criteria that constitutes valid sexual consent whether from moral, institutional or legal contexts should be established by moral arguments[160]: in other words, the fundamentals that define what constitute a valid consent are always to be researched in the field of morality. This leads to a consideration of consent as being objective, since it does not depend on the context or on the subjective views or interpretations of events of the involved individuals[161]. In a moral conceptualization of consent however, the

[150] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 100.
[151] Ivi, page 101.
[152] Ibidem.
[153] Kazan, P. (1998). Sexual Assault and the Problem of Consent, in S.G. French, W. Teays, and L.M. Purdy (eds). *Violence Against Women*, Ithaca, NY: Cornell University Press, pp. 27–42.
[154] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 559.
[155] Ivi, page 567.
[156] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 101.
[157] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 559.
[158] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, pages 101-102.
[159] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 561.
[160] Ivi, page 562.
[161] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 562.

validity or authenticity of sexual consent is not to be questioned, but instead the real question is about whether the quality of the consent is valid enough in that context[162], for example in a context of unwanted sexual intercourse, where consent is only apparently genuine.
However, further discussion on the moral nature of sexual consent risks to result in a more philosophical reasoning. Nonetheless, we can argue that a moral understanding of consent is indeed vital in a contest of law production, but it cannot be seen as the only constituting element in a potential definition of it, which implies a more detailed description.

Consent in a sexual context can be defined also as an agreement of two individuals in participating in a sexual intercourse and by definition it has to be given freely[163] and voluntarily. However, the conditions under which this agreement is fulfilled can vary case by case[164]. The agreement form given in this definition may be adopted in a legal framework since it best suits the contractual view of law depicted by theorists such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau, which envisages law in general as a form of an intentional contract concluded by two willing parts.
Any clearly given yes or no constitutes a form of consent as well as an agreement between two people, even with or without the presence of force or coercion[165]. In fact, as argued in paragraph 1.3. about wanted and unwanted sexual intercourses, even in presence of force, consent can still occur and be authentic[166]: that is one of the drawbacks of using the lack of consent in a definition of sexual violence. It follows that said type of consent is not classifiable as full consent, acquiring therefore a different meaning: therefore, any agreement to engage in a sexual intercourse even in presence of coercion, as shown, could be considered indeed as consensual intercourse[167].
Thereby, the question that emerges is that if we have to consider this latter kind of consent as legally prosecutable, which would make more intricated its assessment in a trial[168]. In fact, if consent has been evidently given despite not being fully free and voluntary, in front of the law the consent does exists and is not questionable[169]. On the other side, we found other theorists that agreed with the view that in presence of threat or coercion is not possible to give free consent[170]. As we already argued, the classification of consent as an agreement between two individuals is problematised and triggers instances of hidden or acquiesced consent.

[162] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 565.
[163] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 95.
[164] Ivi, page 97.
[165] Ibidem.
[166] Dripps, D. A. (1992). Beyond rape: An essay on the difference between the presence of force and the absence of consent. *Colum. L. Rev.*, *92*, 1780, page 1793.
[167] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, pages 97-98.
[168] Ivi, page 98.
[169] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 562.
[170] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 98.

Ultimately, we can also affirm that consent represents a manifestation of autonomy of an individual and therefore it represents the exercise of the free will as well[171] and is equal to self-determination[172]. Self-determination or individual autonomy, as a scholar wrote, is the "liberal conception of free sexual choice based on rational decision-making and the underlying mind–body distinction[173]".

Furthermore, consent in the context of sexuality can also be considered as autonomy in the decision of an individual or as sexual autonomy. An autonomy based on a human right encompasses both the individual dimension since it is the individual himself or herself that is entitled to make decision about his or her body, and the relational dimension because the decision is taken in a broader context of the interpersonal relationship that affects the decision itself[174]. In addition, an autonomy based on a human right encompasses also the principle of non-discrimination and thereby it initiates a process of gendering autonomy, in the words of an author[175]. The consequent reasoning if therefore whether and to what extent the very fact of being woman limits her autonomy[176].

In the context of law, self-determination is rarely explained in an exhaustive way[177]. Lack of consent and use of force are linked to the concept of autonomy[178]. According to a commentator, the construction based on lack of consent is more focused on the expression of an opinion by a victim, in this way giving emphasis to the response of the victim to the actions of the defendant[179]. In the construction based on the use of force, the focus is placed instead on the denial of the will of the victim[180]. All in all, both constructions focus on the expression of the complainant of determination or the impossibility of expressing one and exclude the surrounding context[181].

As a result, it should be attributed to the woman autonomy competencies in order to affirm that she chooses authentically[182]. A non-coerced individual should be able to make decision after having gained sufficient information, and the individual is expected to show he or she has deeply understood the received information[183].

When a woman undergoes rape, among many other types of violence, her autonomy in the field of reproductive health is completely lost, either due to the risk of the event suffered permanently and severely affecting her

[171] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 567.
[172] Friedman, M. (2003). *Autonomy, gender, politics*. Oxford University Press, page 3.
[173] Lacey, N. (1998). Unspeakable subjects, impossible rights: Sexuality, integrity and criminal law. *Can JL and Jurisprudence*, *11*, 47.
[174] De Vido, S. (2020). Violence against women's health in international law, page 164.
[175] Ivi, page 165.
[176] Ibidem.
[177] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*. Routledge, page 127.
[178] Lacey, N. (1998). Unspeakable subjects, impossible rights, 47.
[179] MacKinnon, C. A. (2005). Defining rape internationally: A comment on Akayesu. *Colum. J. Transnat'l L.*, *44*, 940.
[180] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 127.
[181] Ibidem.
[182] De Vido, S. (2020). Violence against women's health in international law, page 155.
[183] McLean, S. A. (2009). *Autonomy, consent and the law*. Routledge, page 41.

reproductive capacities or because, as it is true in the case of domestic violence, her capacity to make autonomous decisions is compromised by the pressure of the violent partner[184].

Autonomy in the interpersonal relation is able to explain the presumption of consent within the marriage, simply due to the fact that the relationship between husband and wife itself implies consent[185], according to general understanding of the institution of marriage. However, minimal requisites for providing a valid consent to intercourse must be a guarantee of a certain degree of freedom, and therefore of autonomy, in order for consent not to seem the result of threats, violence or oppressive behaviours[186].

As shown, often the boundaries of sexual autonomy of women is imposed by the male, patriarchal counterpart and by the society and history: this prevent women from acting freely within society and deprives them from many basic rights. In the words of an author, patriarchal negation of women's autonomy in decision-making leads irreversibly to violation of women's rights to health, privacy, reproductive and sexual self-determination, physical integrity and even to life in some cases[187].

If consent is considered as a synonym of autonomy, a legal definition encompassing such view would be reportedly suitable since it allows the crime of rape and sexual violence to be regarded as a violation of the basic human right of the autonomy of an individual, either personal autonomy, autonomy in the personal decisions or sexual autonomy.

In conclusion, as we argued in this paragraph, the concept of consent in a sexual relationship or intercourse is certainly characterized by different meanings and shades that sometimes overlap, often not readily classified and difficult to assess *a posteriori*. Its definition become therefore context-sensitive, meaning that it has to be assessed according to the individual case and taking as well into consideration the surrounding circumstances of the intimate relationship: attempts to capture its complexity through categorical measures become complicated[188] and not feasible.

Consent becomes therefore something broader than an affirmative response to sexual intercourse with a second person: in a sense, it becomes a negotiation of social expectations or of fitting in to a certain socially constructed world[189]. We can argue that in the context of sexual relations, the dilemma about how to classify or name different sexual activities and the ambiguities associated with this concept are failures of contemporary society to "define the boundaries of bodily integrity", as some scholars stated[190]. In order to reconfigure a better explanation of sexual consent, it is necessary also to reconfigure the concepts of sexuality and the ideals of both

[184] De Vido, S. (2020). Violence against women's health in international law, page 156.
[185] Ivi, pages 157-158.
[186] Ivi, page 158.
[187] Ivi, page 60.
[188] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 113.
[189] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 99.
[190] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 111.

masculine and feminine sexuality, as already argued[191]. In fact, as long as genders are constructed within society and around male sexual drive, the female sexual drive will be instead ignored within sexual and cultural discourses, as well as being socially internalized by peers[192].

In conclusion, the right way to assess consent in an instance of sexual activity is not to enlist a series of behaviours that highlight consent, but to engage in a research of the inner understandings of willingness of partners[193]. As a scholar outlined, it is only through the development of a complete understanding of consensual sexual experiences, namely how and under which circumstances a partner says "yes", that it would be possible to analyse what is actually missing in non-consensual sexual acts[194]. Hence, we can argue that only after a deeper examination of consensual sexual experiences, the phenomenon of sexual violence could be better understood[195].

1.5. The definition of consent in domestic legislation about sexual violence

The question that emerges after the attempt to define consent in a sexual context is which meaning is better attributable to an application in a legal framework, whether national or international. In fact, it is often times true (and we already highlighted this fact) that women who experienced negative sexual intercourses that meet the legal definition of rape do not always define it as such[196]. In the current paragraph we will try to give an answer to this dilemma.

The premise that we are adopting in this paragraph is that if and only if B consents to sexual relations with A, it is *ceteris paribus* permissible for A to have them with B[197]. By law, as argued, "sexual intercourse" cannot be considered to exist without a reference to a contract or an agreement of the willing of the individuals involved[198]. It follows that, always according to law, consent is the only element that can make a sexual intercourse possible[199].

The contractualist vision historically envisaged by the law system may thereby be reflected also in the context of sexual relations. Under condition of consent, (and under condition that it would be present for the entire duration of the sexual act[200]), according to law is possible to have sexual intercourse: consent is not therefore cause of exclusion of sexual violence or rape, but instead it is the constitutive element of the actual possibility to affirm that, according to law, something like sexual intercourse exists[201].

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[191] Hakvåg, H. (2010). Does yes mean yes? Exploring sexual coercion in normative heterosexuality, page 125.
[192] Ibidem.
[193] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 103.
[194] Ibidem.
[195] Ivi, page 105.
[196] Walker, S. J. (1997). When "no" becomes "yes", page 157.
[197] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 561.
[198] Gazzolo, T. (2017). Il contratto, o dell'inesistenza della donna. *Politica del diritto*, *48*(1), 149-162, page 155.
[199] Ibidem.
[200] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 128.
[201] Gazzolo, T. (2017). Il contratto, o dell'inesistenza della donna, pages 155-156.

It is not possible to reach legal conclusions on sexual consent unless engaging in moral judgments[202]. If consent, as we said in paragraph 1.4., attributes a moral permission to engage in a sexual act, it possesses as well the power to render it as legally permissive[203]. Whereas an individual psychological state may determine what is morally permissive, the legal system however needs more specific guidelines[204]. It is not possible to legally account an individual if the second individual did not show observable manifestations of his or her mental state[205]. The former individual acts in a wrong way if only the latter has not visibly consented, whatever the psychological state of mind[206]. For the same reason, if the latter manifests consent, the latter does no wrong, and this is not able to believe that the partner gave consent because is led to do due to different reasons such as fears of consequences[207].

Sexual intercourse would exist in relation to the contract, only under negotiations: the contract constitutes the sexual intercourse and its condition of being a feasible possibility[208]. In turn, according to law, sexual intercourse exists as a contract, a voluntary agreement, therefore an exchange[209].

The difference between pleasure and violence, consensual intercourse and rape would be consequently a difference traced by law[210] and under the law. The right to do certain actions (e.g. touch, kiss, engage in a sexual activity) would have to be assessed according to law, otherwise they would be considered as violence and not properly as being part of a sexual intercourse[211], since the latter can only happen in presence of consent.

In other words, sexual intercourse does not occur without consent by definition, and in absence of it is not possible to define it as a proper "sexual intercourse", whilst it rather acquires a different meaning (namely rape). Whenever we found coercion, we don't find consent[212]. Consequently, we can affirm that sexual intercourse is an instance of a contract[213] and the lack of consent primarily constitute the criminal offence of rape[214].

In conclusion, as we introduced in paragraph 1.4, after taking into consideration the diversity of multiple understanding of the concept of consent in literature, it is possible to argue that the conceptualization that suits the most a legal configuration of lacking consent in a crime of sexual violence is certainly the agreement model that recalls the long-standing contractualist view of the law. This evidence can be easily retrieved in many national and international legal systems.

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[202] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 563.
[203] Ivi, page 559.
[204] Ivi, page 568.
[205] Ibidem.
[206] Ibidem.
[207] Ibidem.
[208] Gazzolo, T. (2017). Il contratto, o dell'inesistenza della donna, pages 163-164.
[209] Ivi, page 164.
[210] Ibidem.
[211] Ibidem.
[212] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 128.
[213] Gazzolo, T. (2017). Il contratto, o dell'inesistenza della donna, page 164.
[214] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 128.

In fact, in the next paragraph we will demonstrate that the conceptualization of consent found in subsequent international law tools has been made possible by a previous attempt of standardization provided by the ECtHR in the famous case of M.C. v. Bulgaria.

1.6. The Case *M.C. v. Bulgaria* as Pioneer in Understanding what is Consent in a Sexual Intercourse

Freely given consent, as shown, plays an important role when discussing about sexual violence legislation[215]. In the last decades, human rights acquired more importance as measures of protection of women against sexual and physical violations and their application enabled the guarantee of a better protection of victim of sexual crimes[216].

The ECtHR provided for the first time in 2003 a proper definition of rape to be read in the context of international law in the notorious case of *M.C. v. Bulgaria*. The case concerned a case of rape committed by individuals not belonging to the same household of the victim[217]. In this case, the Court outlined the fact that the core of inquiries and of legal procedures must be the search of an evidence of a lacking consent of the victim, even if instances of coercion are not detected[218], and not on the assessment of evidences of physical resistance from the victim, as more often used to occur in this type of cases. Those assessments were revolutionary in a context of sexual violence. The case is remarkable since it contributed to the development and the drafting of Article 36 of the Istanbul Convention on sexual violence based on lacking consent of the victim.

The case involved a 15 years old girl living in Bulgaria claiming to have been raped in 1995 by two men and to have reported the offence to Bulgarian authorities. The latter claimed instead to have insufficient proof of the occurrence of the rape and that the victim did not even "attempt to seek help[219]". Thereby, the investigation was closed, leading the applicant to resort to the ECtHR.

One of the claims of the victim was that the authorities gave no weight to her argument that she was unable to resist to her perpetrator because of feelings of shock and fear[220]. As claimed by an author, the ineffectiveness of the investigations lied in the fact that the whole procedure was *ab initio* conditioned by the presumption of the presence of consent from the side of the victim due to the evident lack of physical resistance[221]. At the time, the law of Bulgaria required an assessment of force or threats from the side of the perpetrator in order to attest an

[215] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 93.
[216] Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria. *Feminist Legal Studies*, *13*(1), 145-157, page 147.
[217] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 63.
[218] Ivi, pages 126-127.
[219] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria. *J. Int'l Crim. Just.*, *3*, 447, page 449.
[220] Hasselbacher, L. (2009). State obligations regarding domestic violence: The European Court of Human Rights, due diligence, and international legal minimums of protection. *Nw. UJ Int'l Hum. Rts.*, *8*, 190, page 200.
[221] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 454.

occurrence of rape, and the inquiry was abandoned with the claim from the side of the authorities that there was no sign of them in the specific case[222].

The Court in its assessment recognised two important tenets. On one side, it observed that it exists a positive obligation of the State to punish rape and to investigate the case[223]: the Court here applied therefore the principle of due diligence which we will further discuss in the next chapter. It also stated that the complaints of the case of *M.C. v. Bulgaria* had to be analysed under Article 3 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[224] (hereinafter ECHR) provided that the occurring events did constitute a violation of both Articles[225]. In fact, the applicant contended as well that Bulgarian law did not provide adequate protection against rape as required by said Articles[226]. The Bulgarian Criminal Code defines rape solely as:

> *"A person who has sexual intercourse with a person of the female sex:*
> *1. who is deprived of the possibility of self-defence, and without her consent;*
> *2. by compelling her thereto by force or threat;*
> *3. by reducing her to a state of helplessness.[227]"*

In agreement with a scholar, this provision has been interpreted by Bulgarian Courts as incorporating lack of consent in sexual intercourse as an inherent and implicit element[228], therefore not giving to consent an explicit role in sexual violence criminalisation. The three subparagraphs integrate a different case of lack of consent and are considered as alternative, and not cumulative, elements of the crime[229]. The non-fulfilment of which Bulgaria was guilty lied in the fact that its substantive criminal law lacked many elements and it was not evidently adequate to face similar cases[230]. However, the Bulgarian Criminal Code recognises also that sexual intercourse with a person under the age of 14 is a punishable offence, and that consent is not a valid defence in this case[231].

In this case, rape has been considered by the ECtHR as a form of ill-treatment under Article 3 and as a violation of physical and moral integrity under Article 8[232]. The Court had already stated that rape is a form of ill-treatment

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[222] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 200.
[223] *M.C. V. Bulgaria*, Application No. 39272/98, Council of Europe: European Court of Human Rights, 4 December 2003, page 27.
[224] Ibidem.
[225] Ivi, page 36.
[226] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 449.
[227] Criminal Code of Bulgaria, 1 May 1968, Article 152.
[228] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 449.
[229] Ibidem.
[230] Ivi, page 454.
[231] Criminal Code of Bulgaria, Article 151.
[232] Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria, page 154.

to be prosecuted under Article 3 in a previous case, *Aydin v. Turkey* in 1997[233]. The task of the Court was to assess in which way domestic legislation and practice in the prosecution of the crime of rape and the manner in which authorities developed the investigations showed evident faults that could account as violations of Article 3 and 8[234].

Article 3 prohibits any forms of torture by stating that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment[235]". The State thereby is responsible for guaranteeing that every individual within their jurisdiction is not subjected to an ill-treatment performed by both private individuals and State's agents[236].

The Court stated that even though the State is entitled with choosing the mean or means that it considers appropriate in order to secure adequate compliance, grave acts, such as rape, require efficient criminal law provisions since fundamental values and rights are undermined when the act is committed[237]. In fact, sexual violence represents one of the most severe attack on the intimate self and to the dignity of a human being and many scholars agreed on the fact that it can easily be classified as torture, inhuman or degrading treatment, since the consequences (of physical, psychological and so forth) of such act can be compared to those ones caused by torture[238].

The State is also obliged to perform adequate investigations on the case: these are directed not only to individuals that act in the name of the State, but also to private parties[239]. If a State is unable to protect a person within its jurisdiction from violence or coercive behaviours of a private party, whether they are close to the victim or not, it may be considered as equal to a violation to the right to life and prohibition of torture, inhuman or degrading treatment or punishment[240].

We can argue that the approach of the ECtHR witnesses that the role of domestic violence and violence against women contributed through time to the process of inequality between men and women, which is recognised by both national and international legal instruments and courts, including the subject of study of this work, the Istanbul Convention[241].

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[233] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 457.

[234] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 28.

[235] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* November 1950, Article 3.

[236] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 28.

[237] Ibidem.

[238] Seifert, R. (1994). *War and rape: A preliminary analysis.* In A. Stiglmayer (Ed.), Mass rape: The war against women in Bosnia-Herzegovina. Lincoln, PA: University of Nebraska Press, 54–72, page 55; De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 20.

[239] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 28.

[240] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective. *Evropsky politicky a pravni diskurz*, (1, Iss. 5), 109-122, page 115.

[241] Ibidem.

Article 8.1 establishes instead the right of the respect for the private and family life of every citizen[242]: this latter provision implies that the State shall adopt efficient legislative measures, in accord to its law system, in order to make sure that every citizen is able to enjoy the rights of a private life[243]. Under Article 8, the positive obligation concerns in addition the safeguard of the physical integrity of the victim. In addition, both Articles imply that the State must undertake legislative adjustment that shall punish rape and that could easily be put in practice[244].

Bulgaria in this case was violating Article 8 since State's actors failed to meet their positive obligations that emerged considering the recent developments of standards in comparative and international law concerning the guarantee of the physical integrity and safeguard of the victim[245]. As a proof, the Court held that the lack of consent is an inherent element in the whole criminal provision of Bulgarian criminal code[246], and that its absence had not properly been assessed by authorities.

In conclusion, the case of *M.C. v. Bulgaria* stated that the positive obligation of the State extends as well to ensuring the correct application and practice of the laws and not only to just put in place adequate measures in the form of laws[247].

A further claim from the side of the applicant was that the requirement of evidence of force and threat leads the investigation to stress the emphasis solely on active physical force and resistance of the victim, and to later abandon the proceeding since the presence of said elements was not assessed[248]. As a result, any sexual act performed without the full consent of the victim but in which physical force or resistance were evidently not present or detected remained unpunished[249] in Bulgaria. According to the judgment of the Court, however, it is not possible to establish a connection between lack of physical resistance and victim's consent to it[250]. The absence of force or resistance from the side of the victim in the case of *M.C. v. Bulgaria* impeded to proceed with the investigation, in accordance with the applicant's claim[251].

The ECtHR in its innovative comment acknowledged therefore the modern conception surrounding constituting elements of rape and its impact on the States' positive obligation to provide adequate protection[252]. In fact, as we argued, domestic law on sexual violence historically required during the trial a proof that the victim had been resisting the act of violence.

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[242] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* Article 8.1.

[243] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 28.

[244] Ibidem.

[245] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 201.

[246] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 11.

[247] Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria, page 154.

[248] Ivi, page 150.

[249] Ibidem.

[250] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 30.

[251] Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria, page 150.

[252] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 28.

Considering though recent developments in many countries and the dismantling of the different stereotypes and myths about rape, this practice had been progressively abandoned, till disappearing in most European countries and in common-law systems[253]. The definition of rape acquires in this way more meanings, for example the use of violence or threats of violence by the perpetrator, while in case-law and in theory, the lack of consent is seen as the element that mainly constitutes the offence of rape[254].

Furthermore, in international criminal law it has recently been recognised that force is not an element of rape but that if the perpetrator took advantage of coercive circumstances to proceed with sexual activities it is possible to prosecute him or her[255]. However, contrary to the Court's judgment, we can rebut this statement by saying that force is an element of rape, but it is not a *defining* element of the offence.

Another element which emerged during the *M.C. v. Bulgaria* case was that recent developments of understandings of experience of sexual violence demonstrated that victims often do not physically oppose to the perpetrator, both because of psychological reasons and of fear of suffering further violence from the perpetrator[256]. In fact, a more rigid approach to the prosecution of sexual-related crimes as the requirement of proof of physical resistance risks to leave unpunished certain kinds of rape: in this way the sexual autonomy of individuals would result jeopardised[257]. The Court ultimately stressed that rape is indeed a violation of personal autonomy and self-determination[258]. In doing so, it considered this particular aspect of harm, avoiding a paternalistic approach[259].

Demanding the utmost resistance by the victim by judges means that the role of women in society, which is confined in a system of oppressive relations, is in this way completely neglected[260].

According to contemporary and recent developed standard in the area of sexual violence, Article 3 and 8 of the ECHR are interpreted as implying a penalisation and prosecution of sexual acts that lack overt consent even if the victim did not oppose an evident resistance to the act itself[261].

In this case, the Court finally outlined in the judgment that the crucial characteristic of rape is the evident lack of consent of the victim[262]. If applied to other contexts than this specific case, it is in fact necessary to show more that only resistance in order to assess the absence of the consent of the victim[263]. As we already demonstrated in the preceding paragraphs, in jurisprudence it is not feasible to adopt narrow or rigid definitions

[253] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 29.
[254] Ibidem.
[255] Ivi, page 30.
[256] Ibidem.
[257] Ibidem.
[258] De Vido, S. (2020). Violence against women's health in international law, page 37.
[259] Sjöholm, M. (2017). *Gender-sensitive norm interpretation by regional human rights law systems*. Martinus Nijhoff Publishers, page 287.
[260] De Vido, S. (2020). Violence against women's health in international law, page 157.
[261] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 30.
[262] Ivi, page 12.
[263] Ibidem.

of rape, for example by defining it as always and strictly accompanied by physical force[264]. Instead, the configuration shifted more towards classifying rape as lacking consent in a sexual intercourse[265]. As a result, the aim of the positive obligations for states under Articles 3 and 8 of the ECHR must include the penalisation and prosecution of non-consensual sexual and physical acts, even when physical resistance of the victim is not attested[266], in order to better protect the sexual autonomy of individuals[267].

Remarkably, the decision of the Court to consider the violation of two Articles of the ECHR at the same time as a single violation rather than in sequence shows the centrality of the lacking consent as being the defining constituent of the crime of rape[268]. In fact, as we demonstrated, unwanted sexual intercourse can account as a violation of physical integrity under Article 3 and a violation of sexual autonomy under Article 8[269].

However, in a context of a trial, it is undoubtedly true that showing that a victim did or did not consent would be very difficult[270] in terms of practical procedure. The judgment of the ECtHR stated that despite this difficulty and the fact that said problem is of an even harder solution when direct proves of rape such as traces of violence or witnesses are not present, State's authorities have the obligation to deeply investigate the facts and make a decision taking into consideration also the surrounding circumstances[271], which are to be considered as providing a context that can serves as a basis for the interpretation of the facts. The resistance of the victim to the acts of the perpetrator is in this way no more deemed as a defining element of the crime[272]. Finally, the conclusion and final decision on the case must be based on the issue of lacking consent[273]. Despite the fact that positive obligations implicitly allow for a margin of appreciation, the Court in this case relied on this principle without allowing any margin of appreciation to states[274].

We can argue that the adoption of an international definition of the crime of rape as such certainly contributes to reducing the area of extension of the crime, "where imposition and enforcement of criminal law measures were held to constitute an unjustified interference by the State[275]" with the rights it itself is devoted to protect.

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[264] Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria, page 151.
[265] Ibidem.
[266] Ibidem.
[267] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 451.
[268] Ivi, page 458.
[269] Ibidem.
[270] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 559.
[271] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[272] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 452.
[273] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[274] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, pages 459 and 461.
[275] Ivi, page 453.

Regardless, the obligation to ensure the rights in the ECHR (and broadly speaking to any kind of Convention) implies a positive obligation for the states, which includes also the protection against wrongful acts committed by private parties[276].

Said positive obligations might as well serve as authorisation for the adoption of a concerted definition of the crime of rape based on specific elements: the ECHR may in fact be interpreted as prescribing how domestic law is to be drafted, interpreted, applied and amended, in order to expand the jurisdiction of substantive criminal law provisions[277].

The innovative view of the judgment of the case of 2003 highlights an emergent new perception of how the crimes of sexual violence and rape are understood, both from a legal perspective and broadly from the point of view of society. Those new recent developments in theory, legislation, social understanding of sexual violence finally demonstrate that modern society evolved towards a new respect for sexual autonomy of individuals[278] and that it demands a stricter penalisation of perpetrators.

The major contribution of this judgment is that it marked the emergence of a novel international definition of rape, and sexual crimes in general, focused on lack of consent as the central defining element[279], and that it serves to lay the foundations of new legal instruments, always more updated, tackling the issue of sexual violence.

Force and threats as defining elements of rape, the requirement of proof of physical resistance of the victim and other similar elements all witness an outdated perception of the crime of rape that need to be amended and upgraded.

At this point, we analysed thus far the theory around valid consent in sexual violence and rape. In the next chapter we will introduce the Istanbul Convention, since we deemed it is the most suitable international legal tool able to tackle the issue of violence against women and, in particular, of sexual violence and rape.

In fact, we will argue that this instrument agrees with the considerations we have just made in this chapter. It recognises that lack of consent of the victim is the founding element of the crime of rape, and it demands to parties to include said element in their legislation on rape, which is often based on other elements such as force, threats, etc.

[276] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 453.

[277] Ivi, page 454.

[278] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 30.

[279] Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in MC v. Bulgaria, page 457.

2. Sexual Violence in the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

2.1. Introduction on the Istanbul Convention

Firstly, in this paragraph will be presented a general overview of the Convention and its most relevant provisions, underlining the innovative aspects of it.
Afterwards, the definition (or multiple definitions where needed) of two fundamental concepts for the purposes and object of the Convention will be analysed in the following paragraphs, namely gender (2.2.) and violence against women (2.3.).
Paragraph 2.4. explains instead in detail the concept of positive obligations of due diligence from the part of the member States with respect to the provisions envisaged by the Convention, especially to Article 36, while the following paragraph explains the mechanisms of implementation specially provided by it for States (2.5.). Finally, paragraph 2.6. describes in detail the most important provision of the Istanbul Convention that we are taking into analysis for the whole dissertation, namely Article 36 on sexual violence.

The Convention on Preventing and Combating Violence against Women and Domestic Violence was adopted by the Council of Europe in April 2011, opened for signature in May 2011 in Istanbul and it entered into force the 1st of August 2014[280].
It poses that the victim is at the centre of the design of the Convention[281], and one if its main aim is to "dismantle gender stereotypes[282]". Within States' obligations, it includes to protect women from gender-based violence and the prosecution of violence against women.
Not only does it develop and strengthen the already existing legal regime regarding gender-based violence, but it also establishes a range of new normative standards on violence against women[283]. In the words of a scholar, it is quite innovative in its structure, since at the same time it is a human rights law and a criminal law Convention[284]. The Istanbul Conv. is therefore an important tool that could help future research on innovative and more effective policies about domestic violence and violence against women in general[285].

[280] Official website of The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), found in: https://www.coe.int/en/web/istanbul-convention/historical-background, retrieved 02/03/20.
[281] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 4.
[282] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 151.
[283] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 4 and 9.
[284] De Vido, S. (2020). Violence against women's health in international law, page 192.
[285] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul. *Diritto e questioni pubbliche*, *14*(1), 859-890, page 858.

The core of the Istanbul Conv. is clearly the prevention and the fight against violence against women, with a special focus on the domestic dimension of the violence[286]. The value that the Convention adds when compared to previous international legal instruments is that it addresses domestic violence and violence against women from multiple points of view[287], and by including both human rights policies and criminal law provisions, it acquires a dual nature.

The fact of the provisions contained by the Istanbul Conv. being legally binding on ratifying states is for some scholar deemed as a benefit and an advantage of the Istanbul Conv.[288], going "beyond a purely symbolic role", as a scholar stated[289]. According to another scholar, the Istanbul Conv. "represents efforts to create a holistic treaty with a strong interdisciplinary perspective"[290]. It is undoubtedly true that strong efforts have been made by States to provide for national and international instruments to manage the issue of violence against women, but more than one scholar is convinced that the Istanbul Convention would soon become the most powerful weapon to be used for the safeguard of women[291].

The Istanbul Conv. emerges in the context of the post-war age, when we can observe an ever-increasing production of human rights-based treaties, addressing violence against women among others[292]. In other contexts, many international treaties had tried to include violence against women and the forms related to it in their legal frameworks.

We can cite as examples the timid attempt found in Article 7 and 8 of the Rome Statute of the International Criminal Court of 1998, stating that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity" when systematically addressed to a civilian population, are to be considered respectively as crimes against humanity and crimes of war[293], and a second instance in humanitarian law coded by the Geneva Conventions of 1949, where rape is classified as a crime of war in a context of an international conflict[294].

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[286] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence? *The International Journal of Human Rights*, *16*(7), 947-962, page 948.

[287] De Vido, S. (2020). Violence against women's health in international law, page 192.

[288] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 947.

[289] Ivi, page 956.

[290] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 9.

[291] De Vido, S. (2016). The ratification of the Council of Europe Istanbul Convention by the EU, page 102; McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 959; Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 15.

[292] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 83.

[293] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 7, lit. g and 8.2.(xxii).

[294] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, Article 27.

Conversely, other international bodies had not succeeded in rendering those crimes in an international perspective or the efforts made by States or regional authorities are not sufficient to fight such a phenomenon[295]. For example, the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (known as CEDAW) does not contain any reference to violence against women or domestic violence[296], even though it represented a first specific response to the widespread problem of the discrimination of women[297]. With respect to CEDAW, the Istanbul Conv. aims at the discovery of the very causes and roots of the discrimination of women: here the differences between women and men are normalised and this process is the starting point of the elaboration of norms[298]. The Istanbul Conv. does not envisage a clear prohibition of discrimination of women but considers violence as a proper form of discrimination[299]. In the words of an author, a pattern of discrimination in this sense can be attested, as also human rights courts have outlined, when the state shows tolerance for acts of gender-based violence[300].

More recently, the UN adopted a different range of soft law acts (reports, resolutions, documents and so forth) in order to tackle the issue of violence against women: unfortunately, these are non-binding instruments[301]. After years of mobilization and sensibilization of society and institutions, thanks also to NGO and feminist movements, the issue of violence against women began to acquire a relevant position in the agendas of national and international authorities, and many countries recently adopted a number of *ad hoc* provisions in order to contain the phenomenon[302]. However, despite several attempts, the real challenge consists in the correct implementation of such normative *corpus*[303]. Furthermore, in addition to the problem of implementation we can as well find the lack of attention to prevention policies[304].

At the time of writing, despite the fact that nowadays it is generally accepted that violence against women can account as a violation of human rights, there is no UN treaty specifically addressing the issue[305]. Before the adoption of the Istanbul Conv., there were no other legally binding tools concerning domestic violence neither within the system of the Council of Europe, apart from those applied by the judges of the European Court of

[295] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 245.
[296] De Vido, S. (2016). The ratification of the Council of Europe Istanbul Convention by the EU, page 74.
[297] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 861.
[298] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 19.
[299] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 870.
[300] De Vido, S. (2020). Violence against women's health in international law, page 153.
[301] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 95.
[302] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 3.
[303] Ibidem.
[304] Ibidem.
[305] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 1.

Human Rights (hereinafter ECtHR): however, those provisions were limited[306]. Said tools, at the time, stressed solely the obligations of States to guarantee a minimum standard for cases related with domestic violence within justice systems[307].

The Istanbul Conv. is the result of the recent tendency of International Law to delimitate the issues and the instruments adopted to tackle them on a regional basis[308]. In fact, the adoption of regional conventions is a way to approach the safeguard of human rights, and consequently of violence against women, in a local way, allowing the compartmentation of the diverse problems and the adoption of measures that better suits the geographical, linguistic and cultural context, even though designed according to international rules, addressing thereby the issues in a more effective way[309]. In this context, the Istanbul Convention opens new frontiers in the international legislation on violence against women[310]: in fact, it provides States with a new range of provisions that include also the areas of prevention and education, among many others[311] and most importantly, it distinguishes violence against women from domestic violence[312]. As a scholar outlined, the Convention can be considered as filling the vacuum of the norms related to the issue of violence against women[313].

According to another scholar, this important legal tool has been designed emulating other recent conventions on different forms of violence, like the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 2007 and the Council of Europe Convention on Action against Trafficking in Human Beings of 2005[314]. We can argue that the adoption of such document shows that the Council of Europe understood the magnitude of the issue of violence against women and of domestic violence and the urgency of a legal response for them[315].

What follows is a general overview of the main points of the Convention; the intent is not to fully describe each obligation of the Istanbul Conv., but to highlight instead the main provisions that are pivotal for this work.

As the CAHVIO (*ad hoc* Committee for Preventing and Combating Violence against Women and Domestic Violence) reports outlined[316], the Istanbul Conv. is based on three different areas of action, defined as prevention, protection, prosecution of perpetrators: the legal obligations required by the Convention fall within

[306] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 957.
[307] Ibidem.
[308] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica,* page 10.
[309] Ibidem.
[310] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 12.
[311] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 957.
[312] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 36.
[313] Ivi, page 88.
[314] Ivi, page 101.
[315]McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 956.
[316] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 101.

those three different areas[317]. This structure follows the example of other already existing international conventions within the Council of Europe context[318]. These pillars are referred to as the three "ps". Trough the innovative provisions embedded within the three "ps", the Istanbul Conv. is able to establish soft laws and international standards[319]. However, more than preventive or protective measures or the prosecution of perpetrators are necessary to tackle the issue of violence against women in all its forms. Therefore, the drafter of the Istanbul Conv. added a further "p", which stands for "integrated policies"[320]. Taken together, those four pillars point to envisage a comprehensive approach tackling the issue of violence against women[321], and each of the four areas contain different provisions directly assessing contextual interventions[322]. Taking legislative measures to criminalise physical violence and sexual violence including rape are the main obligations for States that fall under the pillar of protection[323]. Those two aspects are particularly relevant for the whole analysis.
The Convention aims at establishing a proper definition of an integrated model of action against violence and imposes to parties the adoption of juridical reforms directed to trigger changes in society and in the mentality of people as well, both men and women[324]. It is to observe thereby that Criminal law is not the only instrument for achieving those aims, nor the most dominant[325], and that also other areas rather than criminalization and legislation, such as prevention or protection, are equally important and effective when dealing with domestic violence or violence against women.

2.2. The Definition of Gender

As shown in paragraph 2 of chapter 1, it is impossible to speak about sexual violence without mentioning the concept of gender: the two concepts are necessarily intertwined. The Istanbul Conv. enlists its own definition of gender, which deserves a separate discussion, and, in this chapter, we discuss the concept as intended by it. In fact, in the Istanbul Conv. we find a wider and inclusive definition of gender according to society [326]. This

[317] Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence. *Human Rights Law Review*, *18*(1), 133-155, page 144.
[318] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 12.
[319] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 12.
[320] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 12.
[321] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 10.
[322] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 18.
[323] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 44.
[324] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 864.
[325] Ibidem.
[326] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, pages 4-5.

can be explained by the fact that one of the aims of the Istanbul Conv. is to made parties achieve an equality principle between women and men (and therefore a clear definition of gender is utterly necessary[327]) and that the gender of the victim is the major reason of the forms of violence envisaged by the Convention[328].

The term gender is defined in the Convention as following:

> *"c. "gender" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men[329]."*

In this definition we can resume the already mentioned discourses about gender, given that the Istanbul Conv. specifically considers gender as "socially constructed". The term "gender" cited in this definition does not aim to replace the terms "women" and "men" used in the Convention[330], and as a consequence, gender-based violence does not correspond solely to violence against women[331]. Paragraph 2 of Article 2 states that its terms are to be applied to every victim of domestic violence[332]: accordingly, domestic violence can be addressed for example also to elderly people or children that live within the same household[333]. However, States are entitled to establish themselves the extension of applicability of the norms, recognizing at the same time the centrality of the meaning of gender envisaged by the Convention[334].

A related provision of the Istanbul Conv. regards Article 17, which declares that parties must promote an active participation of ICT and media in the process of development and enforcement of norms aimed to prevent violence, according with freedom of expression[335]. This means that media should avoid those common misrepresentations and that are sadly common in nowadays communication, which can give birth to gender stereotypes or fuel already existing ones. For example, those public reproduction of scenes depicting degrading treatment of women or over-sexualised roles are to be avoided. The aim of the Article is simple: to eradicate gender stereotypes from society [336].

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[327] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 8.

[328] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 32.

[329] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011, Article 3, lit. c.

[330] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 8.

[331] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 33.

[332] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 2.2.

[333] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica,* page 18.

[334] Ivi, page 19.

[335] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 17.

[336] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica,* page 22.

As we saw in the preceding chapter, the Convention agrees with the view of the idea of gender as being present in the society as a structural stereotype, mainly expressed through gender roles. In addition, it recognises that those same stereotypes might damage the women, often in a permanent way and prevent them to enjoy basic rights and to be autonomous in the decisions surrounding their beings and sexuality.
We further showed in this paragraph that the Convention embraces the concept of gender in an innovative way and it is able to extend the scope of its provisions by simply extending the definition of gender as well. A similar analysis can be provided also for another pillar concept of the Istanbul Conv., namely violence against women, as the following paragraph suggests.

2.3. The definition of violence against women

The Convention deals with different concepts that surround the issues of violence against women and domestic violence. In Article 3 we find an exhaustive list of said concepts: for the purpose of this dissertation we will provide the given definition of "violence against women":

> *"a. "violence against women" is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life[337]."*

The definition of violence is to some extent wide, and the Istanbul Conv. includes both domestic violence and violence against women but distinguishing them[338]. The definition as given by the Convention is certainly broader than that provided by other legal tools: it reaches branches of more evident violence against women such as physical and sexual abuse, but also other aspects, usually ignored or less salient, for example psychological and economic violence[339]. In fact, sexual violence definition often falls within the broader domain of physical violence rather than being considered as a distinct form of crime[340].
Violence is defined as one of the social mechanisms that aim at the subordination of women with respect with men and when stating that it occurs "whether in public or in private life", the Istanbul Conv. recognises violence against women as being a violation of human rights[341]. The reason behind this statement is simple: as long as parties have an obligation to undertake necessary legislative measures to exert due diligence of the full

[337] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 3, lit. a.
[338] Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence, page 136.
[339] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 948.
[340] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 115.
[341] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica,* pages 18 and 20.

compliance of the provisions of the treaty, and since a failure in taking adequate measures could prevent victims to enjoy human and fundamental rights, it is possible to state that violence against women accounts as a violation of human rights[342].

In order to attempt to attribute a proper meaning to sexual violence, we can apply the analysis of the multiple definitions that surround the concept of the phenomenon elaborated by a scholar. The analysis consists in a disaggregation of the manifold definitions contained by the single denomination of "violence against women": in international law, the phenomenon is not to be considered as an independent crime, but rather as a "socio-juridical [definition] that serves as a container[343]", including therefore other instances of manifestations or behaviours.

As another scholar outlined, if the definition of sexual violence includes forced and non-forced acts, it means that it considers these two distinctions as being equal[344]. This is exactly what the Istanbul Conv. attempts to recognise, and in fact in its own definition it includes almost every instance and manifestation of violence against women. The use or threats of physical violence is no more than one of the different means through which the right to the self-control of sexuality of a women can be violated[345] and there are many other means that can in fact account as violence against women. Among many others, as examples we can list murdering, economic violence, psychological violence, sexual violence and sexual harassment, stalking, acid attacks, forced genital mutilation, forced marriage and child marriage, forced prostitution, forced sterilisation, forced abortion, dowry-related violence or killings, threats, sexual slavery and so forth. In this work we are focusing more on sexual violence.

As an author contented, violence against women can be conceived as an "umbrella term", including a group of offences and wrongful behaviours rather than an offence *per se*[346]. Rape amounts to violence against the woman and also to violence against women health in some cases, because it deeply affects the sexuality of women and their capacity to make autonomous decisions about their own body[347].

As also outlined by CAHVIO, the disequilibrium between men and women leads to several patterns of domination of women performed by men, and that this pattern, which is legitimate to consider as structural, is to be taken into account in the fight against violence against women[348]. Thanks to the Istanbul Conv., violence against women is no more considered as a private offence addressed to an individual, but instead as violation of international human rights, since it "interferes with the full enjoyment of rights and freedoms by women[349]".

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[342] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, pages 120-121.

[343] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 25.

[344] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 117.

[345] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 558.

[346] De Vido, S. (2020). Violence against women's health in international law, page 5.

[347] Ivi, page 38.

[348] CAHVIO (2009) 5, *Report of the first Meeting of CAHVIO*, 4th of May 2009, page 35.

[349] De Vido, S. (2016). The ratification of the Council of Europe Istanbul Convention by the EU, page 74.

As mentioned before, the Istanbul Conv. includes human rights violations in the same definition of violence against women of Article 3[350].

Following a progressive generalisation, the Istanbul Conv. consider violence as a founding element of human relationships: in this context, violence underwent a process of normalisation through history and the prevarication of one sex over the other became a rule in the relationships between sexes[351]. It also became an interpretative paradigm of the relationships between gender, but as well between different other definitions of social categories[352]. Here lies the wider range of applicability of the Convention: not only to women, but also to migrants, children and so one, or more generally to vulnerable people or to those that are more exposed to domestic violence[353].

It follows that a peculiarity of the Istanbul Conv. is that it allows culture, religion, social factors, tradition, gender stereotypes and violence against women to intersect[354]. The provisions provided by the Istanbul Conv. in order to fight against violence fully respect the principle of "intersectionality" defined by the feminist scholar K. Crenshaw[355]. In a hypothetical application of the concept of intersectionality to this context, discrimination of women in contemporary society occurs in fact due to the intersection of different factors, namely gender, sexuality, race, age, social position, access to justice system and so forth that overlap giving birth to stereotypes and preventing women from enjoying basic human rights. Intersectionality is relevant as well when a woman is raped because she is a woman[356].

Some researches demonstrated that specific roles or stereotypes give strength to "unwanted and harmful practices" and contribute to the widespread acceptance of violence against women among society[357].

In Article 12.1, the Istanbul Conv. specifically promotes a change to be implemented by States in the social and cultural sphere of both women and men in order to extirpate prejudices and traditions and other harmful practices based on the idea of the inferiority of women with respect to men or on stereotyped and gendered roles attributed to women and men[358]. This means that the Istanbul Conv. is strongly committed to the complete eradication of

[350] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 44; Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence, page 136.

[351] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica,* page 19.

[352] Ibidem.

[353] Ibidem.

[354] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 6.

[355] The concept of intersectionality is explained in Crenshaw, K. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *u. Chi. Legal f.*, 139.

[356] De Vido, S. (2020). Violence against women's health in international law, page 143.

[357] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 8

[358] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 12.1.

those elements cited in Article 12 and of gender-based violence that itself recognises to be a product of history and to be present in the same structure of nowadays society, as mentioned in the Preamble[359].

Once more, and more importantly, tackling the issue starting from its roots implies that culture, traditions, religion or family honour can no longer be considered as explanations or justifications for the acts of violence contemplated by the Convention, as stated by Article 12.5[360]. The Istanbul Conv. further excludes that such justifications can be relevant in a criminal context, specifying that are inadmissible, especially when the victim is accused of violating norms or tradition of cultural, social or religious nature[361], that consequently have no legal meaning whatsoever. For example, still in some European countries, honour is a mitigating circumstance for certain forms of violence, although not necessarily under the law but for example within society and culture[362]. As a consequence, often the behaviour of a female victim of rape or sexual abuses determines whether or not she deserves compassion or dishonour[363].

The "cultural defense" as commonly described in literature (namely a justification of a wrongful act that discharge the perpetrator and that comes directly from culture, traditions or society), is thereby not admitted as a valid justification by the Convention[364]. It follows that the Istanbul Conv. provides a different key of interpretation of the phenomenon of the cultural defense, eradicating social stereotypes in an attempt to overcome them and eliminating the symbolic value that this concept possesses within many societies, including also minorities[365]. Perpetrators and victim, according to the Convention, can no longer rely on a justification based on cultural defense in order to demand for mitigating or aggravating factors: this element become thereby irrelevant.

Forms of violence against women such as honour killings, forced genital mutilations or dowry-related violence still occur due to cultural, traditional, tribal or religious justifications in many societies[366]. Yet, the structure of society can indeed be changed and shaped differently provided that it will no longer be considered as expression of the nature of men and women solely based on biological and physiological differences[367].

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[359] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Preamble.

[360] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 871; Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 12.5.

[361]Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 871.

[362] De Vido, S. (2020). Violence against women's health in international law, page 9.

[363] Ibidem.

[364] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, pages 871-872.

[365] Ivi, pages 872-873.

[366]Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 7.

[367] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 866.

The Istanbul Conv. requires member States to accomplish to those measure aimed at the dismantling of the unequal power relations between men and women[368]: in fact, as we mentioned, in the Preamble we notice that violence against women is recognised as being a "manifestation of historically unequal power relations between women and men", that consequently caused the former to be dominated or discriminated by the latter, further preventing them to emancipate and to fully enjoy their rights[369].

The Preamble of the Istanbul Conv. recognises also that the origin and causes of violence against women lie in the social environment[370]:

> *"[…] Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men[371].*

The adjective "structural" highlights an intrinsic and embedded sense of how violence against women is perceived among members of society. This feeling cannot certainly be overcome through individual actions, since it is an element produced by society itself and in order to trigger a change, the whole way of conceiving the phenomenon has to change perspective. The acts of violence against women and domestic violence are often considered as natural and socially accepted, often even silently approved by the surrounding community and social environment[372].

To recognise the structural nature of violence against women does not necessarily mean excluding episodes of violence committed against other genders, but instead emphasising a dramatic characteristic intrinsic in every society[373].

By defining violence against women as structural, we tend to think to a characterization that is nowadays integrated in social life and relations and that cannot be considered as an issue between victim and perpetrator alone[374]. The Istanbul Conv. represents a positive new signal of awareness from the political and juridical authorities of the deep roots of both violence against women and domestic violence, and also of the transcultural character of the phenomenon, which is transversally widespread in many countries[375]. Fighting violence against women by recognising its social and cultural origin, according to a scholar, is important for two reasons:

1) domestic violence is no longer considered as a private issue, but a political one;

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[368] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 43.

[369] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Preamble.

[370] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 9.

[371] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Preamble.

[372] Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence, page 137.

[373] De Vido, S. (2020). Violence against women's health in international law, page 11.

[374] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 42.

[375] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 863.

2) attempts of ascribing acts of violence to mental illnesses or *raptus* of the perpetrator are delegitimated within the Istanbul Conv. [376].

In short, by defining the structural character of violence against women, the Convention highlights the *continuum* of violence that causes damage mostly to women due to oppressive behaviours, which can acquire different degrees of intensity, either within or beyond a domestic environment[377].

Violence against women as defined up to this point could be manifest in different ways and can be committed by both state and non-state actors[378]. Consequently, due to international obligations, the State can and more importantly have the obligation to intervene in the private sphere of its citizens in instances of domestic violence in order to prevent and repress every form of violence against women and cannot remain silent.

Despite the fact that the phenomenon is certainly widespread, violence against women has remained hidden and undocumented for centuries. This was due to the fact that it was always considered as a private matter, best dealt with in the home and left there due to social shame patterns, and not regarded as a public issue[379]. More specifically, rape or sexual violence were in fact criminalised as being offences to the family honour and not as crimes against an individual[380]. As we will see in the analysis of the compliance of selected countries, there are many countries that still regard those offences as crimes against the public morality.

Historically, human rights policies, even though those not directly related to violence against women, have been designed in a way that created a distinction between the public and private sphere: the international relations between states correspond to the public domain while the private domain concerns national affairs. In the words of an author, the private sphere represents what is free and the domain in which outsiders do not usually interferes[381]. The correspondent norms were applied only when the State was for some reason involved in the breaking of human rights, but in the private sphere those norms were not applied, since the intrusion of the State was denied by the same domestic dimension of the problem[382]. The State was responsible to respond only when it was the one violating those rights, and the State's responsibility of protecting those rights was not required in a context of two private parties in conflict[383].

Accordingly, domestic violence and violence against women in general were not traditionally contained in human rights policies or covenants[384]. In fact, human rights doctrine and international law doctrine had previously focused solely on the protection of private individuals from the violent intrusion of States' authorities

[376] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 869.
[377] Ibidem.
[378] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 4.
[379] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 191; Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 111.
[380] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 126.
[381] Gavison, R. (1992). Feminism and the public/private distinction. *Stan. L. Rev., 45,* 1, page 6.
[382] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 951.
[383] Ibidem.
[384] Ibidem.

and institutions[385]. In the case of violence against women, the public aspect used to emerge only in major or more salient cases, for example the murdering of the women by a relative or a partner[386]. Therefore, as a scholar argued, "Women have traditionally been excluded from international law and its legal structures[387]", and for women the private sphere has always been a zone of oppression and violation of their human rights[388]. And, in fact, traditionally, the state has heavily interfered in the decisions about the sexuality and reproductive health of women but abstained from intervening in the context of the family[389].

As proposed by the same scholar, the State should instead intervene in the private life as long as it is able to combat violence without interfering in the free exercise of the autonomy of the woman[390]. It follows that it must intervene when the episodes of violence against women occurs in the context of the community or the family, but it must not intervene when the issue of the autonomy of the woman is to be taken into consideration[391]. In the context of a rape, apart from proper punishment, it is also demanded an intervention of the State, which can act through laws or specific *ad hoc* actions depending on the situation of the victim[392].

Trough history women have always been considered as the point of start of policies directed at controlling population due to the stereotypes surrounding male and female roles in society[393]. As a result, it is possible to argue that the right to health and to reproductive health of women "have been neglected because of the male conception of the private sphere[394]".

The traditional distinction between public and private sphere had then been dismantled thanks to international legal tools and tribunals: previously in fact, legislative powers tended to consider domestic environment as beyond the State jurisdiction[395], as if it were a protected domain ruled by the free will of the involved parties. As an example, in the case *Opuz v. Turkey*[396] in 2009, the ECtHR defined for the first time the nature of the obligations of States with respect to domestic violence, stating that it does not involve private or family matters, but instead is a public issue that requires action from the part of the State[397]. The ultimate acceptance of violence against women as a violation of human rights allows to consider it as an issue to be safeguarded directly by the

[385] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 109.
[386] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 83.
[387] Charlesworth, H., Chinkin, C., & Wright, S. (1991). Feminist approaches to international law. *The American Journal of International Law*, *85*(4), 613-645, pages 621-622.
[388] De Vido, S. (2020). Violence against women's health in international law, page 166.
[389] Ivi, page 167.
[390] Ibidem.
[391] Ibidem.
[392] Ibidem.
[393] Hartmann, B. (1995). *Reproductive rights and wrongs: the global politics of population control*. South End Press, page 170.
[394] De Vido, S. (2020). Violence against women's health in international law, page 167.
[395] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 43; De Vido, S. (2016); The ratification of the Council of Europe Istanbul Convention by the EU, page 73.
[396] Opuz v. Turkey, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009.
[397] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, pages 117-118.

State[398] and as a result, the public and private separation has gradually faded within human rights policies[399]. Over time, domestic violence and more broadly violence against women were viewed lesser and lesser as a private issue, becoming an urgent issue in the daily political agenda of states and communities[400]. Finally, international law has recognised the positive obligation of the state to intervene for the prevention of such forms of violence, to investigate and prosecute instances of the crime and to protect victims of violence[401].

As a basic explanation of the public and private distinction we can show as examples the traditional separated roles attributed to men and women by society[402], as we already wrote. In fact, tradition roles ascribed to men allow them to live and act within the public sphere in a more free and flexible way, for example by working outside the home, participating in the government, or other typically "masculine" activities[403]. Said roles enact violations in this environment to be more evident and easily punishable, while issues pertaining to women remain often hidden by domestic walls (think of domestic violence, which is the most evident example of such value), due to the private dimension of the problem[404]. As a scholar outlined, the whole system is indeed influenced by the division of public and private[405], often unnoticeably and unconsciously. As women achieved the same rights and responsibilities as men at a certain point in history, it was argued that their behaviour became more and more of a masculine nature[406].

Remarkably, in the context of the Istanbul Conv., the public or private environment in which the crime is performed is not relevant for the definition of the crime itself, but instead for the assessment of a possible compensation or of mitigating or aggravating factors[407] (as an example of aggravating factor we can report the hypothetical case of a crime addressed to the ex-partner or current partner, or a family member, a relative and so forth[408]). Thereby, the innovative approach of the Istanbul Conv. allows its obligations to be applied even in such contexts that evidently lack of the international or transnational characteristics that distinguish other international legal instruments, such as violence in a context of a domestic environment or within the surrounding community[409].

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[398] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 42.

[399] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 951.

[400] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, pages 115-116.

[401] Ivi, page 116.

[402] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 192.

[403] Ibidem.

[404] Ibidem.

[405] Ibidem.

[406] Campbell, A. (1993). *Men, women, and aggression*. New York: Basic Books, page 126.

[407] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 40.

[408] Ibidem.

[409] Ivi, page 115.

In conclusion, we demonstrated that the Istanbul Conv. is innovative from the point of view of its conceptualization of the crime of sexual violence since it provides a wider range of different categorizations of it with respect to other international legal tools. This made possible to effectively protect victims and to better prosecute criminals. In fact, as we demonstrated, the inclusion of multiple definitions gave voice especially to those victims of acts that can be considered as sexual violence, but that often are not recognised as such by national legislation or by culture, for instance those crimes placed under the top of the pyramid in the image we used as a point of reference in the first chapter.

Moreover, by including more "sub-definitions" within the broader concept of sexual violence, the Istanbul Conv. implicitly recognises that this kind of violence is still present in society in a structural way, which makes more difficult to explore solutions for its criminalisation. By applying the same analysis, we performed for the concept of gender envisaged by the Istanbul Conv. and applying the templates unveiled in the first chapter of this work, also in the case of violence against women, its definition reflects the considerations we found in literature. In fact, it can be considered as an umbrella definition since it embraces different views of the same phenomenon and wants to be inclusive of all forms of violence against women. Similarly to gender, both terms include as subcategories other expressions of violence in this sense.

An obstacle that has been successfully overcome at least in the context of the Istanbul Conv., as shown, is the inclusion of the crime of sexual violence within the crimes of public nature rather than among the private ones: the historical consideration of sexual violence as being a private offence has been finally abandoned and the perspective shifted instead toward a public recognition of the crime. The abandonment of a harmful practise of physical, psychological and sexual integrity of victims might in fact easily be a consequence of a deep internal change in the cultural environment, often demanded and achieved by women themselves in the case of sexual violence, rather than the result of an external or trickle-down imposition[410].

Furthermore, a wider understanding of this crime enables as well to overcome those deeply crystallised myths and stereotypes about sexual violence and to prevent perpetrators to use those very elements in order to dismiss themselves from a possible judgment (phenomenon otherwise known as cultural defense).

In the following paragraph we will discuss instead how states are supposed to enforce the provisions included by the Istanbul Conv. and which obligations require them to fulfil to their commitment to the Istanbul Conv.

2.4. Due Diligence

The due diligence is a general concept of International Law[411] which have been developed for the first time in the context of the Inter-American Court of Human Rights (IACHR) after the case *Velasquez Rodriguez v. Honduras* in 1988[412]. The case concerned the abduction and the following disappearance of a student, Angel Manfredo Velasquez Rodriguez, following a series of very similar related cases of forced disappearance of

[410] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 884.

[411] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 146.

[412] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 193.

protesters performed by the central government of Honduras[413]. The Court recognised in this case for the first time the state responsibility for forced disappearances, for the failure in acting for the prevention of those acts and for ensuring the full enjoyment of rights for its citizens[414].

A second definition has been given by Judge Martens in his dissenting opinion in *Gul v. Switzerland* as "requiring member states to take action"[415], involving therefore a proactive, positive participation of the State with respect to obligations it has undertaken.

In the opinion of a scholar, due diligence can also be defined as the "level care or activity that a duty-bearer is expected to exercise in the fulfilment of their duties[416]"; the duty-bearer here is intended as being the State.

States bear "due diligence obligations" in preventing and combating crimes enlisted in international treaties: the aim of due diligence obligations for States is to prevent, investigate, punish and provide remedies to violations of fundamental human rights[417]. In contexts different from human rights systems, the standard of due diligence serves as a unit of measure of States' compliance of obligations[418]. The criterion of due diligence can be interpreted according to different areas of competence of the law to which it is referred, and it acquires importance also in human rights policies.

The obligations of due diligence are connected to the duty of prosecuting an alleged perpetrator, and this duty can be considered as the result of three different forms of obligation: obligation of result, since the outcome is to prosecute the alleged perpetrator and attest its criminal responsibility; obligation of due diligence in the way in which investigation and prosecution are performed, meaning without undue delay and in a gender-sensitive way; and finally, an obligation to undertake progressive steps since it requires a process of training of authorities, including the judiciary, and a difficult change of attitude in the society[419].

Governments and states' authorities are the first to bear obligations regarding the application of human rights in society: those are entitled with the "negative obligation" to respect individual rights and not to violate them[420]. Negative obligations in this context are intended as being the application of legislation or the introduction of a new legislation about the issues[421].

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[413] Hasselbacher, L. (2009). State obligations regarding domestic violence, pages 193-194.

[414] Ivi, page 194.

[415] *Gül v. Switzerland*, Application no. 23218/94, Council of Europe: European Court of Human Rights, 10 October 1994, paragraph D.

[416] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 119.

[417] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 146.

[418] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 119.

[419] De Vido, S. (2020). Violence against women's health in international law, page 209.

[420] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 109.

[421] Ibidem.

A scholar divided the positive obligations in the context of the ECtHR into two main categories[422], however this division could be useful also when applied to the study of different human rights systems, such as the Istanbul Conv. A first definition regards the protection of human rights when private parties are involved, whilst a second one includes the legislative action intended to undertake necessary legal adjustment to the compliance of the rights[423].

Both designations are crucial for this work, as we will see afterwards. In a human rights-based system, States' failure to act in a positive way, with passive response to violence, is to be penalised and considered as an international human rights violation. States' responsibility is to be accounted not solely for direct violations perpetrated by state actors, but also for a State's inability to act or to provide protection in cases of infractions of human rights by private individuals or entities[424]. However, it is clear that full compliance of human rights cannot be achieved if protection and respect of them regard only public authorities or public sphere[425]. Thereby, the obligations of the state regarding human rights are not only to fulfil by this institution alone, but the State must ensure as well that human rights norms and principles are implemented within it and under its supervision, also between private actors[426]. As a result, the state is responsible not only for restraining agents that act in its name from violation of human rights, but indeed it shall exercise due diligence in order to implement, to ensure and to protect basic human rights also in the private sphere. In other words, it means to comply with its "positive obligations": the state commit itself to "undertake specific affirmative tasks"[427]. However, it can be complicated to assess whether a State has committed a violation or if an omission can amount to a violation or a lack of due diligence[428].

It is true that the state may be responsible for violating human rights, even where the victim already obtained justice: due diligence means therefore ensuring that authorities act without undue delay, and avoid any form of subsequent victimisation, with the consequence of causing the victim another secondary form of gender-based violence[429], reiterating the episode of violence and rendering useless the whole legal procedure.

Remarkably, when a State applies, enforces or perpetuates any gender stereotype in its national laws and policies, it follows that it officially institutionalises the stereotype, giving it the strength and the authority of a proper law and/or custom[430]. This follows that States have due diligence obligations as well to investigate cases

[422] Dröge, C. (2003). *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*. Heidelberg: Springer, pages 381-382; Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 112.

[423] Ibidem.

[424] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 112.

[425] Ivi, pages 109-110.

[426] Ivi, page 110.

[427] Ivi, pages 110-111.

[428] Ivi, page 119.

[429] De Vido, S. (2020). Violence against women's health in international law, page 209.

[430] Cook, R., & Cusack, S. (2011). *Gender stereotyping: transnational legal perspectives*. University of Pennsylvania Press, page 36.

of gender-based violence against women in an effective and timely way, without being misled by stereotypes of any kind[431].

Positive obligations of the State might be of a legal or practical nature, substantive or procedural[432]. Positive obligations can even flow from recognition of negative rights: when a negative right is acknowledged by the State to occur in certain conditions, for example torture, the act itself of recognition is to be accounted as a positive obligation[433]. If a State makes little or no effort in bringing certain offences to an end, it means that it is somehow condones them[434], both tacitly and consciously or thoroughly unconsciously. Applied to our case of domestic violence and violence against women, States can be held responsible even just for tolerating those acts of violence perpetrated by non-state actors, namely private parties[435].

We can apply in this context the analysis of a scholar applied to violence against women health but that can be anyway valid also for violence against women in general. From a legal point of view, the structural aspect of violence against women can be configured as patterns of discrimination, which will be useful in case of reconceptualising States' obligations in this respect[436]. A pattern of discrimination does not include solely social and cultural conceptions embedded in society but as well some sort of tolerance of a State towards violence against women[437]. In this context, the pattern of discrimination coming from society is connected to the one coming from the state and this relationship makes the two pattern to strengthen even more[438].

According to the same scholar, the distinction of the two patterns acquires importance when it comes to State's obligations: in fact, the state has legal obligations to prevent violence against women by imposing changing in the cultural patterns that consider the woman as subordinated to the man, but its obligations also fall into overthrowing the pattern of discrimination that instead comes from the State through policies and legislation that might sustain the stereotyped gender roles in society and therefore cause violence[439].

In the context of the Convention, we can state that it commits itself to operate those same changes, required to be enacted in ratifying states and within societies for what concerns violence against women and domestic violence, in the form of positive obligations aimed at dismantling stereotypes about gender and sexuality.

As we can infer, States bear responsibility for violence against women when they violate their obligations to protect the human rights of women who are victims or survivors of violence committed by both State and non-state actors[440]. In the context of the Istanbul Conv., the concept of due diligence sets obligations in order for

[431] De Vido, S. (2020). Violence against women's health in international law, page 211.
[432] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 111; for a more detailed definition of substantive law see *infra,* chapter 3.1.
[433] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 192.
[434] Roth, K. (1994). *Domestic Violence as an International Human Rights Issue,* in Human Rights of Women: National and International Perspectives, 326, page 330.
[435] Hasselbacher, L. (2009). State obligations regarding domestic violence, page 192.
[436] De Vido, S. (2020). Violence against women's health in international law, page 138.
[437] Ivi, pages 138-139.
[438] Ivi, pages 139.
[439] Ibidem.
[440] Ivi, page 5.

crimes occurring in the private sphere to be prosecuted,[441] or when the State does not adopt adequate measures for the prevention, or the repression of violence addressed to women by privates[442].

The ECtHR for example, interpreted thus far the concept of due diligence contemplated by the Istanbul Convention as adopting adequate law provisions and procedures by the State and organizing systems that allow them to better prevent acts of violence[443].

In the cases of rape or violence against women, the content of positive obligations would be to regulate the dimension of offences against the individual and to adopt appropriate sanctions that must be supported by enforcement procedures[444].

The due diligence principle has become one of the foundations of the Istanbul Conv. [445] and it is better clarified in Article 5:

> *"1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.*
>
> *2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors[446]."*

Not only it is required a State obligation to ensure that their officials, agents, institutions, representatives and so forth are abstaining from performing acts of violence against women and domestic violence [447], but there are also included positive obligations directed to parties to act and take effective measures. Failure to do in such way will incur state responsibility[448]. The State has the obligation to intervene not only when there is an immediate risk for an individual but also when a particular category of women is in danger[449], for example a specific age or job category of women.

Article 5 establishes therefore "the principle of State responsibility"[450]: this concept has played a primary role since it allows the recognition of the crimes included in the Istanbul Conv. as violations of international human

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[441] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 952.

[442] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 60.

[443] Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence, page 146.

[444] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 113.

[445] Ivi, page 120.

[446] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 5.2.

[447] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 120.

[448] Ibidem.

[449] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 150.

[450] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 951.

rights[451]. We can apply the analysis of a scholar that stated that due diligence is thereby the standard used to determine which actions States should enforce in order to address violence against women and domestic violence[452].

According to the Istanbul Conv., however, the due diligence obligation does not include the criminalization of the wrongful acts enlisted by the Istanbul Conv., which is instead categorized as obligation to achieve a certain result[453]. Due diligence obligations are intended as ascribing responsibility to the State for the criminal acts of both State and non-state actors by taking any needed measure in order to make sure that those specific criminal acts will not occur[454]. These obligations are therefore applied also in a private context. In fact, in the case of the Istanbul Conv., violence against women acquires the same status: there is no distinction of crimes whether it was committed by a public or a private actor[455]. Nonetheless, the measures to be taken by the State in the context of due diligence are not clearly defined by the Convention and a range of solutions can be freely chosen by single States.

In the context of this analysis, the principle of due diligence is important regarding the provision of the Istanbul Conv. that directly address sexual violence and rape: in fact, as we will see, in Article 36 of the Convention, States are encouraged to undertake "necessary legislative or other measures[456]" in order to criminalize the conducts of sexual violence and rape. This means that the State bear due diligence since the provision mentioned in the Article provides for the State an active participation in the process of criminalisation. Not only must it criminalize already committed acts, but it shall also ensure that the legislative framework of its own country contains sufficient norms that regulate such crimes.

We can state that the Convention commits itself to operate those changes, required to be enacted in ratifying States and within societies for what concerns violence against women and domestic violence, in the form of positive obligations aimed at dismantling stereotypes about gender and sexuality. Thereby, the positive rights relative to sexual violence and rape can be easily classified as due diligence rules.

Having discussed the concept of due diligence regarding the legislative power of the State, in the next paragraph we will discuss instead how States put in practise said due diligence obligations, namely how the implementation of the Istanbul Conv. is executed.

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[451] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 951.

[452] Khrystova, G. (2014). State positive obligations and due diligence in human rights and domestic violence perspective, page 119.

[453] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 151.

[454] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 2.

[455] Ibidem.

[456] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 36.1.

2.5. Implementation of the Istanbul Convention

The comprehensive approach of the Istanbul Conv. allows the issue of violence against women to be tackled in many different ways if compared to other legal regional or international instruments: the Istanbul Conv., in fact, set an obligation for parties to include certain types of crimes imputable to violence against women that are not yet been included in the criminal codes of States parties[457].

The Convention includes provisions on substantive law, which is defined as a type of law "that creates or defines rights, duties, obligations, and causes of action that can be enforced by law[458]", thereby requiring States to actively work on their internal legislations. Said provisions are to be incorporated into the national codes of law of parties, whether civil or criminal[459].

The ratification of the Istanbul Conv. therefore requires States to amend their lacking legislations, especially the criminal codes in order to introduce new crimes, update obsolete laws or adopt a wider range of sanctions[460]. For example, the Istanbul Conv. establishes that physical and sexual violence and practices like forced marriage and forced genital mutilation (also known as FGM) have to be criminalised by ratifying States[461].

If we compare other international instruments with the Istanbul Conv., we find that violence against women as such is not included in criminal laws of the parties and that States introduce instead in their criminal codes only those behaviours that directly originates from it and that we enlist in chapter 2.3., therefore attributing to the act of violence a gendered perspective[462]. The latter is a further element that allows us to argue that the Istanbul Conv. is innovative under more points of view. States fulfil with the requirements of the Istanbul Conv. when they achieve to criminalize the behaviours imputable to violence against women when characterized by one or more elements of it (physical violence, sexual violence and so forth)[463].

However, despite the fact that States are legally bound by the provision of the Istanbul Conv., many legal systems of some member states are still not aligned with the obligations enlisted in the Istanbul Conv. and many countries are not able to provide the whole range of the required services for victims[464]. This is caused by the absence of a clear criminalisation of certain offences or to the imprecise definitions of some crimes in internal codes of law[465], as we will see in the course of the paragraph regarding the specific case of Article 36 of the Istanbul Conv., and more in detail in the third chapter regarding the case-study of six specific countries.

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[457] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 5; De Vido, S. (2016). The ratification of the Council of Europe Istanbul Convention by the EU, page 77.

[458] Merriam-Webster Online Dictionary, found in https://www.merriam-webster.com/legal/substantive%20law, retrieved 18/03/20.

[459] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, pages 50 and 53.

[460] Ivi, page 41.

[461] Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence, page 148.

[462] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 49.

[463] Ivi, page 50.

[464] Ivi, page 185.

[465] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 11.

According to the view of the EU, the eradication of violence against women and domestic violence is a step forward that acquires particular urgency[466]. On one side, some EU members have indeed taken tight measures that cover a vast range of different branches of the issue, but on the other side, "latecomers" still presents remarkable backlogs in their national legislations concerning violence against women or domestic violence[467]. For example, they show unequal treatment in the protection of the victims or, most notably, as already mentioned, incomplete implementation at domestic level of dedicated international or regional legal tools[468].

EU member states criminalise some forms of violence as criminal offences in respective national criminal codes[469], but in some examples of legal frameworks we can notice that violence against women as defined by the Istanbul Conv. is not classified as a crime *per se*[470]. In some instances, we can observe that those criminal offences are indeed not applied to the domain of violence against women, but in other contexts, and the provision applies it to a broader situation[471]. In fact, some kind of crimes are included as specific provisions in criminal codes, for example rape or stalking, whilst others are categorized as general offences[472].

Let put as example the offence of serious injuries: on one side this offence can indeed be included in criminal codes as a form of violence against women, but on the other it is more frequent to encounter it as a general form of violence, not directly connected to the one addressed against women[473]. In all the member states of EU, murder, physical assault and bodily harm are classified under physical violence while rape and sexual abuse under sexual violence[474]. If specific offences happen to be enlisted under more general crimes, it does hamper fulfilment with the Istanbul Conv. broadly speaking[475]. This different approach to compliance might negatively affect the efficiency of the Istanbul Conv. as a whole[476].

States can take different approaches in assessing the norms in their internal legislation. Some parties reached compliance or amend their legislative framework before ratification of the Istanbul Conv. for example, while others still lack a comprehensive framework: in any case, the process of alignment can even be a gradual process, framed in time or still ongoing at the time of writing this work [477]. In addition, the implementation promoted by the Istanbul Conv. is not to be intended as being necessarily gender-specific: it can easily be gender-neutral or general, containing no specific provisions reserved to women[478].

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[466] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 18.
[467] Ibidem.
[468] Ivi, page 19.
[469] Ibidem.
[470] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* pages 19-20.
[471] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 19.
[472] Ivi, page 20.
[473] Ivi, page 19.
[474] Ibidem.
[475] Ivi, page 61.
[476] Ibidem.
[477] Ivi, page 53.
[478] Ivi, page 61.

Having explained the implementation of the Istanbul Conv., in the next paragraph we will enter the central discussion of this work: how sexual violence and rape are criminalised by the Istanbul Conv.

2.6. Article 36 on Sexual Violence of the Convention

The core of this paragraph regards the criminalisation of sexual violence. In this section, I will deal solely with the crime of sexual violence, including rape, describing which provision the Istanbul Convention specifically envisages for sexual violence.

To express the concept in a more correct legal language, we can affirm that the most suitable and widely accepted definition of sexual violence is that an individual A commits a sexual offense when a second individual B says no or when B does not positively agree to sexual intercourse[479], reporting again the statement of a scholar mentioned at the beginning of this work. We can affirm that sexual violence is gender-based because, although men and boys are also victims of it, women are particularly and disproportionately subjected to this form of violence[480].

With respect to rape, it was argued that the harm in this case lies in the violation of sexual autonomy and bodily integrity, with the consequence that the protected interest can be precisely identified in sexual autonomy[481]. As argued in the preceding chapter, consent can be considered as sexual autonomy and therefore we agree with this statement since, by violating the rule of consent through sexual violence, it means that the perpetrator is preventing the victim of the violence from enjoying a thorough sexual autonomy.

Taking the representation of the magnitude of the problem of sexual violence in the image in paragraph 3 of chapter 1 as a reference, we can observe that it schematizes very clearly the different degrees of sexual violence as normally seen by society: it places "fatal sexual assault" on the top, as the most evident and visible one, attributing thereby lesser importance to other forms. The fatal sexual assault or real rape occurs between strangers, is physically violent and a "real" victim fights back, according to popular belief and cultural myths[482]. According to the image, there are many forms of sexual violence that remains at the boundaries, often undenounced or only denounced in surveys and not to police, or not even revealed by victims. Since those latter forms of sexual violence often lay in the background, analysing the patterns, evolutions, and dynamics of different types of sexual behaviours, including the so-called ''healthy'' sexuality, till reaching degrading and violent experiences would open new frontiers of the study in this field and fill the gap of a lacking research[483].

[479] Wertheimer, A. (2000). What Is Consent? And Is It Important?, page 558.
[480] De Vido, S. (2020). Violence against women's health in international law, page 36.
[481] Eriksson, M. (2011). *Defining rape: emerging obligations for states under international law?*, page 67.
[482] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 112.
[483] Ivi, page 126.

The drafters considered that the Istanbul Conv. should of course include one of the main and most common expression of violence against women, namely sexual violence, a crime that often can lead to serious consequences, including death or manslaughter[484].

Here, sexual violence including rape is an independent concept, untied to the one of physical violence as stated in Article 35[485]. Note that the application of the law that criminalises the offence of rape must be assessed under the standard of due diligence[486], as it is the case of the Convention. Sexual violence including rape criminalisation is regulated by Article 36:

> "*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[487]."*

Article 36 is more detailed and specific than other provisions contained by the Istanbul Conv. [488]. The word "intentional" cited in the Article undergoes a process of interpretation which depends from the legal framework of each country[489]. The element of intentionality is however extended to all the different constituents of the crime[490]. Despite the fact that the Convention does not contain the element of intent as a whole, which is essential in order to identify any act of violence against women and that characterises offences in criminal law[491], in this case the element of intentionality acquires relevancy only when it is to be assessed individual responsibility for

[484] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 14.
[485] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 122.
[486] De Vido, S. (2020). Violence against women's health in international law, page 187.
[487] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 36.
[488] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 65.
[489] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 32.
[490] Ibidem.
[491] De Vido, S. (2020). Violence against women's health in international law, page 5.

specific offences such are stalking, rape and so forth that can be set within the terms of the more general framework of violence against women[492].

In lit. a., the act of vaginal, anal or oral penetration is defined as being of a "sexual nature": this element has been included in order to avoid misinterpretations[493]. The act must in fact possess a sexual connotation in order to be prosecuted and therefore any different connotation is to be ignored[494] (think for example in a medical or gynaecological context, were the eventual penetration does not of course suppose a sexual nature).

In lit. c, the occurrences in which the victim is forced to comply with acts of a sexual nature without consent with third person other than the perpetrator is criminalised: this is in fact a very common feature in abusive relationships and in occurrences of sexual violence[495]. Lit. c protects the victim in cases in which it undergoes acts of sexual violence not directly with the perpetrator but with a third person, intentionally chosen by the same perpetrator[496].

The need for the provision in 36.2 stems instead from the fact that, as a scholar highlights, "gendered assumption of consent is reflective of the gendered nature of sexual violence[497]". When determining consent, often during a trial, the focus is placed by judges on whether or not a woman resisted and to what extent she has done so[498]: this is considered as being an outdated method, incapable of assessing the whole range of evidence of the lack of consent. It follows that the legal prosecution of this crime will require a display of evidence establishing a standard that determines whether the victim has given its free consent: said standard is to be adjusted according to the single case[499].

The standard has also to take into consideration the different psychological and behavioural responses to sexual violence and rape and avoid suppositions of attitude of typical situational behaviours or gender stereotypes or myths on sexuality[500]. In fact, some victims of sexual rape or violence tend to behave in ways that make the other part to suppose an evidence of consent where it actually does not intend to: it follows that often the victim could consent to sexual intercourse inadvertently by acquiring some behaviours that are considered typical of consent[501]. This fact can be exploited during trials, where judges can consider those behaviours as an evidence of consent, even in cases where contextually it could not be considered as such, and therefore conclude in favour

[492] Ibidem.
[493] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[494] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[495] Ibidem.
[496] Ibidem.
[497] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 96.
[498] Ivi, page 103.
[499] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[500] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[501] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, pages 95-96.

of a clear evidence of consent[502]. As shown in the preceding chapter, this occurrence was attested by the applicant in the case of *M.C. v. Bulgaria*, where the Bulgarian national authorities assessed consent in a situation where, clearly, it was absent, convinced that the behaviour of the victim was attributable to a consenting individual to sexual intercourse. The aim of Article 36.2 is indeed to avoid those instances.

According to the Istanbul Conv., the relationship between victim and perpetrator assumes no value in the criminalization of non-consensual act of sexual violence and rape: this has been established in order to safeguard victims belonging to the legal categories of current of former spouses or partners[503].

Thereby, relevant to this analysis is also Article 54 of the Istanbul Conv., stating that:

> *"Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary[504]."*

We can draw a subtle connection line between Article 36 and Article 54: in a hypothesis of crime of rape or broadly of a sexual violence, during the trial, the practice to show and ask for past sexual activities of the victim must be abandoned (except when is "relevant and necessary", as stated). The aim of Article 54 of the Istanbul Conv. is to avoid the difficulties arising from defining consent as a list of specific behaviours, as we show in chapter 1.4., thereby demonstrating those being irrelevant when analysing a case of sexual violence. Under the Convention it is not admitted either to establish a list of behaviours describing evidence of consent in an exhaustive way, further demonstration that such approach in a national legislation does not lead to effectively assess an instance of rape.

Further, Article 55, paragraph 1, establishes that investigations or prosecution of offences established in accordance with Articles 36 shall not be dependent solely upon a report or complaint filed by a victim and that the procedure might continue even if the victim had withdrawn her or his statement or complaint[505]: this provision permits to overcome the obstacles of traditional court trials and to better safeguard the privacy of the applicants.

It is also relevant to note that Article 78 clearly prohibits any reservation to Article 36[506]: this means that ratifying States cannot derogate on Article 36. This allows us to better analyse the legislations of State members in relation to sexual violence. It is in fact true that not every State member aligned their legislation with Article 36 yet[507], and we will see in the following paragraphs how States comply or not with this specific Article.

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[502] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 96.

[503] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.

[504] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 54.

[505] Ivi, Article 55.1.

[506] Ivi, Article 78.

[507] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 65.

Women who had experienced a forced sexual act often do not label it as sexual violence or rape, even if it matches the existing legal definition of the crime when compared[508]. Besides, when forced sexual intercourse is perpetrated by a *de facto* partner, the victim would be less inclined to define it as rape[509]. It follows that very often, in different countries, the definition of sexual violence or rape is not yet well defined, leaving incomplete some aspects of it. This is what the Istanbul Conv. poses as aim in article 36, as we already seen: to align domestic legislation with a more modern, updated and unequivocal conceptualization of the crime of sexual violence, able to shape a crime of sexual violence which reflects the needs of nowadays society in this field.
Concerning the implementation of Article 36.1, the explanatory report requires the Parties to:

> "*Provide for criminal legislation which encompasses the notion of lack of freely given consent to any of the sexual acts listed in lit. a to lit. c*[510]*."*

This means that the Istanbul Conv. requires the criminalization of non-consensual acts of sexual nature with an individual. Furthermore, it also specifies that consent must be voluntary and free. We can apply to the notion of free given consent enlisted in Article 36.2 of the Istanbul Conv. the analysis of a scholar, that stated that consent stresses the emphasis on the desires and willingness of both women and men to engage in sexual activities, and consequently it avoids the dilemma of determining if the consent was authentic or not[511]. As argued by a scholar, it seems likely that adding lack of consent and in addition presuming, also by law, that girls below a certain age are unable to give consent might better guarantee the protection of a woman's rights and of her autonomy[512].
There are no defined instructions of how to include the element of consent and the elements precluding the freely given consent in the national legislations[513]. The only condition is that the presence of free consent must be attested within the surrounding circumstances of the specific case[514].
A reflection about the influence of the case of *M.C. v. Bulgaria* on the Istanbul Conv. can be evidently found in paragraph number 191 of the Explanatory report, which shows that the case brought an important improvement in the legislation on sexual violence and in the drafting of Article 36 of the Istanbul Conv.[515]. The Istanbul Conv., therefore, embraces the view of the ECtHR about sexual violence as punishable under the Articles 3 and 8 of the ECHR.

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[508] Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence, page 114.
[509] Ibidem.
[510] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[511] Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 98.
[512] De Vido, S. (2020). Violence against women's health in international law, page 199.
[513] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.
[514] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 65.
[515] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 33.

As shown, many scholars outlined the fact that in contemporary law, rape's characterization shifted towards the introduction of the lack of consent expressed before or during the sexual act: this lack defines itself the crime of rape and attribute it a violent sense[516]. As a result, the Istanbul Conv., thanks also to the judgment of the ECtHR on the case *M.C. v. Bulgaria*, introduces in an explicit way the lack of consent as a constituting element of sexual violence and sets positive obligations for the States to enforce or amend an adequate legislation that contains this very element, in order to be able to better protect victims of rape. Furthermore, in the Istanbul Conv. context, the surrounding circumstances of the case provide a basis for the interpretation of the case and a context that enables a better application of the law.

In many countries, the legal prosecution of sexual acts that lack of consent is sought through the interpretation of the terms included in the body of law, regardless the specific terms chosen by the legislators[517]. The terms used for the designation of sexual violence and rape can vary from coercion to violence, from threat to surprise (as it is still the case of the French Criminal Code[518]) and so one[519].

In conclusion, as already argued, the Istanbul Conv. in Article 36 condemns acts of sexual violence and rape. We can argue that the Istanbul Conv. in its definition of consent, even though not explicitly provided, does not include the physical/behavioural, psychological or moral conceptualization of it. In fact, the Istanbul Conv. does not provide an exhaustive lists of behaviours to be considered as marks of consent, nor it contemplates a set of questions to be addressed to applicants in order to assess their state of mind. The contexts of the surrounding circumstances are case sensitive and consequently they do not require strict standards of interpretation. In fact, both in a general context and in a legal context, as a scholar stated, the dynamics of sexual interaction need to be considered in different environments and circumstances[520].

Needless to say, the fundamentals under which the Istanbul Conv. is conceived certainly originates from moral considerations, but as argued in the preceding paragraph, those moral pillars are not to be considered as constituting elements, but rather the origin and starting point of the whole process of law-making, whatever the area under analysis.

Conversely, the Istanbul Conv. implicitly understands consent as an agreement, and this can be corroborated by the fact that, being the Istanbul Conv. an international law covenant, the contractualist view of the concept of consent, as already argued, is best suitable for a practical application in law.

In the Convention, the inclusion of non-consent in the definition of sexual-related crimes reflects a change that occurred within society, which itself demanded such modifications within national and international justice systems in order to better adapt to a modern world.

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[516] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 126, Beres, M. A. (2007). 'Spontaneous' sexual consent: An analysis of sexual consent literature, page 93.

[517] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 29.

[518] Penal Code of France, Section III, Article 222-22.

[519] *M.C. V. Bulgaria*, Council of Europe: European Court of Human Rights, page 29.

[520] Schulhofer, S. J. (1998). *Unwanted sex: The culture of intimidation and the failure of law*, page 103.

In the next part of the dissertation we will argue that at least six countries within those that ratified the Istanbul Conv. do not fulfil with the provision contained by Article 36 we have just discussed. We will support this argument with the help of the reports of the monitoring body of the Convention, GREVIO, after briefly discuss its role and functioning.

3. The Istanbul Convention Monitoring System and the Analysis of Compliance of Article 36 on Sexual Violence in selected GREVIO Reports

3.1. Introduction to the chapter

In a domestic law context, a newly recognised right might be implemented solely with the help of already existing legal tools. However, this is not always true when speaking about international human rights legislation[521], which in turn find implementation by the side of States members more difficult under many points of view. In fact, international institutions are in some cases still underdeveloped[522] and they are not able therefore to provide adequate means to secure compliance. In order to ensure compliance, it has become common practice to create new monitoring bodies for each new human rights agreement[523].

For example, the International Covenants on Human Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the International Convention on the Elimination of all forms of Racial Discrimination (CERD), the United Nations Convention against Torture (UNCAT), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and The United Nations Convention on the Rights of the Child (UNCRC) alike contemplate a system of reports to be submitted to a supervisory body by States[524], although each monitoring system appears to be very different[525].

Following said examples, the Istanbul Conv. as well requires a monitoring system composed by two parts: the Group of Experts on Combatting Violence against Women and Domestic Violence (GREVIO) and the Committee of the Parties[526].

In this chapter we will first discuss in more detail the role and the internal functioning of GREVIO as a monitoring system (3.2.) and then we will attempt to decide whether GREVIO is an effective or ineffective monitoring system by presenting the main arguments in favour and against found in academic literature (3.3.). Then, we will analyse the reports of the GREVIO of six selected countries for what concerns compliance of Article 36 of the Istanbul Conv, from 3.4. to 3.9.

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[521] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights. *Yale J. Int'l L., 12*, 396, page 396.

[522] Ibidem.

[523] Ibidem.

[524] Gaer, F. D. (2003). Implementing international human rights norms: UN human rights treaty bodies and NGOs. *Journal of Human Rights*, *2*(3), 339-357, page 341.

[525] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 398.

[526] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 78.

3.2. The GREVIO's monitoring function

The universal and inclusive proposition of the theory behind the Istanbul Conv. is strengthened by its monitoring system[527], in the words of an author. In short, the monitoring system associated with the Istanbul Conv. has the tasks to supervise Parties' compliance with the obligations[528]. In addition, the body as well emanates reports and conclusions about implementation of the Istanbul Conv. of the single country under examination[529]. Remarkably, GREVIO does not have jurisdiction in the examination of individual complains of violations of the Istanbul Conv.: its jurisdiction is to be considered thereby as quasi-judicial, equal to the one envisaged for other UN treaty bodies[530].

In the course of this paragraph we will analyse the provisions enlisted in the Istanbul Conv. aimed at regulating the functioning of the monitoring system, as stated by Chapter IX, in Articles from 66 to 70.

In Article 66, the Istanbul Conv. sets the creation of a Group of Experts on Action against Violence Against Women and Domestic Violence, known as "GREVIO", composed by ten to fifteen members, aiming at supervising the implementation of the Istanbul Conv. [531]. Due to the Istanbul Conv. intrinsically universal purpose, in order to result coherent, gender and geographical origin of the members are to be taken into consideration for the composition of the group of experts[532] . The members will participate in GREVIO as individual professionals[533].

Among the many skill and features, the individuals chosen to become part of GREVIO shall possess the characteristics of being impartial persons of "high moral character[534]" and to demonstrate previous acknowledged, professional experience in the fields of human rights, domestic violence, women rights or gender equality[535]. In addition, if the Parties decide to directly nominate one of the members, it may include a representative of an NGO[536]. The competences required by members of the GREVIO can therefore be easily and especially referred to as independence and expertise[537].

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[527] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 11.
[528] Ivi, page 12.
[529] Ibidem.
[530] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 181.
[531] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 66.1, 66.2.
[532] Ivi, Article 66.2.
[533] Ivi, Article 66.4, lit. e.
[534] Ivi, Article 66.4, lit. a.
[535] Ivi, Article 66.4, lit. a.
[536] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 58.
[537] Ibidem.

The Committee of the Parties, composed by representatives of State parties[538], shall elect those members, chosen among candidates nominated by the parties themselves[539]. The drafters of the Istanbul Conv. agreed upon the fact that the power to elect the members of GREVIO should rest on the shoulder of the Committee of the Parties, that before setting the election process shall also consult the Parties and obtain their unanimity[540].
Article 67 establishes instead the second pillar of the Istanbul Conv. monitoring system, namely the Committee of the parties, which represents a political and intergovernmental body. The equal participation of the parties would be ensured in the whole procedure of election and building of GREVIO[541] through the activity of the Committee.

Article 68 describes instead the procedure that GREVIO follows in its monitoring process: according to Article 68.4, GREVIO is responsible for deciding how the procedure is to be executed[542].
Initially, GREVIO would prepare a questionnaire to be presented to parties and for each evaluation it could even adopt a specific questionnaire to be responded directly by Parties[543] and then perform an evaluation visit in the country. The explanatory report attached to the Istanbul Conv. defines the term "questionnaire" as a series of written direct questions or guidelines for the collection of information of "qualitative and quantitative nature" on the provisions taken by the States for the implementation of the Istanbul Conv. [544].
On this basis, parties will complete a report on the measure taken to tackle violence against women in their territories, whether legislative, preventive, educative or any other type of arrangement[545]. Following reports are sequenced in time, decided by GREVIO[546]. At the time of writing, starting from 2017, GREVIO already published the reports of 13 countries[547]. With regard to implementation of the Istanbul Conv., the reports serve to provide Parties with a useful baseline of legislative measures to be enforced[548].

GREVIO can retrieve information from many different sources as well, namely from:

- the Council of Europe Committee of Human Rights;

[538] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 67.1.
[539] Ivi, Article 66.2.
[540] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 59.
[541] Ibidem.
[542] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.4.
[543] Ibidem.
[544] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 60.
[545] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.1.
[546] Ivi, Article 68.13.
[547] In chronological order: Austria, Monaco, Albania, Denmark, Montenegro, Turkey, Portugal, Sweden, Finland, France, Italy, Netherlands, Serbia.
[548] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 59.

- the Parliamentary Assembly of the Council of Europe;
- regional or international bodies;
- databases of any kind;
- already existing information about the countries;
- academic researches and so forth[549].

For instance, reports submitted to the CEDAW Committee would prove to be very useful for this usage[550].
In the case of information being insufficient, GREVIO may even organize special country visits in order to collect further data with the help of national authorities and other independent experts[551]. Country visits here are not intended to be unannounced[552]. However, those country visits constitute only a subsidiary mean to be undertaken only if necessary, under two special conditions:

1) if collected information is not sufficient to exhaustively fill in the report and there are no other means to gain further reliable information;
2) if a critical situation that requires immediate attention by GREVIO is reported in the territory of a State[553].

Finally, after the drafting, the GREVIO report must be submitted to the Secretary General of the Council of Europe[554].

We can argue that the range of action of the GREVIO monitoring body is wider than the one envisaged by UN treaty monitoring system and the one adopted for the CEDAW. The reports submitted by GREVIO in fact, analyse the compliance of the State in relation to every provision of the Convention[555]. As a scholar argued, this kind of approach would bring some advantages since every aspect of the Convention is explored in a deeper way[556] and the compliance of the State member will be evaluated in a more constructive way. Following this method, consistent arrears in the drafting of final reports will be avoided and the whole procedure would result more productive[557].

[549] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.6, 68.7, 68.8.
[550] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 955.
[551] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.9.
[552] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 60.
[553] Ibidem.
[554] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.1.
[555] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 955.
[556] Ibidem.
[557] Ibidem.

Before the final publication, GREVIO shall present a draft report of the analysis containing also suggestions and proposals that would provide help for States that need to tackle a specific problem[558]. The draft shall be transmitted to the Party under analysis in order for it to add comments that are in any case to be taken into consideration by GREVIO[559]. Afterwards, in accordance with the information added by the Party, GREVIO would ultimately adopt the report and the conclusions and then it would be sent to the involved Party and to the Committee of the Parties[560]. This means that since the beginning of the procedure GREVIO and the Party must start a dialogue together that also serves to build up a long-lasting relationship[561].

This latter method can be compared to the practice of including concluding observations at the end of the monitoring procedures in use within UN human rights bodies, observations that contains suggestions and proposals of how to better implement the obligations required by parties[562]. After adoption, the report and the comments of the Party will made public[563]. The reports are available in the website of the Council of Europe[564].

In conclusion, the procedure for country monitoring can be resumed in seven steps:

1. State report;
2. Evaluation visit;
3. Draft GREVIO report;
4. Adoption of GREVIO report;
5. Publication of GREVIO report;
6. Follow-up[565].

GREVIO can also adopt recommendations addressed to the Party concerning two different points: "the measures to be taken to implement the conclusions" and the promotion of "co-operation with that Party for the proper implementation of [the] Convention"[566]. In this way, the independence of GREVIO as a monitoring operator would be respected, at the same time maintaining a political line and dialogue between the parties[567]. In case of a detected series of frequent or persistent acts of violence envisaged by the Convention, paragraphs 13, 14 and

[558] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 955.
[559] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.10.
[560] Ivi, Article 68.11.
[561] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 60.
[562] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 955.
[563] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.11.
[564] https://www.coe.int/en/web/portal/home, retrieved 15/07/20.
[565] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 79.
[566] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 68.12 and 69.
[567] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 60.

15 of Article 68 contain instructions for initiating a special procedure at the end of which GREVIO will request the handover of a report with the record of said acts of violence from the Party[568]. GREVIO would initiate the mentioned procedure when receiving information about a situation that "require immediate attention"[569]. Afterwards, a process of inquiry can be launched, also with the aid of a country visit, if needed: the delegated GREVIO members for the inquiry shall recollect information and afterwards directly report to GREVIO[570]. The purpose of this "special" inquiry procedure is for GREVIO to gain more specific information and data about a special case: said information will therefore be reported to the Party involved and, if necessary, also to upper bodies (namely, the Committee of the Parties and the Committee of Ministers of the Council of Europe)[571].
In addition, according to Article 69, GREVIO is entitled to adopt general recommendations on the implementation of the Istanbul Conv. [572], intended here as having a "common meaning for all Parties" but at the same time being indeed general and not specific for one country[573]. Here as well we can compare this method with the one followed by UN treaty bodies[574].

As also often reported for UN bodies, it has become usual for the GREVIO to involve civil society groups, non-governmental organizations, activists, media or national institutions of the countries under analysis for the drafting of the final report, with the help of so-called "shadow-reports"[575], which are defined as following:

> *"Shadow reports are a method for non-government organizations (NGOs) to supplement and/or present alternative information to reports governments are required to submit under treaties.[576]"*

The participation of NGOs is stressed also by Article 9 of the Istanbul Conv. [577], that emphasises the role they have in the prevention and fight of violence against women: an official recognition at the level of the State and their inclusion in the policies directed to those issues is as well stressed by the Istanbul Conv. [578].

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[568] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 60.
[569] Ibidem.
[570] Ivi, page 61.
[571] Ibidem.
[572] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 69.
[573]Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 61.
[574] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 956.
[575] Ivi, page 955.
[576] Official Website of "The Advocates for Human Rights", found in: https://www.theadvocatesforhumanrights.org/mechanisms, retrieved 17/03/20.
[577] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, Article 9.
[578] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 22.

NGOs, both national and international, exploit their leverage in order to pressure governments to develop their domestic human rights systems and civil society groups can provide the mechanism of enforcement that usually international treaties lack[579].

NGO are often times better qualified in providing services that are directly connected to their everyday work and action: it is true in fact, that information officially provided by States is often not reliable or insufficient[580]. Their ability to gather information has disclosed the effective implementation of the provisions contained by international agreements[581]. NGOs in fact are able to provide alternative information about the behaviour of a country and can offer expertise knowledge on national legal standards, providing a general overview about the internal dynamics of their country of origin[582]. In other cases, it is the NGO itself that provides the only information available about implementation of the treaties[583]. In addition, NGOs in some cases can prove to be a more transparent source when identifying cases whose information are alleged to have manipulated the review or final conclusions of a treaty body[584]. Furthermore, NGO act also as advocates for the adoption or amend of specific domestic laws in conformity with the norms of the treaties[585].

Remarkably, an ever-increasing emphasis on the participation of NGOs in the evaluations of official reports of State members has been developed within human rights systems, and in some cases country reviews shifted more and more from informal discussion to bigger events that broadened the debates, especially domestically[586]. The recommendations issued by monitoring bodies are not aimed solely at the factual information they have received but also at "the role and active participation of NGOs in the reporting processes and follow up", and they often refer to NGOs in their concluding observations and recommendations[587]; this phenomenon had been increasing during the last decades.

A commentator identified three factors that helped introducing non-governmental organizations in the procedure of monitoring systems of many treaty bodies[588]. For the sake of this analysis we are taking into consideration the first two:

1. Continued and articulated interest of individual treaty bodies in receiving substitute sources of information, independent from government;

[579] Hafner-Burton, E. M., & Tsutsui, K. (2005). Human rights in a globalizing world: The paradox of empty promises. *American journal of sociology*, *110*(5), 1373-1411, page 1385.
[580] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 246.
[581] Gaer, F. D. (2003). Implementing international human rights norms: UN human rights treaty bodies and NGOs, page 340.
[582] Ivi, page 339.
[583] Ivi, page 340.
[584] Ivi, page 346.
[585] Ivi, page 340.
[586] Ibidem.
[587] Ivi, page 343.
[588] Ibidem.

2. professionalisation of the role of human rights NGOs, due to their growing capacity to provide reliable data on actual implementation of rights by States and their ability to provide a wider overview on the compliance of specific national laws with their international human rights counterparts[589].

The factors we analysed allowed an increasing formalisation of the role of NGOs and their incorporation within monitoring methods and sources.

If we apply the same analysis to the context of the Istanbul Conv. we can observe that it indeed requires in its provisions the inclusion of civil society in order to support the monitoring phase and provide information, and as a result we can notice a strong interest from the side of the drafters for their active inclusion in the system.

Regarding factor number 2, as we showed, NGOs can in fact contribute to provide information that can be hard to retrieve due to the peculiarity and sensitivity of the cases of domestic violence and violence against women, and in addition they are able to individuate the breaches in the national legislation. Dedicated NGOs, due to their acknowledged expertise, can also provide services for the sake of the Convention's obligations and facilitate the whole process of monitoring.

Therefore, we can conclude that many scholars deemed that NGOs' role in human rights-based monitoring bodies is very influential[590]. We can argue that they serve not only as sources of reliable and authentic information, but they also allow the public reverberation of the work, conclusion and implementation of the treaty bodies, to some extent raising awareness among public opinion[591]. Contemporary law cannot ignore the demand of such important authorities like those directly working with women victims of violence in the case of the Istanbul Conv. [592].

The question that arises after analysing in detail the role of the GREVIO as a monitoring body is whether this mechanism is successful and innovative or not, namely whether it is capable to encourage states to adopt amendments in their legislation or if they are able to acknowledge their non-compliance. In the next paragraph we will present the main strengths and weaknesses of such system.

3.3. GREVIO: effective or ineffective monitoring system?

Despite the fact that the monitoring mechanisms supporting international human rights agreements do not receive as much attention as the rights that those agreements recognise, they are of an equal importance[593].

As argued, a monitoring system like GREVIO might potentially empower the Istanbul Convention itself, but under another perspective it can be considered as a weak system, not capable to ensure an effective realisation of every provision in ratifying countries.

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[589] Gaer, F. D. (2003). Implementing international human rights norms: UN human rights treaty bodies and NGOs, page 343.

[590] Ivi, page 346.

[591] Ivi, pages 340-341.

[592] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 245.

[593] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 396.

It is clear that the effectiveness of a reporting system is to be measured also by the secondary characteristics of the system itself, for example the structure of the reports, the composition of the monitoring body that receives the reports, the degree of its jurisdiction and inquisitorial power, the extent of its reporting powers, capabilities and range[594].

Hereafter we are going to define the main arguments in favour and against a similar monitoring system as described in literature and then comparing them to the system of GREVIO.

In general, we can argue that an independent monitoring system entitled to emanate recommendations like the one designed for the Istanbul Conv. would be of a higher effectiveness than a court such is the ECtHR[595] and also better equipped to guarantee immediate and constructive responses from States[596].

In this case of monitoring system, there is no need for victims to bring their cases to a court, and therefore this allows to better stress the emphasis on the hidden crimes of domestic violence that often occur behind closed doors and make victims unable to denounce due to fright or shame[597]. In fact, as widely acknowledged, some occurrences of violence against women remain reportedly undetected if we use a system of courts[598], since victims are discouraged by the public exposure of it.

By emanating recommendations, GREVIO is able to take a broader position than a regular judge[599], placing itself in a higher position. In addition, the general recommendations are not legally-binding and are to be included in future monitoring stages; in this way, they might as well become a point of reference for the Parties since they create a dialogue centred on the different thematic areas of the Convention and help countries to properly enforce and implement the Istanbul Conv. [600]. Moreover, the work developed by monitoring systems might be helpful for future applications of uniform standards serving to estimate compliance[601].

We can affirm that said secondary solutions are better desirable in order to better deal with the issue of violence against women[602], as in the case of the Istanbul Conv. Therefore, in spite of issuing non-binding acts and

[594] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, pages 411-412.

[595] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 947.

[596] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 58.

[597] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 947 and 957.

[598] Ivi, page 957.

[599] Ibidem.

[600] Council of Europe Treaty Series - No. 210 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, page 61.

[601] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 412.

[602] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 957.

recommendations, these mechanisms can be indeed deemed more effective for ensuring the fulfilment of provisions of an international Convention[603].

Besides, GREVIO has the competence "to comment on preventive requirements in abstract[604]", while for example the range of action of the ECtHR is limited to pronounce only in a specific case. As a result, GREVIO will be able to be more specific about the positive obligations to undertake measures by parties, in this way reaching the point of influencing the future jurisprudence of the ECtHR[605].

In the case of the obligations expected to be undertaken by a State entailing the actual realisation of certain rights rather than warranties, those rights might not be capable of being settled by law or by a court[606]. The claim that would allege that a State failed in guaranteeing a certain right rather than not observing it would be more difficult to assess in a trial[607].

Therefore, by following the procedure of a monitoring system like GREVIO, based on the emission of reports stressing the situation of each member State, accounts as the most appropriate method given the specific circumstances of the issues of domestic violence and violence against women regulated by the Istanbul Convention[608]. Issuing state-specific evaluations undoubtedly empowers a monitoring body's ability to also influence and put pressure on individual governments[609].

In a complaint procedure the agreement under analysis is not aimed at providing protection for one or more rights but rather to stimulate international cooperation: hence, a monitoring system is preferable[610]. In addition, in a system based on complaint, the applicant is in charge of presenting proof of non-compliance of the State, hindering the process of monitoring due to the difficulty of presenting such proves[611]. On the other side, a reporting system eliminates the problem since it is the State itself that presents the proves of its own non-fulfilment[612].

A reporting system of the State is the "least intrusive means" when monitoring compliance of human rights treaties of a single state, and it is also preferable by States since they manage in this way to better protect their sovereignty[613].

However, the same composition of the body influences its effectiveness: in fact, we find two very different options, namely when the reports are analysed by a political body or by a body composed by individuals who

[603] De Vido, S. (2016). The ratification of the Council of Europe Istanbul Convention by the EU, page 79.
[604] Grans, L. (2018). The Istanbul Convention and the positive obligation to prevent violence, page 146.
[605] Ibidem.
[606] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 410.
[607] Ivi, pages 410-411.
[608] Ivi, page 411.
[609] Ivi, page 414.
[610] Ivi, page 411.
[611] Ivi, page 413.
[612] Ibidem.
[613] Ivi, page 410.

operate as experts or act as independent professionals[614]. A body composed by representatives belonging to the government would be expected to have biased interest on the side of the State concerning prestige and respect of its sovereignty[615]. A body composed instead by experts, independent from the central government, would aim at the general interest of the international community and of individuals, posing themselves in a higher position and acquiring more objectiveness and impartiality[616].

Concerning the monitoring system provided by the Istanbul Conv., as reported in paragraph 3.2., we ultimately find that it envisaged both options. On one side, the Committee of the Parties is in charge with analysing the final drafts of the reports and on the other side, GREVIO is composed by expert who acts as individual professionals. The political body, however, does not risk being biased since it is not connected to any national political entity, but it is instead transnational, which guarantees its impartiality. We find here another argument in favour on the thesis that the monitoring body of the Istanbul Conv. can be considered as producing positive effects.

Concerning the information contained in the reports, as a scholar outlined, the reliability of the information would be improved if the receiving body has the power to verify the reliability of the information, also with the help of visits or inspections in the country under analysis, and also to emit follow-up that would help in the following phases of the process of alignment[617].

As we wrote, GREVIO has in fact the power to undertake country visits when critical cases in selected countries are detected and the follow-up process is a default procedure embedded in the same functioning of the GREVIO, which closely follows the developing alignment of each country.

Obviously, a report completed without clear directives on the nature of the provided information would be of an inferior value when judging the extent of State's compliance[618]. On the other side, when specific information is instead demanded by the body itself, reports of States can actually be deemed more effective [619] and therefore acquire a higher status and credit.

When monitoring compliance of the Convention, States are indeed required to follow and complete in detail the questionnaire provided by GREVIO itself, which is designed in a way that the information provided by the state will be exhaustive and will concern every provision and aspect of the Istanbul Conv. GREVIO therefore is able to demand and obtain very specific information in order to monitor fulfilment, and in case of the information not being sufficient, it also envisages alternative sources, mentioned in the previous paragraph, to acquire as

[614] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 412.
[615] Capotorti, F. (1968). The international measures of implementation included in the Covenants on Human Rights. *Stockholm: Eide & Schou*, 132, page 136.
[616] Ibidem.
[617] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 412.
[618] Ibidem.
[619] Ibidem.

much information as needed to accomplish this task, avoiding lack of useful knowledge. Under this perspective, we can insist on the fact that GREVIO does not present pitfalls.

On the other side, the monitoring system envisaged by the Convention, according to some other scholars, is not particularly sharp or constructive[620].

The promises from the side of a State to at least try to apply human rights are weaker than automatic ensuring them: the effectiveness of a monitoring system is to be measured taking into consideration the political support demanded[621] and also received.

GREVIO is of course a body whose work is still at the beginning and follow-up procedure are still taking place at the time of writing. Consequently, it is difficult to measure in this respect the political support. The risk is of course that GREVIO reports will be accepted by states with scepticism and the measures taken after the publication of the reports will not be significant in any case. Further comments on this argument are thus premature.

Another example supporting the thesis that monitoring bodies of this kind are not strong enough is that human rights treaty bodies are not designed to support their members with strong institutional tools, able to ensure compliance[622]. The only positive result that might be achieved by a monitoring system offered by this kind of treaties is that the legal instruments of the regime directly influences practices by providing State members with information and legitimating motivations to internalize new norms of appropriate behaviours[623].

This argument can be applied also in the context of the Istanbul Conv. However, this form of direct influence might be deemed weak and often ineffective[624], and we can attest the same for what concerns the GREVIO reports. The risk in fact is that those can influence the behaviour of State parties only partially and might not actually have enough credit for States to undertake the changes required by the reporting procedure.

In addition, the main task of the GREVIO is limited to the writing of periodical reports[625]. As a result, GREVIO is not comparable with an authority that has proper jurisdiction and it has competence in emanating binding judgments as the ECtHR, to which the Istanbul Conv. briefly refers to in its Preamble solely to include its jurisprudence within the sources that have been consulted during the drafting procedure[626].

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[620] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 878.

[621] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 411.

[622] Hafner-Burton, E. M., & Tsutsui, K. (2005). Human rights in a globalizing world: The paradox of empty promises, page 1380.

[623] Ivi, page 1384.

[624] Ibidem.

[625] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 878.

[626] Ivi, page 879.

Clearly, the process put through by monitoring bodies could in some cases be compromised by the difficulty of retrieving sufficient and reliable data and information[627] and that is the reason why the Istanbul Conv. itself relies on information provided also by NGOs, apart from that provided directly by the State.
Anyway, even though we mentioned the fact that GREVIO is able to retrieve very reliable information, there is still the risk of the information about the situation of a State being insufficient or incomplete, as a result leading the report not to be exhaustive and complete and rendering the whole monitoring procedure meaningless. This occurrence of course depends on the single countries under examination and can be considered case sensitive.

GREVIO has been designed as an independent commission in charge of measuring compliance of the parties. A drawback of an independent commission is that, apart from being more expensive to gather, it could be more at risk of political pressure form single governments, which often find themselves hostile towards external judgment of domestic policies, regarded as being more intrusive and detrimental of State sovereignty[628]. Nevertheless, this obstacle could be removed in the long-term, since the power, accountability and influence of the monitoring body can gradually increase over time as the work of the commission improves and governments would become more familiar with the procedure[629]. However, this relationship can only develop in the long-term, and therefore in the short-term we can still find a suspicious government and a weak monitoring body.
Despite the fact that GREVIO is for sure a trustworthy body, its work is still emergent, and we cannot draw a definitive conclusion on this point.

According to a commentator, countries with huge underdeveloped system of human rights subscribe some human rights treaties due to the fact that they aim solely at the benefits brought by those treaties but "without living up to their legal commitments to actually protect human rights[630]".
We can notice that this behaviour in some states is indeed caused by the system of monitoring or implementing the treaties being inadequate or weak[631] or deemed such by states. Therefore, the States are committing to such treaties not because they are genuinely interested in reducing violations of human rights in their countries and they would be in this way encouraged by the fact of the monitoring body being weak. This behaviour has been denominated by another scholar as "insincere act[632]", meaning that, since human rights treaties are unable to properly report a situation of a country, these same countries are to certain extent entitled to perseverate their behaviour and at the same time enjoy the benefits brought by subscribing human rights treaties[633].

[627] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 418.
[628] Ivi, page 419.
[629] Ibidem.
[630] Hathaway, O. A. (2002). Do human rights treaties make a difference?. *The Yale Law Journal*, *111*(8), 1935-2042, page 2008.
[631] Ibidem.
[632] Hafner-Burton, E. M., Helfer, L. R., & Fariss, C. J. (2011). Emergency and escape: explaining derogations from human rights treaties. *International Organization*, *65*(4), 673-707, page 685.
[633] Ibidem.

If we apply this analysis to GREVIO, we may propose the hypothesis that a country might be interested in ratifying the Istanbul Conv. in order to be covered when violating rights concerning domestic violence or violence against women due to the fact that they consider GREVIO to be inconsistent or irrelevant when assessing their domestic compliance. Obviously, at the moment of writing these are only suppositions and speculations and there are no evident proves of such behaviour in state members, regardless of the fact that this may of course be an occurrence which is likely to be detected in the next future as the work of GREVIO will improve.

After briefly presenting both positive and negative points of a system like GREVIO, we need at this point to apply the same analysis specifically referring to the object of this dissertation, namely Article 36 of the Istanbul Conv.

In this respect, we can affirm that GREVIO has the power to make states comply with Article 36 (and more in general with the whole Convention). Compliance is realised despite the limits we accurately reported. Nonetheless, at the same time, the lowered credit, reputation and prestige of the State whose report presents more points of non-compliance enables and encourages said State to proceed with changes in their legislation in order to fulfil and to reach the alignment with the standards required by the Istanbul Conv. but also by the international community.

In conclusion, we demonstrated that, since the Istanbul Conv. promotes also social human rights, it is undoubtedly true that it firmly needs a monitoring system which is strong enough to safeguard the compliance of the rights ascribed. We can affirm that GREVIO is a sufficient mechanism under this point of view.

In the following table we find a resume of the main point discussed above:

Effective	Ineffective
• an independent monitoring system entitled to emanate recommendations is more effective than a court; • no need for victims to bring their cases to a court; • ability to take a broader and higher position than a judge; • the work developed by monitoring systems is helpful for future applications; • body's ability to put pressure on governments. • a reporting system is less intrusive, and States manage to better protect their sovereignty; • body composed by independent experts aims at the general interest of the community and of individuals and are more impartial; • improved reliability of the information if the receiving body has the power to verify the information, with the help of country visits or inspections, and also to emit follow-up; • when specific information is requested by the body itself, reports on States can actually be more reliable.	• promises from the side of a State to try to apply human rights are weaker than actually ensuring them; • effectiveness of a monitoring system measured by considering the political support it receives; • monitoring process might in some cases be compromised by the difficulty of retrieving sufficient and reliable data; • an independent commission may be more expensive and at risk of political pressure form governments; • countries lacking human rights protection subscribe human rights treaties due to the fact that they aim solely at the benefits brought by those treaties, since they count on the fact that systems of monitoring are weak; • human rights treaty bodies are not designed to support their members with strong institutional tools.

Despite the thesis supporting the argument that a monitoring system closely comparable with the one envisaged by the Istanbul Conv. is not considered effective, we can affirm that the hypothesis supporting the opponent argument are prevailing and of a higher stance than the negative points, especially with respect to the specific case of the Convention. Therefore, the monitoring system is considered as being one of the main strength of the Istanbul Convention.

Another observation we can derive from the analysis in this paragraph is that the secondary features of a monitoring regime might have more importance when determining its final effectiveness rather than its general structure[634].

[634] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 420.

We demonstrated that this more recent kind of monitoring system might potentially strengthen even more and become flexible, able to support new instances of responsibility[635] and making the institutional framework more fluid.

In order to demonstrate this last argument, in the next chapter we will analyse six reports of GREVIO showing six specific cases of noncompliance, specifically concerning Article 36 of the Istanbul Conv.

3.4. Italy

GREVIO, as shown, initiates its monitoring process via a questionnaire to be submitted by parties. Concerning Article 36, in the questionnaire GREVIO asks to the parties to indicate how domestic laws criminalises the crime of "sexual violence, including rape, as defined in Article 36, paragraph 1, having due regard to the definition of consent under Article 36, paragraph 2"[636]. It also demands to indicate how their internal law criminalises acts of sexual violence, including rape, that are committed against former or current spouses or partners (Article 36.3). Through this set of questions, GREVIO is able to recollect data and information about the enforcement and compliance of Article 36 of the Istanbul Conv.

In chapter 2 we already argued that in many cases, legislation on sexual violence is not aligned with Article 36 of the Istanbul Convention. Difficulties in defining the crime complicate even more the approach[637]. In turn, in the previous paragraph we argued that GREVIO is a sufficient system to assess the compliance of States parties. In this section, in order to demonstrate that freely given consent in legislation on sexual violence has not yet been introduced as a founding element in many countries as it should be according to Article 36 of the Istanbul Conv., six countries have been selected in order to develop a thorough analysis of compliance under this Article, namely Italy, Portugal, France, Finland, Denmark and the Netherlands. Said analysis had been accomplished through the study of GREVIO reports. We choose those countries since they clearly represent two different regions of Europe, northern and southern, and they have a long tradition of Civil law system, often very similar with each other, as we will show. In the following paragraphs we will analyse the reports of said countries concerning solely the comments about the enforcement of the provision of Article 36.

For each country, we will analyse first the already existing legislation on sexual violence and then the reports by GREVIO, assessing a comment about noncompliance or compliance of Article 36. Afterwards, we will provide a detailed debate about the situation of each country based on the academic literature.

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[635] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 396.

[636] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2016. *Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)*, page 14.

[637] Raijas, R. 11. Sexual Violence in Finland: Legislation, Prevalence, Public Discussion, and Services. *New Views on Sexual Health*, 152, page 153.

The first country under analysis is Italy, whose report has been recently published in January 2020.
According to a survey carried out by the Italian Senate, in 2016 we can count 4046 reported episodes of sexual violence, although with a decreasing tendency (in 2011 the cases were 4617)[638]. Nevertheless, the relevant data to notice is the high incidence of female victims and male perpetrators attested in more than 90% of the episodes between 2011 and 2016[639].
The development of a proper criminalisation of sexual violence in Italy has been very slow: it was only in 1976 that the Italian Court of Cassation condemned a man for sexual violence exerted on his wife[640]. Historically, in many countries including Italy, rape or sexual violence were criminalised as being offences to the public moral or decency, and not as a crime against an individual. The object of the offence was not the person but, conversely, the family honour, the common peace, the respect[641].

In Italy, sexual violence has been included in the crimes against an individual only in 1996[642], as stated by Law No. 66/1996. It represents an update of the previous obsolete law that used to define sexual violence as a crime against public morality[643]. However, the legislator does not define the concept of sexual acts and makes the definition rely on jurisprudence, which in turn had been able to offer a wide range of definitions, including also sexual harassments[644].
The Italian Criminal Code regulates the crime of sexual violence in Articles 609-bis, 609-ter and 609-octies.
The first Article states that any individual that forces another to perform or suffer sexual acts with the use of violence or threat is prosecutable[645]. Likewise, the same prosecution will be applied if the perpetrator exploits the condition of physical or psychological inferiority of the victim when committing the act or if he or she misleads the victim after substituting himself or herself to another individual[646]. Article 609-octies regulates the crime of sexual violence when organized and committed by more than one person[647].
Article 609-ter introduces aggravating circumstances. For the sake of this analysis we are taking into consideration the most relevant ones, namely in the case of committing the crime:

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638 Senato della Repubblica, (2018). *Femicide - The final report of the first Italian Joint Committee of Inquiry. Data and Statistics*, Ufficio Valutazione Impatto, page 3.
639 Ibidem.
640 De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 87.
641 Ivi, page 126.
642 Ibidem.
643 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2020. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Italy*, page 63.
644 Servizio Studi - Dipartimento Istituzioni, (2017). La Convenzione di Istanbul contro la violenza nei confronti delle donne - L'attuazione nell'ordinamento interno, Camera dei deputati - Legislatura - Dossier di documentazione, n. 50, page 35.
645 Codice penale, Libro Secondo Dei Delitti In Particolare, Titolo XII, Dei Delitti Contro La Persona, Capo I, Dei Delitti Contro La Vita E L'incolumità Individuale, 19 Ottobre 1930, Article 609-bis.
646 Ivi, Article 609-bis.
647 Ivi, Article 609-octies.

1. Against a person to which the perpetrator is forefather, parent, even adoptive or tutor;
2. With the help of weapons, alcoholic, narcotic substances or drugs or other instruments or seriously prejudicial substances of the health of the victim;
3. Being disguised or simulating the qualification of public official or in charge of public service;
5. (-ter) against a pregnant woman;
1. (-quater) against a person to whom the perpetrator is the partner, either separated or divorced, namely having had an affective relationship with the victim, even without cohabitation[648].

The system of human rights protection in Italy includes a wide range of treaties and conventions, including the Istanbul Convention[649]. Treaties that are ratified by Italy, including customary and human rights treaty law, and later implemented become incorporated into the law and can be the object of judicial enforcement[650]. *Ad hoc* treaties are transferred into domestic law usually through statutory legislation[651]. Italy ratified the Istanbul Conv. through the adoption of Law 119/2013[652].

Concerning lit. c. of article 36.1 of the Istanbul Conv. regarding the act of forcing another person to perform non-consensual acts with the perpetrator, in the Italian legislation we find that this act is already prosecuted by the crime of private violence regulated by Article 610 of the Criminal code[653]. In fact, it states that "An individual who forces others to perform, tolerate or omit something is punished with imprisonment up to four years[654]".

In case of more severe cases of coercion of will, the crime is enlisted under Article 600 of the Criminal Code about enslavement of other individuals[655], which prosecuted perpetrators that "constrain or keep a person under a state of continuative subjection, forcing it to work or to sexual performances[656]".

Thereby, under these two points of view we can affirm that Italian legislation fully complies with the obligations of the Istanbul Conv.

Concerning other points of Article 36, in par. 3 it requires States parties to adopt adequate legislative measures in order to ensure that sexual-related crimes will be prosecuted even when committed against ex or current

[648] Codice penale, Titolo XII, Capo I, Article 609-ter.
[649] Conforti, B., & Francioni, F. (Eds.). (1997). *Enforcing international human rights in domestic courts* (Vol. 49). Martinus Nijhoff Publishers, page 19.
[650] Ibidem.
[651] Ivi, page 27.
[652] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 52.
[653] Servizio Studi - Dipartimento Istituzioni, (2017). La Convenzione di Istanbul contro la violenza nei confronti delle donne, page 35.
[654] Codice penale, Titolo XII, Capo I, Article 610.
[655] Servizio Studi - Dipartimento Istituzioni, (2017). La Convenzione di Istanbul contro la violenza nei confronti delle, pages 35-36.
[656] Codice penale, Titolo XII, Capo I, Article 600.

spouses or partners[657]. In this respect, the Italian legislative system did not necessitate further modifications[658]. Italy gave effect to the Istanbul Convention through national implementing acts following ratification[659], which modified several provisions of both its Criminal Code and Criminal Procedural Code. In fact, the decree-law n. 93 of 2013 went even further the simple provision of the Convention and it introduced the already-mentioned aggravating circumstance 5-quater, when the crime is committed against a person to whom the perpetrator is the partner, either separated or divorced, namely having had an affective relationship with the victim, even without cohabitation[660].

Further changes had been realised in 2019, therefore very recently. The law 19 of July 2019 introduces new sanctions concerning crimes of sexual violence. The period of imprisonment for acts of sexual violence and sexual violence committed by more than one person have been raised: the former passed from a minimum of six to a maximum of 12 years, formerly being from five to 10, and the latter from minimum of 8 to a maximum of 14, formerly 6 to 12 years[661].

However, according to GREVIO report, the Italian legislation *does not* clearly and explicitly define the crime of sexual violence as an offence based on the lack of freely given consent of the victim and assessed in the context of the surrounding circumstances as prescribed by Article 36 of the Istanbul Conv. [662].

We can apply in the context of Italian normative the analysis of a scholar according to which the law of a proper secular State has not to interfere with the self-determination of the individual[663]. This means that, by explicitly founding the crime of sexual violence on consent, the State defends the self-determination of the individual since, as we mentioned, consent is equal to self-determination. Consequently, we can affirm that Italy is not a secular state in the definition of this scholar, since it allows the self-determination to be contaminated.

According to another scholar, since the act of sexual violence understood by the Italian law is accomplished under the hypothesis of an individual forcing another individual to perform or suffer sexual acts through "violence or threat or abuse of authority[664]", coercion is present in the crime by default[665]. Therefore, it is

[657] Servizio Studi - Dipartimento Istituzioni, (2017). La Convenzione di Istanbul contro la violenza nei confronti delle donne, page 36.
[658] Ibidem.
[659] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 51.
[660] Servizio Studi - Dipartimento Istituzioni, (2017). La Convenzione di Istanbul contro la violenza nei confronti delle donne, page 36; Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 19.
[661] L. 19 luglio 2019, n. 69, Modifiche al Codice penale, al codice di procedura penale e altre disposizioni in materia di tutela delle vittime di violenza domestica e di genere. GU n.173 del 25 luglio 2019, Article 13.
[662] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2020. *GREVIO's (Baseline) Evaluation Report, Italy*, page 63, (emphasis added).
[663] Rescigno, F. (2018). L'autodeterminazione della persona: il faticoso cammino del diritto positivo. *Rivista critica del diritto privato*, *36*(1), 13-46, page 27.
[664] Codice penale, Titolo XII, Capo I, Article 609-bis.
[665] De Vido, S. (2016). *Donne, violenza e diritto internazionale,* page 128.

possible to affirm that when there is coercion, consent is missing by definition, and it is the lack of this element that constitutes the legal foundations of the offence of sexual violence[666].

In fact, in 2013, the Italian Court of Cassation dismissed the appeal of a man against a sentence condemning him to three years of imprisonment for sexual violence against his ex-partner[667]. The Court in its comment highlighted the fact that when an individual proceeds anyway to a sexual intercourse, even when the formerly given consent of the victim have been contaminated and therefore cease due to a change of mind or to a disagreement of the victim with the modalities of performing the sexual act, it is possible to consider it as a crime of sexual violence[668].

The Italian Criminal Code should in fact embrace the view of the lack of consent in its own definition of sexual violence, since, as we said, consent does not exist when there is coercion. The Italian law is consequently limited under this perspective, but on the other side the Court of Cassation recognized to a certain extent this limit. Thereby, as we appraised, the report emitted by GREVIO for the country clearly stated that the explicit requirement of the lack of freely given consent as founding element of the crime is absent in the Italian legislation.

In spite of that, even though the lack of consent is not explicit or required by the law, there have been cases, such as the mentioned case of 2013, in which the crime of sexual violence has been assessed proving the lacking consent during a trial.

Another example refers to a more recent sentence of 2019, where, again, a man was guilty of sexual violence perpetrated on his ex-partner. According to the Court of Cassation, in this case the objective element of the crime (namely the factual event constituting the crime) was constituted not only by the invasive behaviour on the sexual freedom and integrity of the other person, realised with the presence of a dissent from the part of the victim, but also by the absence of consent of the victim, not expressed neither in a tacit form, as it would be the case in which the victim would not be aware of the acts performed with his or her body[669]. Likewise, the subjective element (namely the personal conscience and willingness of action or omission of a crime of a guilty) of sexual violence is constituted by a generical fraud and therefore by the conscience and willingness of the convicted of engaging in an invasive and detrimental act of the sexual freedom of the non-consenting person[670]. The Court concluded its comment by stating that "the lack of consent constitutes an explicit requisite [of the crime][671]". In fact, it would be enough for the perpetrator to be aware of the fact that the consent from the part of the victim had not been manifested properly when performing the sexual acts[672]. In fact, as we already discussed in chapter 1.5. on the definition of consent in legislation about sexual violence, there are no normative standards that could impose to the victim an obligation, even implicit, of expressing non-consent to the violation

666 De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 128.
667 Ibidem.
668 Ivi, pages 128-129; Corte di Cassazione, Sezione III, sentenza 3 aprile 2013, n. 15334, par.4.
669 Corte di Cassazione, Sezione III Penale, Sentenza 19 marzo – 15 ottobre 2019, n. 42118, par. 4.1.
670 Ibidem.
671 Ibidem.
672 Ibidem.

of other individuals in his or her sphere of sexual intimacy[673]. Conversely, the dissent has to be presumed where there are no clear and univocal evidences or indications demonstrating the existence of a consent, either tacit but in any case, unequivocal[674].

Since the Istanbul Conv. can be considered as being an *ad hoc* treaty, some obstacles and limitations that could prevent the enforcement by Italian courts of the rights contained in it can be easily observed[675]. The first limitation originates from the Italian Constitution: a provision of a treaty that clearly discords with a constitutional rule might not be enforced without a prior modification of the Constitution itself[676]. Second, the status of statutory law of human rights treaties does not mean that they immediately precede over incompatible laws[677].

It is true that at first, they can claim precedence by attesting the criterion of presumption of conformity or speciality, but in practice Italian courts do not tend to displace current legislation[678].

Therefore, international treaties containing human rights provisions are embedded with resistance against incompatible national laws even if they have been ratified or implemented afterwards[679].

Nonetheless, international human rights treaties can serve as a powerful means of interpretation: they can help improve and develop national legislation on human and individual rights and they can set the standards for interpretation and determination of the legitimation of application of other international tools subscribed by Italy[680], even though the same argument can be valid also for other countries.

In conclusion, according to some scholars, it is also true that the Italian law system shows many inadequacies: in particular, they refers to "the old-fashioned mentality of some judges to consider human rights obligations non-self-executing and to the inefficiency of the judicial machinery[681]".

We demonstrate therefore that the Italian Courts have assessed in more than one case the crime of sexual violence based on the lack of consent. In addition, there have recently been some changes in the Italian legislation on sexual-related crimes that introduced heaviest sanctions for the convicted.

Nonetheless, these elements and facts have proved not to be sufficient when speaking of compliance with Article 36. It is for this reason that GREVIO in its report urged Italian authorities to change the wording of the legislation, introducing lack of consent as a founding element.

It is also to take into consideration the cited structural limitations imposed by the Italian Constitution and the high probability that said limitation might prevent or hinder in the future the process of further enforcement and implementation of the Convention. We speak about the future since the report has been emitted by GREVIO

[673] Corte di Cassazione, Sentenza 19 marzo – 15 ottobre 2019, par. 4.1.
[674] Ibidem.
[675] Conforti, B., & Francioni, F. (Eds.). (1997). *Enforcing international human rights in domestic courts*, page 29.
[676] Ibidem.
[677] Ibidem.
[678] Ibidem.
[679] Ivi, page 30.
[680] Ibidem.
[681] Ivi, pages 33-34.

very recently, so it is premature to judge the process of alignment with the obligations of Italy. Anyhow, given the circumstances, we cannot affirm that in the future Italy will surely comply with every provision of the Istanbul Convention.
Incidentally, unfortunately we find other countries in Europe that present similar problems. That is the case of Portugal for example, as we will see in the next paragraph.

3.5. Portugal

Portugal initiated changes of its legislation before the ratification of the Istanbul Conv. but completed its reforms only afterwards[682]. It already had specific legislation in place addressing women victims of violence since the 1990's[683]. However, amendments to the Criminal Code were necessary to fully comply with the Convention[684]. Portuguese legislation on violence against women, as it is the case for many European countries, is the only one out of six cases of this work that we find embedded in the broader legislation of domestic violence, since it is considered as the most common form of violence against women[685]. At this point, we are going to introduce the main features regarding Portuguese legislation.

Articles 163 and 164 of the Criminal Code of Portugal regulate the crime of sexual violence and sexual coercion. In Article 163 about sexual coercion we find that an individual is prosecuted if he or she forces another individual to suffer or perform with him or her or a third individual a sexual act through the use of violence, serious threat or after rendering the second individual unconscious for this same purpose[686]. In addition, whoever is abusing an authorial position, deriving from a familiar relationship, tutorship or curatorship, hierarchic, economic or job dependence, or is exploiting the frightening situation he or she has created, forcing another person to suffer or perform relevant sexual acts with him or her or another person by any other mean apart from those mentioned above will be as well legally prosecuted[687].
Article 164 on sexual violence declares that an individual can be prosecuted if he or she forces another person to suffer or perform with him or her or a third person copula, anal or oral intercourse or to suffer vaginal or anal penetration with bodily parts or objects with the use of violence, serious threat or after rendering the second individual unconscious for this same purpose[688]. Furthermore, an individual is as well prosecuted when he or she forces another person to suffer or perform with him or her or another person copula, anal or oral intercourse or to suffer vaginal or anal penetration with bodily parts or objects by any other mean apart from those mentioned above when abusing an authorial position deriving from a familiar relationship, tutorship or

[682] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 51.
[683] Ibidem.
[684] Ibidem.
[685] Ibidem.
[686] Código Penal De Portugal, 4 de Setembro 2007, Article 163.1.
[687] Ivi, Article 163.2.
[688] Ivi, Article 164.1.

curatorship, hierarchic, economic or job dependence, or is exploiting the frightening situation he or she has created [689].

As we can notice and according also to the GREVIO report, the definition of sexual crimes given in Portugal's Criminal Code is not based merely on the absence of consent of the victim[690]. Both the Articles analysed above require using violence or severe threat or rendering the victim unconscious or incapable of resistance as a constituent element of the offence[691].

In order to comply with the provision of the Istanbul Conv. and to better protect and safeguard victims of sexual violence, several changes and amendments have been accomplished in Portuguese legislation.

Despite the reforms executed to the crimes of sexual violence starting from the Criminal Code of 1982, the law is still not neutral nor purified by prejudices as claimed[692]. When delineating the legal details of the crime, the legislator based itself on the myth that sexual violation is performed by a stranger that uses physical violence or severe threats against the victim or that makes the victim unconscious or unable to resist[693].

A national legislation recognizing women as being the main group suffering violence within the household has been adopted in 2009, namely the Law n.º 112/2009, of 16 of September[694]. However, according to a scholar, the Portuguese Criminal law is still not sufficient to protect three basic human rights of women, namely the right to her freedom, to sexual self-determination and personal integrity, in two cases, sexual violation and sexual harassment[695]. In fact, again, the Istanbul Conv. demands the criminalisation of any non-consensual sexual act, imposing that in the crimes of rape and sexual harassment were to be abolished the requisites of violence and severe threat as constituting elements of the offence as the one provided by Articles 163.1 and 164.1 of the Portuguese Criminal Code[696].

In 2015 however, a penal reform was carried out, and the wording "by any other mean apart from those mentioned above" was added in order to cover acts of sexual coercion and violence without violence or threat[697]. The aim of this new amendment was to make Portugal's criminal legislation on sexual violence comply with Article 36 of the Istanbul Convention[698]. However, according to GREVIO, these changes did not eliminate the requirement of the use of force: in fact, in both Articles 163 and 164, the conduct is described with the word

[689] Código Penal De Portugal, Article 164.2.

[690] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Portugal*, page 49.

[691] Ibidem.

[692] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 109.

[693] Ibidem.

[694] Ivi, page 106; Lei n.º 112/2009, de 16 de Setembro.

[695] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 105.

[696] Ivi, page 108.

[697] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, Portugal*, page 49.

[698] Ibidem.

"force" and therefore, according to the report, is not sufficient to avoid the requirement of proves of victim's resistance in trials in order to assess a sentence[699].

If we analyse the Criminal Code of Portugal through history, we find that the crime of sexual violence has always be conceived as a crime of constrained execution, meaning that in order for it to be assessed, it requires typical means of constrain, namely violence or severe threat[700].

Under the Criminal Code of 1886 we find that the jurisprudence of the Supreme Court of Justice reached the point of affirming that the element of violence always exists in the case of the act being performed against or without the willingness of the victim[701]. Such an understanding is still into effect at the time of writing according to a more caring jurisprudence of women rights and human dignity[702].

As an example of the dangerous effects of this legislation we report a case of 2011 in which the perpetrator had been acquitted from the crime of sexual violence of his patient[703]. The Tribunal proved the lack of consent by the side of the victim and afterwards it recognised that the requisite of violence was not fulfilled in the case in order for the perpetrator to be charged with the crime, founding thereby the whole judgment on the lack of resistance of the victim and in the absence of an argument or a fight between perpetrator and victim[704].

The conception that requires the use of physical violence as either *vis absoluta*, namely the violence used by an individual in order to extort to another a negotiable willingness otherwise inexistent[705], or *vis compulsiva*, intended as psychical violence exerted on an individual in order to conclude a judicial negotiation[706], and the duty of resistance to be attributed to the victim, continues to be defended by the penal doctrine[707].

Thus, an alteration of the Portuguese Criminal law is needed, so that it will exist according to Article 36 of the Istanbul Conv. and as well with the jurisprudence of the ECtHR, that define sexual violence as a crime against the freedom of consent and of sexual self-determination as we already wrote, without demanding duties of resistance to victim, as also stated in the case of *M.C. v. Bulgaria*[708].

The extension of the crime of sexual violence in the Criminal code corresponds to an ethic imperative of criminalisation imposed by the Constitution that in Articles 25.1 and 26.1 affirms the right to the personal integrity and to the free development of the personality, reaching the extent of sexual freedom and self-

[699] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, Portugal,* page 49.
[700] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 108.
[701] Santos, B. D. (1924-1925), O crime de violação, *RLJ*, Ano 57.º, page 369.
[702] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 110.
[703] Ivi, page 108.
[704] Ibidem.
[705] Edizioni Giuridiche Simone, Dizionari Online, found in: https://www.simone.it/newdiz/newdiz.php?action=view&id=3159&dizionario=3#:~:text=Vis%20absoluta%20%5BViolenza%20fisica%3B%20cfr,%2C%20anche%20se%20viziata%2C%20esiste., retrieved 06/07/20.
[706] Ivi, retrieved 06/07/20.
[707] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 109.
[708] Ivi, pages 109-110.

determination[709]. These are indeed very relevant rights, referring to one's own interior and to his or her own identity and autonomy, implying a power of disposal over oneself without intromission of external individuals[710].

Yet, two different jurisprudence tendencies persist nowadays in Portugal: on one side we find the one that requires proves of resistance and on the other side the second one is satisfied solely with lack of consent[711]. From this ambivalence originates the needs of legislative intervention in order to extend the concept of sexual violence[712].

An alleged difficulty in proving the lack of consent has been presented against this enlargement of the current legislation[713]. In a case of a violent crime, the main proves consist in fact in the declaration of the victim, medical and psychological examinations and evaluations and other testimonies attesting potential traumatic consequences[714].

On the other side, potential difficulties in presenting such proves are relevant only within the judicial procedure, where in some cases the lack of consent is proved and in others is not possible to gather sufficient proves of it, and not in the legal definition of the offence [715]. In fact, such definition is formulated in a general and abstract manner, linked to the hierarchy of judicial goods and not to the issues of evidence[716]. Therefore, the evidences acquire a case-sensitive dimension, and the analysis of the whole case is submitted to the criminal procedure and to the psychology of justice, and not to the legislator[717] as it should be according to the Istanbul Convention. The need of a form of additional violence to the non-consensual act would permit in this way that only the cases in which a physical traces or signs of violence in the body of the victim are detected would be prosecutable, thus obtaining an incontestable proof of the facts and protecting the defendant from false declarations[718]. In fact, when a complaint of sexual-related crimes is presented, it is very likely that the applicant is charged with the accusation of having raised false declarations[719]. However, false declarations are not usually raised in case of other crimes such as theft, in which the credibility of the victim or the issue of consent is not even debated or posed[720]. In Portugal, we find that only 5% of the presented complaints of sexual violence are based on false

[709] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 110.
[710] Ibidem.
[711] Ivi, page 111.
[712] Ibidem.
[713] Ibidem.
[714] Ibidem.
[715] Ibidem.
[716] Ibidem.
[717] Ibidem.
[718] Ibidem.
[719] Ibidem.
[720] Ivi, pages 111-112.

declarations[721]. The possibility of the presence of false declarations exists in any type of crime, but this phenomenon did not influence the legal definition and wording or the treatment of the victims[722].

In conclusion, GREVIO recommended Portuguese authorities to amend the criminal legislation in order to guarantee that sexual crimes will be based on the lack of freely given consent of the victim[723]. The Criminal law in Portugal must in this way be modified in order to clarify that sexual acts described in articles 163.1 and 164.1 of the Criminal Code would be punished because of the lack of consent of one of the two parties or because the consent was not freely given, and considering instead the existence of physical violence or severe threat as aggravating circumstances[724], thereby updating the law.

As a result, the characteristic of the sexual act considered as relevant for the victim will not be the objective delineation by itself but rather the lack of consent for its practise[725]. The legal definition of sexual violence needs finally to adjust to the reality of the life of women and of their experience, reaching every extent of non-consensual sexual acts, regardless the use of means of constrain like violence or threat[726].

3.6. France

Section III of the French Penal Code regulates sexual offences. Article 222-22 defines sexual aggression as "any sexual assault committed with violence, constraint, threat or surprise[727]". Any act of sexual penetration or of other nature against an individual through the use of violence, constraint, threat or surprise is defined and punishable as rape in the Penal Code[728].

Here we found an innovative element that we do not find in other countries analysed in this work, namely the element of surprise defining the offence of rape. Rape by 'surprise' might occur where there is no opportunity for the victim to explicitly give consent, for example in a case of an unconscious patient in a hospital[729]. Another example of rape by surprise is constituted by a famous case of 1857: the Court of Cassation of France recognised a crime of rape in a case where the crime was performed in the house of the victim by an intruder who had sexual intercourse with her while she was asleep and in a situation where the victim at the moment of the sexual intercourse thought that the perpetrator was her husband[730].

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[721] Santos, J. C. *et al*. (2009). *Different systems, similar outcomes? Tracking attrition in reported cases in eleven countries*, European Comission DAPHNE II Programme Project n.º JLS/DAP/06-1/141/WYC, Delegação do Sul do Instituto Nacional de Medicina Legal, I.P., Lisboa, page 8.

[722] Sottomayor, M. C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 112.

[723] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, Portugal,* page 49.

[724] Sottomayor, M.C. (2015). A Convenção de Istambul e o novo paradigma da violência de género, page 110.

[725] Ibidem.

[726] Ivi, pages 119-120.

[727] Penal Code of France, 22 July 1992, Section III, Article 222-22.

[728] Ivi, Article 222-23.

[729] Bacik, I., Maunsell, C., & Gogan, S. (1998). *The Legal Process and Victims of Rape: A comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape, in the fifteen Member States of the European Union* (p. 224). Dublin Rape Crisis Centre, page 206.

[730] Ibidem.

In addition, the offence of rape is assessed also if:

- it causes mutilation or permanent disability in the victim;
- it is committed against a person whose particular vulnerability, due to age, sickness, infirmity, physical or psychological disability or to pregnancy, is apparent or known to the perpetrator;
- it is committed by a legitimate, natural or adoptive ascendant, or by any other person with any kind of authority over the victim;
- it is committed by a person abusing the authority conferred by his or her position;
- it is committed by two or more individuals as perpetrators or accomplices;
- it is committed with the use or threatened use of a weapon;
- the victim has been brought into contact with the perpetrator through the use of a communications network;
- it is committed because of the sexual orientation of the victim[731].

In addition, the sentence is harsher in case of the death of the victim or if the rape is preceded, accompanied or followed by acts of torture or barbarity[732].

As we can notice, lack of consent is defined broadly according to a scholar[733], but the analysis developed by GREVIO showed that in the Penal Code of France the definition of sexual offence is not explicitly founded on the violation of the free and unequivocal consent of the victim[734].

Nonetheless, case laws of France are consistent in recognising that everyone has the right to refuse sexual intercourses and that as a result, judges commonly base their legal interpretation of sexual assault and rape on the lack of consent of the victim[735]. In addition, the lack of consent is assessed in the light of the behaviour of the perpetrator which is characterised by violence, coercion, threat or surprise[736]. According to French authorities, this legal definition allows an objective method of assessment of the crime since it suggests deducing the absence of consent from objective elements of the behaviour of the perpetrator and its effects on the victim[737].

On one side, as we explained in the third chapter, it is true that the Istanbul Conv. leaves to the single State to decide on the wording of the provisions on rape and sexual violence and on the factors that are supposed to

[731] Penal Code of France, Section III, Article 222-24.
[732] Ivi, Articles 222-25 and 222-26.
[733] Bacik, I., Maunsell, C., & Gogan, S. (1998). *The Legal Process and Victims of Rape*, page 206.
[734] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), France*, page 55.
[735] Ibidem.
[736] Ibidem.
[737] Ivi, pages 55-56.

preclude consent. On the other side, the way in which the French legislation is coded places the emphasis on the proves of non-consent, at the expenses of the centrality of the lack of consent[738].

By adopting a definition based on non-consent of the victim, it will be possible according to GREVIO to overcome the current obstacles present in France such as legal uncertainty generated by ambiguous interpretations of the constituent elements of violence, coercion, threat and surprise and the incapacity of such proves to entirely cover the case of every non-consenting victim of sexual crimes, especially when they find themselves in a state of shock[739].

Most importantly, such definition would allow to shift the perspective towards recognising that the will of the victim is at the centre of the entire discourse on sexual violence[740]. GREVIO thereby suggested French government to take into consideration the concern of the risk to place a heavy burden of proves on the victim[741].

According to the GREVIO report on France, since 1980, moves towards an improvement in the definition of sexual violence have been undoubtedly made[742]. Four laws were approved on July 22 of 1992, amending the previous Penal Code and a further law passed on December 16 of 1992. Before this adjustments, the definition of rape in the French Code dated back to the eighteenth century[743].

Recently, Law n. 2018-703 of 3 of August 2018 introduced innovations for what concerns sexual related crimes. In particular, the definition of rape has been extended also to acts of penetration imposed on a victim but performed on the perpetrator, and a new aggravating circumstance was added for what concerns sexual assaults committed against a victim to whom has been distributed a substance compromising his or her ability to have control on his or her behaviour or discernment without knowledge[744].

While welcoming these improvements, GREVIO however notes that authorities have not yet properly revaluated the definition of sexual assault and rape as acts necessarily qualified by the use of violence, coercion, threat or surprise[745].

In conclusion, also in the case of France, the amendments and further adopted laws on sexual violence and rape seem not to be sufficient in order to tackle those issues and ensure proper protection of victims. As a result, GREVIO suggested French authorities to definitively base the definition of sexual violence on the absence of the freely given consent of the victim as demanded by Article 36.1 of the Istanbul Convention[746].

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738 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, France*, page 56.

739 Ibidem.

740 Ibidem.

741 Ibidem.

742 Ivi, page 55.

743 Bacik, I., Maunsell, C., & Gogan, S. (1998). *The Legal Process and Victims of Rape,* page 206.

744 Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, France*, page 55.

745 Ibidem.

746 Ivi, page 57.

3.7. Finland

Finland presents somewhat the same problematics of Italy and Portugal.
It has given effect to the Convention through a national implementing act after ratification[747] and in 2015, Finland amended its Criminal Code in order to align it with the Istanbul Conv. [748]. Despite the fact of the amendments to the legislation seeming to have ensured an appropriate compliance with the provisions of the Istanbul Conv., we can still notice many pitfalls in the Finnish law[749]. In fact, as also highlighted by GREVIO, the crime of rape is still based on the presence of force or threat or on the inability of the victim to defend, formulate or express the will and the right to self-determination is not properly marked[750], as we will see in the course of this paragraph.

In Finland, the offence of rape is criminalised in Chapter 20 of the Penal Code amended in 2014. For what concerns Nordic Countries, the formulation of the crime of rape in Finland criminal law is very similar to Denmark, as we will see in the next paragraph, since it focuses on violence and coercion[751].
In Section 1 we observe that "A person who forces another into sexual intercourse by using threat or violence shall be sentenced for rape […].[752]". The sentence of rape is also valid in the case of a person taking advantage of another because the other finds himself or herself in a state of unconsciousness, illness, disability, fear or other state of helplessness, or is unable to defend or to formulate or express his or her own will[753]. Previously, this paragraph concerned solely the abuse of an unconscious woman and was reformulated in order to extend the scope[754]. However, the current law still presents traces of the past law since it requires an evidence of the inability to resist, but, according to an author, the extension of the scope allows the law to begin to take into account the coercive circumstances[755].
In addition, the Penal Code considers the following cases as aggravating circumstances of the crime:

- the perpetrator causes to the victim severe bodily injuries, serious illnesses or a state of mortal danger;
- the offence is committed by more than one person;
- especially marked mental or physical suffering is caused in the victim;
- the offence is committed in a particularly brutal, cruel or humiliating manner;
- a firearm, weapon or other lethal instrument is used for threatening the victim;

[747] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 51.
[748] Ivi, page 52.
[749] Ibidem.
[750] Ibidem.
[751] Jacobsen, J. (2019). Valdtektsstraffebodet: Gjeldane rett og spørsmålet om reform, page 48.
[752] Penal Code of Finland, 21 April 1894, Chapter 20, Section 1.1.
[753] Ibidem, Section 1.2.
[754] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 124.
[755] Ibidem.

- a threat of other serious violence is made[756].

The main debate around which the sexual crimes discourse in Finland is centred concerns the proposal of dividing the crime of rape into three categories, classified from least to most severe[757]. The less serious category has been heavily contested as many commented on the fact that an occurrence of rape cannot be classified as less severe from another and that rape is always a serious and violent crime[758].

Despite the debate, and the definitions proposed being to some extent ambiguous, the three categories of rape were included anyway, resulting in coercion into sexual act (Section 4 of Chapter 20 of the Penal Code of Finland), rape (Section 1) and aggravated rape (Section 2)[759]. The three categories differ from one another in the different degree of physical and psychological violence used against the victim, the amount of damages suffered by the victim and also the number of perpetrators[760].

According to GREVIO report, in Finland the offence of rape is not exclusively based on the complete lack of consent, which is the central element that characterised rape as prescribed by the Istanbul Conv. [761].

In this case as well GREVIO remarked the fact that rape continues to be defined according to the level of physical violence or threats from the side of the perpetrator and to the requirement to show that the victim was in a state of fear, helplessness or unable to defend or formulate or express his or her will[762]. Said approach does not completely capture the reality of sexual violence experienced by women, nor their reaction to threats as would be flight, fight, freeze, flop or befriend[763]. Therefore, not every form of sexual violence is criminalised in Finland, showing that its legislation is not aligned with the Istanbul Conv. [764].

In addition, also in the case of Finland we observe that evidences of physical resistance of the victim are required and that as a result the attention is focused on the behaviour and reaction of the victim and not in the actions of the defendant[765].

As a final remark, GREVIO encourages the authorities of Finland to reform the legislation on sexual offences in Chapter 20 in order to incorporate the concept of freely given consent as the Article 36 demands, requiring also to ensure suitable sanctions for non-consensual sexual acts, also when valid consent is precluded by the surrounding circumstances[766].

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[756] Penal Code of Finland, 21 April 1894, Chapter 20, Section 2.
[757] Raijas, R. 11. Sexual Violence in Finland, page 154.
[758] Ibidem.
[759] Ibidem.
[760] Ibidem.
[761] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Finland,* page 43.
[762] Ibidem.
[763] Ibidem.
[764] Ibidem.
[765] Ibidem.
[766] Ivi, page 44.

As a preliminary statement we have to embrace the view of a scholar that pointed out that literature about sexual violence in Finland is scarce, and therefore the overview over the general situation of the country is very limited[767].

In general, in Nordic countries, thus including also Finland, women's autonomy over their bodies and their sexuality have long been recognised and considered as a moral principle[768]. Gender norms in Nordic countries give more freedom to women in order to comply with their sexuality based on their own needs compared to norms we find in other societies[769]. In a non-official way, the sexual autonomy is often challenged or in some cases even precluded[770]. In fact, as shown, the definitions prescribed by the law do not entirely cover the whole spectrum of sexual acts and the law itself abstains in interfering with those behaviours that deny or belittle sexual autonomy of women[771].

Nonetheless, in the past years, steps forward have been made by Finnish legislators in order to accomplish important reforms of sexual-related crimes legislation[772]. In 1994, coming into force starting from 1999, the law for the first time recognised that marital rape was to be considered a crime; previously in fact, marital rape was not envisaged by criminal law provisions[773]. In spite of this, Finland was one of the least countries in Europe to criminalise rape within the marriage[774].

Moreover, Finland was able to amend its legislation for what concerns the reform of the right to prosecute assaults in the private sphere and in reviewing the essentials elements of rape in the Criminal Act in 2011: before that time, in fact, sexual intercourse with a defenceless individual was considered as sexual abuse, and was therefore accompanied by a more lenient punishment than an offence classified as rape[775]. The Act itself classified sexual intercourses with a defenceless victim (e.g., unconscious or unable to fight back) as rape[776].

In addition, previous law required a physical fight of the victim against the responsible for the act, otherwise the legal element primarily constituting the sexual crime could not be met[777]. According to the new law, the legal criteria that define sexual crime might be met even in case of the offender having induced such a state of fear in the victim that she was not able to fight or resist[778]. As a result, a clear verbal expression of not wanting to engage in a sexual intercourse is now judicially sufficient[779].

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[767] Raijas, R. 11. Sexual Violence in Finland, page 164.
[768] Ivi, page 153.
[769] Ibidem.
[770] Ibidem.
[771] Ibidem.
[772] Ibidem.
[773] Ibidem.
[774] Ibidem.
[775] Kotanen, R. (2018). The rise of the crime victim and punitive policies? Changes to the legal regulation of intimate partner violence in Finland. *Violence against women*, *24*(12), 1433-1453, page 1435.
[776] Ibidem.
[777] Raijas, R. 11. Sexual Violence in Finland, page 155.
[778] Ibidem.
[779] Ibidem.

However, as we can suppose from the report of GREVIO, if a clear verbal expression of non-consent is sufficient in a context of a judicial trial, the legislation does not demand it explicitly, therefore leading to uncertainties about its assessment.

In 2013, the law on sexual violence was reviewed and the possibility of founding the crime of sexual violence on non-consent of the victim was discussed[780]. According to the Finnish government, the countries that include the lack of consent as essential element in the crime of rape also present additional elements regarding valid consent, which delineate under which circumstances the consent can be given[781]. However, in the case of Finland, the government believed that those elements are not aligned with the doctrine of evaluating evidence: this means that a situation in which the partners are the only ones that must ensure that the other partner had given its free consent is considered as unnatural and abstract[782].

Moreover, we can observe in a case of 2013 that the Supreme Court of Finland gradually shifted from an interpretation of case laws based on the use of force to another based on lack of consent[783]. The Court never made directly reference to the case of *M.C. v. Bulgaria* or to the provisions of the Istanbul Convention, but we can infer that it was heavily influenced by those[784]. In fact, it stated in its declaration on the specific case that the consent cannot be deduced exclusively from "ending physical or verbal resistance having first denied it[785]" and that the scope of the criminal liability is not avoided only because one partner assumes that the other has changed mind if this change did not occur in a verbal way or in another way[786].

We agree on the fact that criminal law often reflects changes that occur in society[787]. In fact, the formulation of Finnish law on sexual violence of 1889 contained the term of "sexual chastity": we can infer that this wording clearly reflected attitudes of society that used to prevail[788], and also, in the opinion of a commentator, how sexual morality in Finland is deeply rooted in religion[789]. In the 1960s in fact, the violation of the sexual autonomy of a women could account as a crime only if considered not chaste and therefore if was violating conservative and religious values, which in turn were given more importance for what concerns legal protection that the proper sexual autonomy of the woman[790].

[780] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 124.
[781] Ibidem.
[782] Ibidem.
[783] Ivi, page 125.
[784] Ibidem.
[785] Korkein Oikeus, KKO:2013:96, 2013/12/20, R2012/187, par. 48.
[786] Ibidem.
[787] Raijas, R. 11. Sexual Violence in Finland, page 154.
[788] Ibidem.
[789] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 91.
[790] Ivi, page 92.

The conceptualisation of rape and other sexual-related crimes as not being chaste is the key for the interpretation of the contradiction between marriage and rape[791]. As for rape within the marriage, this definition attests the huge obstacle to its criminalisation in Finland[792]. A crime against chastity in Finnish society would not be appropriate in a context of a marriage and it would be considered as shameful[793]. A classification that considers marital intercourse as a crime against sexual moral and chastity would not be possible as a consequence, because otherwise the whole idea of marriage as the place for legitimate sexual intercourse would be contradicted[794]. And this contradiction was so relevant that not even the most distressing violation of the sexual autonomy of a women and in particular of a wife, could be accounted as a chastity crime, implying thereby that these acts and the marriage they were committed in were to be considered as immoral[795].

As a consequence, a forced sexual intercourse could be considered as rape only in the case of the perpetrator not being the husband of the woman[796]. The husband could only be charged with the accuse of rape only if he had helped or supported another man in committing the rape with the wife[797].

Accordingly, other provisions allowed a husband to be charged for an assault or coercion when committing an act considered equivalent to rape, despite the fact that said provisions regulated physical violence and not sexual-related crimes[798]. This, again, supports the idea that the law was aimed at protecting exactly the female chastity and not female sexual autonomy[799].

Accordingly, the law has been reformed and the wording changed to shift the focus on sexual-related crimes rather than chastity[800]. In addition, the previously outdated term "coercion into sexual intercourse" used in the Code was replaced simply by "rape"[801].

The new introduced law focused on the justification of protecting the individual autonomy when denied through the use of violence or intimidation rather than protecting chastity or religious values on sexuality[802]. The subsequent idea is that the law should primarily protect individual autonomy and inherently contain the notion that marriage is meant to provide for an ongoing *continuum* of consent[803].

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[791] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 91.
[792] Ibidem.
[793] Ibidem.
[794] Ibidem.
[795] Ibidem.
[796] Ivi, page 88.
[797] Ivi, pages 88-89.
[798] Ivi, page 89.
[799] Raijas, R. 11. Sexual Violence in Finland, page 154.
[800] Ibidem.
[801] Ibidem.
[802] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 90.
[803] Ibidem.

The law was furtherly modified in order to appear neutral for what concerns the gender and sexual orientation of both victim and perpetrator: the new law recognises that both the offender and the victim can be either a man or a woman[804].

In conclusion, we can state that, also in the case of Finland, improving reforms have been attempted, but nonetheless these are not sufficient in order to ensure proper compliance with Article 36. In addition, the importance of understanding the factors that contribute to sexual violence and the effects of such violence on society and especially on victims has not yet been fully recognised in the case of Finland[805].

3.8. Denmark

In this paragraph we are going to analyse the case of Denmark. We can notice some similarities between the Penal Code of Denmark and the one of Finland. This country however did not need huge modifications of its legislation to comply with the Convention since most of the provisions were already implemented before ratification[806] and that many obligations envisaged by the Criminal Code were introduced very early in Denmark, making it one of the most advanced countries for what concerns the legal point of view. For example, the right of a husband to corporally punish his wife was abolished very early in 1683, with the introduction of the Danish Law[807], and marital rape was criminalised in the early 1960s[808]. Yet, for what concerns sexual violence, the Danish legislation still presents some faults.

The Criminal Code of Denmark criminalises rape in a very different way than the countries we already analysed. In fact, the crime of rape is assessed in Articles from 210 to 221 in the following specific cases when an individual:

- has sexual intercourse with a relative below him or her in lineal descent[809];
- has sexual intercourse with his or her brother or sister[810];
- enforces sexual intercourse with the use of violence or threat of violence[811]. Here in this point we notice that placing a person in a position in which is unable to resist is considered as equivalent to violence[812];
- procures for himself or herself sexual intercourse with another individual by other means of coercion than use of violence or threat of violence[813];

[804] Raijas, R. 11. Sexual Violence in Finland, page 154.
[805] Ivi, page 164.
[806] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, pages 50 and 52.
[807] Bertelsen, E., Sørensen, W. Ø., & Jensen, M. W. (2019). Intimate partner (sexual) violence: Danish research and policy. *Journal of Aggression, Maltreatment & Trauma*, *28*(1), 25-46, page 27.
[808] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 84.
[809] Criminal Code of Denmark, 15 April 1930, Article 210.1.
[810] Ivi, Article 210.2.
[811] Ivi, Article 216.1.
[812] Ivi, Article 216.1.
[813] Ivi, Article 217.

- attains for himself or herself extra-marital sexual intercourse with another person by exploiting documented mental illnesses or mental deficiencies of the second person[814];
- obtains for himself or herself extra-marital intercourse with a person which is unable to resist[815];
- is employed in or in charge of a prison, rehabilitation centre, home for children or young people, hospital or institution for treatment of mental disorders or deficiency or any other similar institution and has sexual intercourse with any inmate of the same institution[816];
- has extra-marital intercourse with a second person by exploiting the subordinate position or financial dependence of the latter[817];
- has sexual intercourse with a person by misleading that person who wrongly believes to be married to the former or mistakes the perpetrator for some other individual[818].

In addition, some aggravating circumstances are included in Article 216.2: in the case of the rape being of a particularly dangerous or violent nature or in other particularly aggravating circumstances, the period of imprisonment might be increased[819].

The Criminal Code does not make distinctions between strangers and acquittances: the crime can be committed by both an external person or an already known individual, like a partner or a relative, and so forth[820].

As we can observe, the responsibility for sexual intercourse can be resumed as incurring as a result of the relationship between victim and perpetrator (sibling, stepfather, financial or other dependent relationship) or the circumstances of the case such as the use of force, threat of violence, incapacity of the victim to resist or mistake of identity from the side of the victim[821]. According to GREVIO, the crime of rape in the case of Denmark is not based in any respect on the lacking consent of the victim as demanded by Article 36[822].

The relationship between the victim and the perpetrator is in fact overly relevant within the jurisprudence of Denmark. As an example, we report a case of 2018, where the defendant attempted to discredit the victim focusing on the relationship between them: in order to defend himself against a punishment of mandatory custody, he presented the claim that the Court should have placed more emphasis on the fact that the crimes

[814] Criminal Code of Denmark, Article 218.1.
[815] Ivi, Article 218.2.
[816] Ivi, Article 219.
[817] Ivi, Article 220.
[818] Ivi, Article 221.
[819] Ivi, Article 216.2.
[820] Bertelsen, E., Sørensen, W. Ø., & Jensen, M. W. (2019). Intimate partner (sexual) violence: Danish research and policy, page 29.
[821] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2017. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Denmark*, page 45.
[822] Ibidem.

were committed in a context of intimate relationship, that the relationship between the defendant and the victim had continued, and that the victim was not injured by the act committed[823].

Despite the fact that in this example the relationship between the perpetrator and the victim was not considered as a mitigating factor, the case is anyway relevant since it provides a better framework for the interpretation of how the relationship might still have a pivotal role in trials in Denmark[824]. Following the thesis of a scholar, the majority of cases of rape in Denmark is accomplished by an acquittance or a current or former partner, and therefore we can argue that a provision on rape based on the lack of consent is strongly needed in Denmark[825].

As argued above, the approach of the Danish legislation is very different from the countries we analysed so far. In fact, the Criminal code enlists in its provision on sexual violence the constituting elements of the crime or the characteristics that a victim must possess for the consent to be precluded and to punish the wrongful act[826]. For example, as we note, sexual acts with a sibling, or a stepchild are punishable, and consent is not relevant as the relationship between perpetrator and victim[827]. In Article 219 as well we find that the crime is based on the working relationship between perpetrator and victim, punishing those that engage in a sexual intercourse exploiting his or her higher position in an institution dedicated to people with mental illnesses, rehabilitation or institution for young people or children: again, consent is not taken into consideration[828].

The offence of rape as defined in Article 216 requires instead four elements, namely the use of violence, threat of violence, duress (as defined by the same Danish Criminal Code) and a state or situation in which the victim is made incapable of resistance[829]. Those elements preclude the consent from the part of the victim and renders the sexual act an offence of rape[830]. A further example of an offence precluding the existence of consent is when the mental illness or disability of a person is exploited in order to engage in a sexual intercourse with him or her[831].

However, such an approach does not include cases that do not fulfil any of the circumstances already enlisted in the legislation[832], not covering therefore any other occurrence of rape which in turn might risk remaining unpunished. Is it possible to affirm that the list of crimes considered as rape enlisted in the Criminal code is not an exhaustive lists and different cases of rape different than the ones enlisted in it might be difficult to be framed as such.

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[823] Bertelsen, E., Sørensen, W. Ø., & Jensen, M. W. (2019). Intimate partner (sexual) violence: Danish research and policy, page 31.

[824] Ibidem.

[825] Ivi, page 32.

[826] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2017. *GREVIO's (Baseline) Evaluation Report, Denmark*, page 45.

[827] Ivi, pages 45-46.

[828] Ivi, page 46.

[829] Ibidem.

[830] Ibidem.

[831] Ibidem.

[832] Ibidem.

As stressed by the report, the current law criminalises solely the sexual acts in which the specific circumstances of the case or the characteristics of the individual involved "already lead to an imbalance of power and necessarily negate consent[833]", rather than introducing the concept of sexual violence being a violation of the right to bodily integrity and sexual autonomy of a woman and that consent must therefore be given freely and voluntarily as the result of the woman's free will, assessed in the context of the surrounding circumstances[834].
Moreover, we can add that the aggravating circumstances of Article 216.2 are not defined in an exhaustive way, leaving their definition vague and general. As a result, assessing also the aggravating circumstances may be hard in a context of a judicial trial.

In conclusion, GREVIO authorities suggested the Danish government to redefine the crime of rape by founding it on the lack of freely given consent of the victim in order to fulfil with Article 36 of the Convention[835].
The lack of consent is relevant since it also would hold "perpetrators of rape accountable, notwithstanding that, for any number of reasons they did not have to resort to violence, threat of violence or duress[836]". In addition, it would also allow the justice system to focus on the assessment of the free will of the woman and on the ability of the perpetrator to actually evaluate said will instead of a mere evidence of the other constituents of the offence, in a context of surrounding circumstances[837].

3.9. The Netherlands

The Netherlands as well have been one of the pioneer countries in developing an effective legislation on sexual violence. A rape that takes place within the marriage was explicitly excluded by Dutch law in the legal definition of rape[838] but in 1991 the legislation was modified in order to classify rape in marriage as an offence[839]. In the 1980s, the government started to actively enacts laws on sexual violence[840]. However, up to the date it somehow lost its leadership for what concerns legislation on sexual violence, and according to a scholar, recent developments had the opposite effect of instead compromise safety of women[841].
The logic of the provisions on sexual violence of the Netherlands is to protect people from engaging into sexual contact when they do not wish to do, or in a way they do not desire[842].

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[833] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2017. *GREVIO's (Baseline) Evaluation Report, Denmark*, page 46.
[834] Ibidem.
[835] Ibidem.
[836] Ibidem.
[837] Ibidem.
[838] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales. *European Journal of Women's Studies*, *9*(4), 447-458, page 449.
[839] Roggeband, C. (2012). Shifting policy responses to domestic violence in the Netherlands and Spain (1980-2009). *Violence against women*, *18*(7), 784-806, page 792.
[840] Ivi, page 784.
[841] Ivi, pages 784 and 792.
[842] Nijboer, J. F. (1997). Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands. *Isr. L. Rev.*, *31*, 300, page 322.

In the Dutch legislation, the offence of rape is enlisted under the crimes against Public Moral in Part XIV of the Criminal code, and not as personal offence, as we observed instead in the other countries.

Rape is assessed when a person coerces another to submit to acts comprising or including sexual penetration of the body with the use of violence or by threat of violence or other kind of threats[843]. Coercion to engage in a sexual intercourse involves that the purpose of the defendant is to constrain the victim to engage in the sexual intercourse against his or her will[844]. This follows that in Dutch law a proof is required in order to establish that coercion took place against the will of the victim[845].

In a judgment of 1978, the Court of Appeal of Amsterdam defined the term coercion in a better way than the proper Criminal Code: in fact, coercion has been defined as deprivation of the freedom to decide whether to engage in a sexual intercourse[846]. As a result, it makes no difference if the woman decided to engage in a sexual acts or not, since the focus is on the fact that she was not asked nor in the position to choose[847]. According to some scholars, this should be the most appropriate legal definition of coercion to adopt in the Criminal code[848].

In addition, in the words of an author, the judges should focus more on the abuse of power when evaluating a case of rape: the behaviour of the defendant should be more significant rather than the behaviour of the victim, and the acts of the alleged perpetrator should be evaluated considering as well the background of the power relations between the man and the woman both at the time and also in in the context of their interpersonal relationship[849].

In addition, the offence of rape is valid as well in the case of a person who, aware of the conditions of the second person, engages in sexual acts with said person which is in a state of unconsciousness, diminished consciousness, physical inability to resist, or mental disease or defect of a relevant degree that does not allow this person to sufficiently exercise or express his or her willingness or resist to the offence[850]. In this case, the offender is fully aware of the unconsciousness, incapacitation or mental illness of the victim and that the conditions of the victim preclude himself or herself to defend[851].

The approach of the legislator in this provision is more objective: some people must be protected against more powerful people more than others, regardless of their will[852]. In fact, for example, having sex with a mentally handicapped person not able to formulate a clear opinion about the situation of to simply be aware of the situation would be punishable[853], and the same discourse can be made for the other countries we enlisted in this

[843] Criminal and Penal Code of the Netherlands, 03 March 1881, Section 242.
[844] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales, page 449.
[845] Ibidem.
[846] Ivi, page 452.
[847] Ibidem.
[848] Ibidem.
[849] Ibidem.
[850] Criminal and Penal Code of the Netherlands, Section 243.
[851] Nijboer, J. F. (1997). Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands, page 324.
[852] Ivi, page 331.
[853] Ibidem.

chapter. The emphasis in this cases is not put on consent of the victim but rather on the protection of more vulnerable people[854]. It can occur however that such cases suffer from lack of evidence since often the victims find themselves in a relationship of dependence with their alleged perpetrators such as a familiar relationship or a situation in which the perpetrator is a staff member in a context of a dedicated institution and as a consequence, they rarely complain[855].

However, despite the focus being on protecting vulnerable people, consent of the victim must have the same relevance of the other provisions, as we can infer from the reports of GREVIO, and therefore it is not sufficient to simply protect them because they are more vulnerable but as well it is important to assess their inability to voluntarily express consent.

When committing an offence of rape, the perpetrator is necessarily accomplishing an intentional act and the element of the intentionality is included in rape legislation, even though only implicitly[856]. However, it is widely acknowledged that rape is indeed an intentional crime[857]. Generally speaking, the lowest form of intent is the conditional intent, namely when an individual is considering to intentionally act taking the risk of the consequences of his or her behaviour[858]. Thus, the scope of the provision of rape in the Netherlands is to some extent wide[859]. In addition, the Supreme Court of the Netherlands as well held in a *obiter dicta* that the element of intentionality in relation to a rape offence might exist if the offender has taken the risk to engage in a sexual intercourse with a woman who did not clearly refuse to it and hence it follows that in unclear cases, the protection of the woman who did not clearly consent to the act is rather extensive[860].

Remarkably, the Criminal Code of the Netherlands includes the offence of "indecent assault" in Section 246, which requires that a person can be charged with this offence if, by using violence of any kind or threat of violence or any other threat constrains another person to engage in or suffer indecent acts[861], and hence sexual acts of any kind are to be included in this offence. The scope of Section 246 is more general, and it defines less specific behaviours that can account as sexual violence than Section 242[862]. Here as well we can apply the notion of intentional crime to the offence[863].

The element of violence and threat in both Sections 242 and 246 implies the unwillingness of the victim and the breach of the will is pivotal for these crimes[864], even though they are not explicitly stated by the Criminal code. In fact, for what concerns compliance with Article 36 of the Istanbul Convention, GREVIO outlined the fact that it is possible to infer from the current wording of the legislation that the provisions on rape of Section 242

[854] Nijboer, J. F. (1997). Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands, page 331.
[855] Ibidem.
[856] Ivi, page 323.
[857] Ibidem.
[858] Ibidem.
[859] Ibidem.
[860] Ibidem.
[861] Criminal and Penal Code of the Netherlands, Section 246.
[862] Nijboer, J. F. (1997). Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands, page 323.
[863] Ibidem.
[864] Ivi, page 324.

and indecent assault of Section 246 that we mentioned above both require evidence of constraint[865]. The interpretation that has been given by the national Supreme Court in a decision of 2009 is that the perpetrator deliberately causes the victim to endure sexual acts against his or her will: as a result, this provision does not act in line with Article 36[866].

Starting from about 1980, the legislation on sexual violence in the Netherlands has however undergone a gradual change[867]. In the 1970s and 1980s, consent as a founding criterion for sexual violence was implicitly present in the law of the Netherlands[868]. Yet, at that time the prosecutor had to prove the resistance of the victim in order to determine that he or she was coerced into sexual intercourse[869]. For example, if an alleged perpetrator had intercourse with a woman who was insensible because of alcohol or sleep, resistance could not be assessed since, at the moment of the intercourse, the woman was not aware of what was happening and we can affirm the same if the alleged perpetrator had obtained the consent of the victim for example by means of a fraud concerning the nature of the act or by passing off from someone else, misleading the victim[870].

In 1984, a proposal concerning a revision of the definition of coercion in the provision on rape was promoted, and the purpose of the new redefinition was to cover all those means aimed at submit the victim to a sexual acts than violence or threat of violence [871], considered as being two restricted cases in which assess the crime of rape.

In 1987 a decision by the Dutch Supreme Court on a crime of rape demonstrated that also in the Netherlands the reasoning of lawyers constitutes an obstacle for the broadening of the concept of coercion in rape law[872]. As a result, the perpetrator must have previously assessed that the woman did not consent to engage in a sexual intercourse and therefore have coerced her into a sexual intercourse in order for him to be sentenced[873]. In addition, the decision furtherly clarified that the finding of evidences would be centred on the question whether the sexual acts actually took place against the will of the victim[874]. Therefore, the victim is the one that must prove his or her own non-consent through signs of resistance like for example injuries or witnesses[875]. However, as we already stated many times, a rape can occur without resistance of the victim which silently submit to the

[865] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2020. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), The Netherlands*, page 46.
[866] Ivi, pages 46-47.
[867] Nijboer, J. F. (1997). Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands, page 322.
[868] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales, page 448.
[869] Ivi, page 449.
[870] Ibidem.
[871] Ivi, page 448.
[872] Ivi, page 451.
[873] Ibidem.
[874] Ivi, page 452.
[875] Ibidem.

sexual acts but without her full consent. Nonetheless, the Supreme Court of the Netherlands was not able to prove the crime of sexual violence in this occurrence in its decision of 1987[876].

Until 1991, the definition of rape included as well the occurrence that the victim was not married to the offender at the time of the criminal act[877]. This element had been criticised for a long time before being completely removed from the legislation[878]. Furthermore, nowadays, the definition explicitly recognises the possibility of a male being raped, rendering the legislation gender neutral[879].

In 1988, Korthals Altes, a Dutch politician, drafted a new proposal of law for what concerns the reform of rape legislation and in 1991 the proposal came into force[880]. Starting from this moment, the coercion as defined by the law on sexual violence included, besides coercion through violence and the threat of violence *per se*, also coercion and threats through other acts[881]. In the words of a scholar, the expansion of the definition of coercion seems to echo the judgments the lack of physical resistance of a woman or her submission to the sexual act does not necessarily follow that she had consented voluntarily, considering also that the man has a dominant position[882].

More recently, the current Minister of Justice and Security of the Netherlands advanced in 2020 a legislative proposal aimed at expanding the criminalisation of sexual offences in the country. The new proposal is aimed at criminalising the performance of sexual acts in which the perpetrator must have known that were performed against the will of the victim, basing on surrounding facts and circumstances[883]. If an individual explicitly declines or shows reluctance, the perpetrator should attest that the will of the other person is contaminated and that if the negation is absent it does not evidently mean that the victim is willing to engage in sexual acts [884]. If the suspected fails to assess a clear and definitive consent, he or she risks being legally prosecuted[885].

In addition, the new proposal also provides protection for both male and female victims of sexual violence: in fact, it is likely to occur that a male victim is blackmailed into sexual penetration of the perpetrator's body, and this act is currently defined as sexual assault but not as rape[886]. As a result, the new offence will include perpetrators who force a victim to penetrate his or her own body or that of a third person[887].

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[876] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales, page 452.

[877] Nijboer, J. F. (1997). Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands, page 322.

[878] Ibidem.

[879] Ibidem.

[880] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales, page 453.

[881] Ivi, page 452.

[882] Ibidem.

[883] Grapperhaus to modernise legislation governing sexually transgressive conduct, 12-05-2020, found in: https://www.government.nl/latest/news/2020/05/12/grapperhaus-to-modernise-legislation-governing-sexually-transgressive-conduct, retrieved 09/07/2020.

[884] Ivi, retrieved 09/07/2020.

[885] Ivi, retrieved 09/07/2020.

[886] Ivi, retrieved 09/07/2020.

[887] Ivi, retrieved 09/07/2020.

GREVIO thus positively appreciated such changes initiated by the Dutch Government: instead of being based on constraint, the changes focus on basing the crime on actions against the will of the victim and includes as well situations of acts against the will of the victim in which the perpetrator was not aware of the situation but should have been[888]. If such proposal would pass, it will for sure guarantee a proper fulfilment with Article 36 of the Istanbul Conv., representing a significant change in the legislation, needed in order to abandon the practise of case laws that focus instead on the behaviour of the victim such as appearance and actions prior, during and after the act occurred[889]. Besides, in this way the sexual integrity of the person will be guaranteed and respected[890].

In conclusion, the report of GREVIO suggests Dutch authorities to reform the Criminal Code in order to ensure that sexual-related crimes will be based on the concept of lacking freely given consent as demanded by Article 36 and to include as well appropriate penalties for the sexual acts that evidently lack the consent of the victim[891]. In fact, even when the definition of rape in the Dutch legislation was extended, the requirement of an explicit proof of a direct connection between the violent means of coercion and the involvement of the woman in the act was made more explicit, making the duality of consent and non-consent in sexual violence rape still alive[892].

3.10. Conclusions of the chapter

The first point that stands out from this analysis is that, for example, many elements are common to every Criminal code analysed. In first instance, sexual crimes are defined in a gender-neutral way in every country[893]. Then, we demonstrated that instead of placing non-consent as founding element of sexual related crimes, the countries base the crime on force, coercion, violence and other similar elements.

In some countries like Finland and the Netherlands, evidence of coercion, violence or state of fear, helplessness or inability to defend or formulate or express the will of the victim is required or instead, proof that the sexual act took place against the will of the victim is still demanded in trials.

In the cases of rape committed against people in state of unconsciousness, disability, state of helplessness and so forth, the focus of the legislation is not put on consent of the victim but rather on the protection of more vulnerable people. Nonetheless, this is not sufficient according to the Istanbul Conv., since many difficulties originates from this reasoning, for example when retrieving evidences of the crime.

In those countries, the behaviour of the defendant should be more significant rather than the behaviour of the victim, and we demonstrated that amendments in this field are not sufficient.

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[888] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2020. *GREVIO's (Baseline) Evaluation Report, The Netherlands*, page 47.

[889] Ibidem.

[890] Ibidem.

[891] Ibidem.

[892] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales, page 455.

[893] Bacik, I., Maunsell, C., & Gogan, S. (1998). *The Legal Process and Victims of Rape*, page 2.

We noticed that in some of them, the development of a proper legislation criminalising sexual violence has been very slow: in fact, in Italy only in 1976 the Court of Cassation convicted a man for sexual violence exerted on his wife, and sexual violence has been included in the crimes against the individual only in 1996. Finland instead was one of the least countries in Europe to penalise marital rape, showing a slow pace in updating the law.
Nonetheless, in many countries like Italy, France and Finland, we begin to notice that Courts gradually shifted their interpretations of case laws from evidence of violence or coercion to lack of consent of the victim, even though this is only an interpretation occurring in trials and not officially labelled by legislation. The preference for lack of consent instead of use of force as founding element of rape reflects the importance of sexual self-determination and autonomy, and the protection of the privacy and integrity of the individual[894]. As described in chapter 1.4 and 1.5., this tendency seems to mirror the understanding that sexual self-determination of the individual is more important than showing evidence of the behaviour of a victim of rape or sexual violence. However, it must be stressed once more that GREVIO does not consider this shift sufficient in order to comply with the Convention and that deeper changes are needed.

For what concerns specific countries, we notice that some initial steps forward have been made by some of them, and eventually, positively welcomed by GREVIO. For example, the Italian legislation seems to partially comply with Article 36 as we have seen, but nonetheless it still lacks the element of non-consent as the base of the offence of rape. In Portugal, legislation on sexual violence is embedded by default in the broader legislation of domestic violence, which represents an innovative adjustment. An innovative element is also present in the legislation of France, which includes the surprise as a characterizing element of rape.
Other countries do present innovative elements but are not regarded in a positive way by GREVIO. In Finland, the crime of rape is divided into three categories, coercion into sexual act, rape and aggravated rape. The three categories differ from one another in the degree of physical and psychological violence used against the victim, the amount of damages suffered by the victim and also the number of perpetrators. Nonetheless, the subdivision into three categories has been heavily criticised as shown.
The Criminal codes of Italy and Portugal are very likely concerning sexual violence, and also the wording results as being almost equal: this is probably due to the legal tradition that the two countries have in common.
On the other side, the Criminal Code of Denmark differs consistently, since it enlists a series of cases in which the crime of rape can be assessed and therefore, as we noted, some occurrences of rape risk to be excluded since they do not find an appropriate framing in the legislation. Furthermore, the Criminal code does not make distinctions between strangers and acquittances, as it is the case of other countries, which for example regard rape from an acquittance or a former or current partner as an aggravating circumstance. The crime, in the case of Denmark, can be committed by both an external person or an already known individual, like a partner or

[894] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 132.

relative, and so forth. However, unfortunately, despite the fact that the relationship between victim and perpetrator is, theoretically, meaningless, it is still relevant within the jurisprudence.

In the case of the Netherlands, we found that rape is still classified as an offence against public moral and not as an offence against the individual, as it is instead the case of many other countries, including those that have not been analysed in this work. In the opinion of a commentator, such framing of the law and other similar laws in other countries reflects the unequal power relations between women and men in the sense that the harm that the law attempts to protect women from is a gendered harm and caused to women because they are women and thereby considered as a group[895]. In a words of another scholar, different harms may result from the same violations and one of the determining factors may be in fact the gender of the victim[896]. Nonetheless, generally speaking this is not intended to mean that harm is conceived as collective and not individual[897], as the law classified as against public moral in the Netherlands seems to suggest. It also means that the act of violence that a woman endures is not solely an act performed by an individual, but also the product of an institution or society that strengthens the subordination to men of women intended as a group[898].

However, the Netherlands seems to have translated the insight that rape is connected to inequality between the sexes in an alternative definition of rape[899]: therefore, as it occurred in many other countries, sexual violence and rape are based on this inequality, as the Istanbul Conv. auspicates, which is considered as being intrinsically present in society, as the Convention recognises.

We can observe that in Finland and in the Netherlands, the simple fact that the alleged guilty of sexual offence believed in the consent of the victim is considered reasonable in order to afford him or her a defence, constituting thereby an objective test in determining the *mens rea* of the defendant[900], namely the psychological element of the person who committed the crime.

The aggravating circumstances instead differ from one country to another and in the case of France, for example, they stand out as they include the innovative element of sexual orientation of the victim. The cases shown raised the question of what kind of coercive circumstances would generally make consent irrelevant: more severe coercive circumstances make consent irrelevant due to the heavy coercion or violence[901].

As we demonstrated in the previous paragraphs, the six presented countries do not comply with article 36 of the Istanbul Conv. concerning freely given consent in the context of sexual violence. Therefore, we can argue that those countries had obsolete legislations that need to be amended.

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[895] De Vido, S. (2020). Violence against women's health in international law, page 138.

[896] Rubio-Martin, R., & Sandoval, C. (2011). Engendering the reparations jurisprudence of the Inter-American court of human rights: The promise of the cotton field judgment. *Hum. Rts. Q., 33*, 1062, page 1068.

[897] De Vido, S. (2020). Violence against women's health in international law, page 138.

[898] Ibidem.

[899] Zeegers, N. (2002). Taking account of male dominance in rape law: Redefining rape in the Netherlands and England and Wales, page 448.

[900] Bacik, I., Maunsell, C., & Gogan, S. (1998). *The Legal Process and Victims of Rape*, page 3.

[901] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 125.

Since the choice of the countries to be analysed has been oriented towards representative countries of the European Union and of southern and northern European regions, the results suggested that the traditional distinctions of the two regions and myths and stereotypes on sexual violence and rape are homogeneous within those countries and, broadly, in Europe, also due to the fact that both regions present similar problems and outdated legislations on sexual-related crimes.

In fact, northern countries are often supposed or believed to have more developed legislation or to be more developed countries in general. In this respect, despite the fact that Nordic countries rank highest in gender equality from the social and legal perspective[902], we found instead that at least Finland, Denmark and the Netherlands lack the element of non-consent in their legislation on rape.

On the contrary, we observed that the Nordic countries have relied on a model in which the founding element of rape is use of force or threat of force[903]. This basic definition, as we saw, has been complemented by definitions of rape or sexual abuse that criminalise abuse of a person unable to consent or resist because of unconsciousness, illness, disability or similar characteristics[904]. It is only after 2004 that debates about reforms of law on rape in Nordic countries have shifted towards the lack-of-consent model[905].

It is then possible to argue that this backwardness in sexual crimes legislation reflects some stereotypes and myths about society and sexuality that we describe in Chapter 1 that still persist and that need to be overcome by many countries, showing that those and many other countries are still not aligned with the provisions envisaged by the Istanbul Conv regarding sexual violence and rape.

For what concerns Italy and Portugal, belonging to the southern European region, we can apply the analysis of a scholar that supported the thesis that States tend to resist to incur an obligation to guarantee rather than instead immediately promote a right whenever the realization of said right would either be very expensive or require fundamental structural changes in the society[906]. Therefore, it is here that the difference between positive rights, namely those that require state action for their realization, and negative rights, those that require state abstention, is relevant[907], since evidently the former require more efforts by the State than the latter. The difficulties in their realization do not lie in their definition as social rights but, conversely, in the deep social, economic, and political changes that would be demanded in order to guarantee them[908], as for example the Istanbul Conv. requires. Therefore, Italy and Portugal might not have enough or appropriate economic resources since their political and economic situation presents other issues of a more urgent nature and as a consequence, alignment with

[902] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 83.
[903] Ivi, page 122.
[904] Ibidem.
[905] Ibidem.
[906] Harvey, P. (1987). Monitoring mechanisms for international agreements respecting economic and social human rights, page 400.
[907] Ivi, pages 400-401.
[908] Ibidem.

international treaties containing human and social rights such is the Istanbul Conv. remains a secondary concern for their governments.

However, it is true that not all the countries that ratified the Istanbul Conv. show the absence of lacking consent as founding element of the crime of rape. In fact, as we can infer from the GREVIO report of Austria and Sweden for example, they already amended their legislations on sexual violence after ratification.

In the case of Austria, in 2016 it introduced a new provision on violation of sexual integrity in article 205a of the Criminal Code in addition to Article 201 on rape requiring the use of force, deprivation of the liberty and a threat to life or limb[909]. The new provision covers the occurrences of sexual intercourse or similar behaviours that have been conducted against the will of the victim, under coercion or by intimidating the other person[910]. This represents an important step towards holding perpetrators accountable, according to GREVIO report, despite the fact that they did not have to make use of violence or threats against their victim[911]. Nonetheless, the credit of the new proposal will depend on how its application will be rigorous in the prosecution procedure and in courts[912].

In Sweden, an amendment of the Criminal Code entered into force recently on 1st July of 2018 guaranteeing that all non-consensual sexual intercourses are penalised[913]. The new proposal establishes that the requirement of the consent must be the founding of the crime of rape and that proves of violence, threats or that the vulnerability of the victim is exploited are no longer demanded in a context of trial[914]. In addition, the scope of abuse convictions is extended in order to cover those situations in which for example the alleged perpetrator is aware of the risk of the non-consent of the victim but he or she is engaging in sexual acts with that person anyway [915]. Therefore, it follows that the participation in a sexual activity must be voluntary and this must be acknowledged by the doer[916]. As a result, the passivity of the other person cannot be considered as marking consent or voluntary participation[917].

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[909] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2017. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Austria*, page 39.

[910] Ibidem.

[911] Ibidem.

[912] Ibidem.

[913] Ministry of Justice of Sweden, April 2018, *Consent – the basic requirement of new sexual offences legislation*, Fact sheet.

[914] Ibidem.

[915] Ibidem.

[916] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), Sweden*, page 45.

[917] Ibidem.

Such amendment is an updating of the offence of rape and sexual abuse that previously demanded the use of force, threat or the exploitation of the vulnerable conditions of the victim[918]. Remarkably, the new law makes the onus of ensuring that the sexual activity is undergone voluntarily by both individuals[919]. This change is needed in order to abandon the practice of case laws that often focuses more on the behaviour of the victim rather than on that of the perpetrator[920].

However, we have to report that the two countries, despite the fact of penalising rape by basing the crime on the lack of consent, still not penalise the intentional conduct of causing a person to engage in non-consensual sexual acts with a third person as required by Article 36.1 lit. c of the Convention[921].

In conclusion, in the words of a scholar, definitions of rape differ a great deal at national level[922]. We can observe again that even within jurisdictions where the criminalisation of rape originates from non-consent in addition with the element of intentionality, the requirement of traces of force is still widespread in practise, without mentioning the fact that consent is very often challenged due to suspicion of female sexuality and distress over alleged false declarations of victims[923]. In addition, it should be made clearer in those cases that a failure to resist of the victim does not necessarily mean full consent[924].

According to some commentators, the legal definition of sexual violence and rape evidently has an impact upon victims in three ways:

1. if the definition is not sufficiently broad and it does not cover every instance of rape, the experience of the victim may not be legally considered as rape, even though she defines it as such;
2. if the definition is based on the requirement for the prosecution to prove non-consent, as a result the legal process is focused on the behaviour of the victim and his or her reaction to the sexual violence;
3. if the definition provides for a subjective test for the *mens rea* of the alleged perpetrator, the risk is that even if the victim did not consent, the defendant will be acquitted if he honestly but unreasonably, believed that the victim was consenting[925].

We can affirm that, however, more than one country complies with Article 36 of the Istanbul Conv. such is the case of Sweden and Austria[926]. Conversely, we can infer that a number of other countries which we analysed

[918] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, Sweden,* page 45.
[919] Ivi, page 46.
[920] Ibidem.
[921] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2017. *GREVIO's (Baseline) Evaluation, Austria,* page 39; Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, Sweden,* page 45.
[922] De Vido, S. (2020). Violence against women's health in international law, page 37.
[923] Munro, V. (2014). Sexual autonomy, in M.D. Dubber and T. Hörnle, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press) 747, page 753.
[924] Bacik, I., Maunsell, C., & Gogan, S. (1998). *The Legal Process and Victims of Rape,* page 4.
[925] Ivi, page 2.
[926] Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 2019. *GREVIO's (Baseline) Evaluation Report, Sweden,* page 45.

previously in this chapter still need to amend their legislation in order to comply with this provision and those positive examples we cited seemed to be an exception within the countries that ratified the Istanbul Convention. At this point, we reach the end of this analysis, and we ultimately demonstrated that a consistent work is to be carried out by the single country analysed and, broadly, by other countries joining the Council of Europe for what concerns sexual violence and rape, a work that needs to overcome myths and stereotypes and should focus more on the needs of women in nowadays society, with the consciousness of authorities and governments that violation of human rights and of women rights originates even more strong opposition from the side of feminist movements and also within society, from women themselves.

4. Conclusions

4.1. Limits of the Research and Future Studies

After concluding the analysis in the previous chapter, a few considerations must be made on the whole work.
In first instance, we have to stress the fact that Article 36 is in some cases fully respected by the legislation of some countries, as we demonstrated in chapter 3.10. in the cases of Austria and Sweden. This dissertation takes into consideration countries that do comply only partially and this constitutes therefore a limit for the research. However, in order to develop further studies, it might be relevant to analyse also countries that, instead, fully comply with Article 36 of the Istanbul Conv. and that thereby consider lack of consent as a foundation of the offence of sexual violence or rape. It would be possible in this case to research the methods and strategies that said countries used in order to comply with the provision.
As a result, the example of small countries which have already been analysed by GREVIO such as Monaco or Montenegro might be analysed under this point of view in order to attest if they might represent a model for further implementation of the Istanbul Conv. Despite the fact that they can be small countries and not so influential in the context of the Council of Europe, they can still represent an example to be followed by other, bigger countries and provide for a clearer picture of the situation of sexual violence legislation in the European region.

A possible in-depth analysis might in fact regard future implementation of the Istanbul Conv. of those countries that today still not comply with it.
The research on this topic is however limited, also due to the fact that it is difficult to enforce international treaties in single ratifying countries. Some scholars argue that the implementation of international human rights law has been inconsistent[927]. The problem is that, as outlined also in other contexts than sexual violence, the international covenants contain comprehensive lists of rights that should be afforded to every individual but that nonetheless in many situations are violated[928]. This is due to the fact that many deem human rights as still being a mere rhetoric tool as opposed to real legal obligations, and remarkably, it is sometimes difficult to force a States to fulfil with the obligations they undertook[929]. In fact, the failure for what concerns implementation may derive from a lack of international force demanding compliance with obligations, that in turn should persuade States to enforce international norms[930].
Applying this reasoning to this dissertation, we can affirm that the research is not able to continue unless the countries under analysis will not amend their legislation for sexual violence and rape. The reports of GREVIO constitutes in this sense a mean to pressure governments to appropriately change the legislation and they are

[927] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 958.
[928] Ibidem.
[929] Ibidem.
[930] Ibidem.

limited in the sense that they are able to solely show the pitfalls of the States but have no power when it comes to enforcement.
In the words of many scholars we already cited, it seems that sometimes compliance is epiphenomenal. Often, changes in policy had not occurred because of the simple act of ratifying human rights covenants, but instead due to pressure coming from other sources like national groups, NGOs, academic studies and researches that are able to influence governments[931], and they might possibly influence the credit and reputation of a country as well. Obviously, such evidences have implications for the potential of the Istanbul Conv. to be effective for what concerns violence against women and domestic violence[932], and for the research in this field to follow.

On the other side, it is true that the work developed by GREVIO is still at its debut, since the Convention dates back to 2012, and as a result the monitoring procedure, apart from being a procedure sequenced in time involving countries visits and so forth, has started recently and few countries have been analysed by GREVIO. At the time of writing, as also outlined in paragraph 3.2., GREVIO emitted reports of only 13 countries. Given this circumstances, in this research only few of them have been analysed in order to provide a consistent number of countries not in line with Article 36.
Apart from analysing countries that fully comply with Article 36 as said, further studies could focus on the entire *corpus* of reports emitted by GREVIO, regardless the compliance or noncompliance of the countries under analysis, and the upcoming reports as well.

Another limit attributable to this work is the fact that it does not explore the difficulties in assessing lacking consent in trials by judges. The issue does not pertain to the domain of international law but rather to national law and hence this is not the right context for discussing it.
A further study focusing on this issue might however initiate from an analysis of this kind, starting from international law to end with national legislations: following the adjustment to Article 36 and further amendments of the different legislations about sexual violence, it may be possible to discuss how the lacking consent is assessed in trials and stated in judgments and to develop future models to rely on for countries that instead still refers to the first model of reference for sexual violence, namely the one that focuses on violence, coercion threats and so forth.

4.2. General Conclusions

In conclusion, in Chapter 1, after presenting the main classifications of the concept of consent commonly found in literature and evaluating which delineation would be more suitable in a context of a law on rape, we presented the evidence that this concept can be considered as somehow volatile, difficult to completely define and heavily dependent on the specific circumstances of the case. An appropriate definition to adopt might include more than

[931] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 959.
[932] Ibidem.

one single conceptualisation of consent: for example, it may take into consideration the behavioural aspect only partially and include also the psychological aspect of the problem.

We demonstrated that this failure in properly defining consent without any ambiguities and vagueness is to be accounted, again, to society and its myths and stereotypes, as well as to outdated legislations reflecting an antiquated understanding of the issue of sexual violence, belonging to the past.

Finally, we confirmed that only by examining it in a more extensive way is that we will be able to accurately define consent and solve the debates that originates from it, as well as being able to apply it to legislation on rape and sexual violence. Up to this point, research and processes of drafting legislation are confirmed to be stagnating.

Afterwards, we tried to apply in more detail the concept of consent in the legislation on rape. We started with the consideration that according to law, sexual intercourse cannot exist without a reference to a contract or an agreement between the individuals involved. Therefore, consent itself makes sexual intercourse possible. This is an argument supporting the thesis that consent is in fact the founding element of sexual intercourse and, legally speaking, it renders it permissive and legitimate.

Nonetheless, a legal system needs specific wording and an individual cannot be charged with rape if the alleged victim did not show signs of non-consent and if the consent is implicit. This is another statement confirming that if there is coercion, consent does not exist and that according to law, anything different from consent is equal to rape.

The analysis confirmed the idea that a contractualist view of sexual intercourse and an approach considering consent as an agreement between two people is the most suitable form of conceptualisation to be included in the crime of rape. We find that many legal systems throughout the world embrace this view, although the countries analysed in chapter 3 did not share the same view.

Having applied the same analysis to the Istanbul Convention, we found that in its definition of consent it does not include the physical/behavioural, psychological or moral conceptualization of it. It does not even provide a lists of behaviours to be considered as marking consent, nor it envisages a set of questions aiming to assess the state of mind of an alleged victim.

Conversely, it is possible to affirm that the Convention regards consent as an agreement between individuals in an implicit way: we can support this statement since, as we showed, the contractualist view suits the most a possible conceptualisation of consent and thereby of the offence of rape.

In Chapter 1.6. we further confirmed that the Istanbul Conv. took its definition of consent from a notorious case-law of the ECtHR, *M.C. v. Bulgaria*, and this case initiates for the first time the debate over sexual consent in legislation on rape. In this case, the ECtHR stressed the fact that the focus of inquiries and of legal procedures should be on the research of an evidence of a lacking consent of the victim and not instead on the assessment of proves of physical resistance from the victim. We affirmed that the Court on one side recognised that it exists a positive, due diligence obligation of the State to punish rape and to investigate and on the other side it also confirmed that the events occurred had to be viewed as a form of ill-treatment under Article 3 and as a violation of integrity of the individual under Article 8 of the ECHR. The claim of the Court was that the Criminal Code

of Bulgaria was not sufficiently developed in order to ensure the protection of the victim of the case of *M.C. v. Bulgaria.*

Through the example of the case of *M.C. v. Bulgaria* we established that when a State is not able to protect a person within its jurisdiction from offences coming from a private party, it may anyway be considered as a violation to the right to life and prohibition of torture, inhuman or degrading treatment or punishment. In conclusion, is evident that positive obligations coming from States extend as well to reassure a correct application and practice of laws and it does not mean to only put in place adequate measures, but it requires an active engagement of the State.

This case is innovative under the point of view of the conceptualisation of consent, as it is evident: despite the fact that the Bulgarian Court did not recognise the offence of rape due to lack of signs of resistance of the victim, the ECtHR assessed anyway that the crime occurred since it is demonstrated that in many cases of rape the victim does not show any resistance and instead he or she passively submit to the violence.

The ultimate point of the judgment was that the Court recognised the lack of consent as founding element of the crime of rape: this demonstrates that the case of *M.C. v. Bulgaria* has been a pioneer for the introduction of the lacking consent in rape legislation and heavily influenced the drafters of the Istanbul Conv.

Chapter 3 discussed the monitoring system contemplated by the Istanbul Convention and the analysis of compliance of six selected countries.

Due to the fact that some international institutions are still underdeveloped, enforcement of international treaties, especially those concerning human rights, is often difficult. For this reason, many treaties designed a monitoring system with the task to supervise States' compliance. The Istanbul Conv. as well makes use of such system.

In chapter 3.2. we briefly described its functioning and method of monitoring. We observed that it is composed of two different bodies, the Committee of the Parties, which represents the political body and the GREVIO, Group of Experts on Action against Violence against Women and Domestic Violence, with the task to emit reports on the situation of compliance of ratifying countries, composed by experts on violence against women and domestic violence.

We further described the procedure of reporting, highlighting the main phases of the process. The procedure starts from a questionnaire to be submitted to parties that must be filled with information about implementation of the Istanbul Conv. and additional information about the situation of domestic violence and violence against women in the country. GREVIO has the power to also perform country visits when needed. Later, GREVIO starts the drafting of the report, which is to be submitted to parties that can add their own comments. Afterwards, the reports are made public. We noticed that GREVIO can retrieve information from many different sources in order to draft a comprehensive report.

We validated the assertion that the *spectrum* of action of this monitoring body is wider than the one designed from UN treaties and the one adopted for the CEDAW. The reports submitted by GREVIO in fact, analyse the compliance of the State in relation to the whole Convention.

In addition, we demonstrated the usefulness of the involvement of civil society, non-governmental organizations, activists, media or national institutions in the drafting of the reports operated by this monitoring system. As many researchers argued and as we demonstrated, their involvement renders the process of monitoring more productive and constructive. In fact, the abilities of those groups to retrieve information, provide for better qualified personnel, provide facilities and advocating for their causes and so forth are well-known by international institutions and the Istanbul Conv. as well recognises their important role when human rights are concerned. In the context of the Convention, their participation is important for two reasons, as we confirmed: first, as many international treaties bodies did, it showed a continued interest in finding alternative sources of information, independent from governments and second, the role of human rights NGOs gradually started to gain credit because of their ability to provide data and a broader overview on fulfilment of international law in their countries of belonging.

In paragraph 3 of chapter 3 we debated whether the monitoring system offered by GREVIO is effective or not. Taking into consideration both negative and positive aspects of the system, we enlisted a series of possible downsides and strengths. We stated that, in accordance with many authors and taking into account different perspectives, GREVIO can be regarded as an effective monitoring system, mainly because:

- it is an independent monitoring system, entitled to emanate recommendations, more effective than a simple court;
- it does not require victims to bring their cases in front of a judge;
- it is able to take a higher stance than a single judge;
- its work is helpful for future application in international law;
- it has the ability to put pressure on governments;
- it is a system less intrusive of State sovereignty due to its structure of country reporting;
- it is a body composed by independent experts, that aim at the general interest of the community with more impartiality;
- it has an improved reliability of the information since the receiving body has the power to verify the information;
- it demands information from the State itself, improving reliability of reports.

The monitoring system is therefore confirmed as being one of the main strength of the whole Istanbul Convention.

In Chapter 3 we further dealt with the analysis of compliance of Article 36 of six selected countries (Italy, Portugal, France, Finland, Denmark and the Netherlands).

We showed that at least six out of the 13 countries analysed by GREVIO up to the moment of writing do not comply or do not fully comply with article 36 (as demonstrated by the case of Italy which complies only partially to the provision on rape and sexual violence). As a consequence, many other countries still not analysed by GREVIO might present the same problem.

We found that implementation might be difficult since it is arduous to introduce the necessary legal and social changes that push for the inclusion of consent in the legislation on sexual violence as demanded by Article 36. In general, we demonstrated that the analysed countries broadly base the crime on force, coercion, violence and other elements, different from non-consent, and away from Article 36 on sexual violence and rape. In addition, many countries require in their legislation to prove that force, coercion, violence and so forth really occurred, therefore asking for direct evidence of it to the victim.

The Istanbul Conv. makes suppose that the behaviour of the defendant in a context of a judgment should be more significant rather than the behaviour of the victim, conversely of what usually occurs in national courts. Even so, we illustrated that amendments in this field are not sufficient, at least in the six countries.

It is true that in many cases the jurisprudence developed faster than the legislation, giving more emphasis on non-consent of the victim rather than on proves of force, coercion and violence. This fact witnesses the change in perspective of Courts (and broadly speaking of modern society) towards attributing importance to sexual autonomy and self-determination of the individual and, in this case, of women. However, with the support of the reports of GREVIO we validated the thesis that this tendency of judges is not sufficient in order to ensure compliance of Article 36 and that consequently these countries still need to amend their legislation, a process that appears to be very slow.

In some cases, we showed that many countries made steps forward that have been positively evaluated by GREVIO: as examples, legislation on sexual violence of Portugal is embedded by default in the broader legislation of domestic violence and in the legislation of France we found “surprise” as characterising element of rape.

On the other side, we testified that GREVIO reports evaluated in a negative way many faults of the States under analysis. To cite an example, Denmark still considers rape only a specific list of behaviours and offences, although wide, but nonetheless not sufficient in order to cover every example of sexual violence. In the Netherlands, rape is still classified as an offence against public moral and not as an offence against the individual. Those represents the most evident examples of an antiquated legislation.

The selection of the countries has been made following the criterion or representativeness and depending on the nonofficial division in regions of Europe, northern and southern. As confirmed by the analysis, despite the fact that Nordic countries are often considered as being pioneers in gender equalities and in updated legislations, when speaking of sexual violence and rape it is true, contrary to popular belief, that those countries as well present evident backlogs, as it is the case of Finland, Netherlands, Denmark and, in part, France.

Concerning the southern European region, namely for Italy and Portugal, we applied and confirmed the analysis of a scholar corroborating the hypothesis that those States have less tendency to incur an obligation to guarantee rather than instead promote a rights, due to the fact that the realization of said rights would either be expensive or require fundamental structural changes. Hence, Italy and Portugal might not have enough economic power due to their political and economic situation that presents other issues to be solved in the short period and as a consequence, alignment with international treaties containing human rights such is the Istanbul Conv. for these countries represents a secondary matter.

Despite the fact that the analysed countries do not comply with Article 36, it is not possible to affirm that every country behaves the same way. We presented in fact the cases of Sweden and Austria, which are example of compliance with the obligation to include non-consent of the victim in the definition of rape, despite the fact that it is possible to affirm that both countries comply only partially with Article 36, but at least with the obligation to include non-consent. The two countries can easily represent a model to be followed by noncompliant countries.

Ultimately, we demonstrated that the definition of sexual violence and rape within law affects the victims in three ways: if the definition is not broad enough and it does not criminalise every instance of rape, the experience of the victim might not be considered as rape by law, even though he or she defines it as such; if the definition is based on the requirement to prove lacking consent, as a result the legal process would stress the behaviour of the victim and his or her reaction to the violence; if the definition provides for a subjective test for the *mens rea* of the defendant, the risk is that even if the victim did not consent, the defendant will be acquitted if he honestly demonstrates that he or she believed that the victim was actually consenting to sexual activities.

As final remark, as we highlighted many times, the Istanbul Conv. points to the eradication of violence against women and domestic violence in Europe, establishing such eradication as a fundamental condition for achieve gender equality[933]. Through the adoption of a legally binding instrument on violence against women, the Council of Europe and its Member States affirmed in this way that violence against women represents a violation of the fundamental rights of the women and recognised that violence affects not only women but society as a whole[934].

The international tribunals as well have underlined that cases of sexual intercourse under coercive circumstances should be judged as rape, even if no violence and/or force have been used, no direct threats have been given, nor explicit consent has been expressed[935].

Therefore, with respect to sexual violence and rape, the Istanbul Conv. is an instrument that possesses a high potential for persuading States to adapt their legislation to modern times and conceptions about rape and sexual violence that are emerging more and more, conceptions that find their origin in historical myths and stereotypes deeply embedded in society, but that society itself is every day committed to eradicate and condemn.

The same characteristics make the Istanbul Conv. a model for the definition, strongly requested from more sides, of a global, binding instrument that would be able to ensure an extended and universal commitment in favour of the fight against gendered violence, acting on the specific causes constituting a fertile ground for the spread and the persistence of gendered violence[936].

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[933] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 95.

[934] Ibidem.

[935] Heinskou, M. B., Skilbrei, M. L., & Stefansen, K. (Eds.). (2019). *Rape in the Nordic countries: Continuity and change*, page 132.

[936] Zupi, M., Hassan, S. (2013), *La Convenzione del Consiglio d'Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica*, page 1.

The benefits of the Convention are more than purely symbolic in nature, according to a scholar[937]. The convention places together other statements about violence against women and domestic violence that have been made by UN human rights bodies in the past, such as by the CEDAW Committee, and secures these statements on a legally binding base[938]. Ultimately, the Istanbul Conv. itself resumes the hopes and desires of a past political debate and in the near future represents a model for further examples of international treaties[939].
On the other side however, taking into consideration many points of view, it is possible to state that the Istanbul Conv. marks a significant stage of a path that, sadly, is still expected to be long and difficult[940]. The Convention is not a "magic" instrument, and it requires time and resources, in addition with interdisciplinary efforts in order to start a consistent change[941].
Ending violence against women, as the Preamble prescribes, depends on the achievement of genuine equality between the sexes and on the elimination of the forms of discrimination against women in the public and private domains[942]. Therefore, the obligation to eliminate all forms of discrimination against women includes an obligation to eliminate discrimination based on gender stereotypes, which persist in society and often also in the behaviour of organs of the State[943].
It cannot exist equality between women and men as long as violence against women and discrimination remain a basic component of society, sustaining insecurity in women, hampering their freedom and affecting their health[944]. Ratification is only the first step, and the potential of the Istanbul Conv. lies in its full implementation and compliance with their provisions[945].
The eradication of rape undoubtedly requires a new organization of the conceptualisations of both sexual intercourse and sexuality[946], which is not to be intended anymore as an object to be possessed by an owner[947].
It is often time true that in societies that consider themselves as being more advanced it is often believed that forms of violence against women belong at this point to the past and it is forgotten that very little time has

[937] McQuigg, R. J. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, page 960.
[938] Ibidem.
[939] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 29.
[940] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 863.
[941] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 12.
[942] Ibidem.
[943] De Vido, S. (2020). Violence against women's health in international law, page 217.
[944] Christofi, A., Fries-Tersch, E., Meurens, N., Monteiro, C., Morel, S., & Spanikova, H. (2017). Violence against women and the EU accession to the Istanbul Convention, page 14.
[945] Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, page 12.
[946] Hakvåg, H. (2010). Does yes mean yes? Exploring sexual coercion in normative heterosexuality, page 125.
[947] Marcus, S. (1992). Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention. *Feminists Theorize the Political.* Eds. Judith Butler and Joan W. Scott. New York: Routledge, 385-403, page 399.

passed since serious forms of discrimination against women were officially condemned by national laws[948]. Often, the temptation to minimise those acts seems irresistible, confining in this way the violence to the deviant behaviours of the single perpetrators or to the pathological nature of the relationship within which the violence occurred, or in other cases when a more or less explicit process of victimisation occurs[949].

If the way in which we talk about women and violence has severe implications for social policies and how women are treated in the criminal justice system, then, according to a scholar, we have to "break down and redefine that discourse and move toward a multi-layered discourse of women and violence that will allow women to present and speak for themselves in such a way as to portray the complexities and realities of their lives[950]".

The power, its research and consequences of its exercise in a society that considers it as naturally attributed to a specific gender and the relationships connected to it explain violence against women[951]. Such problem belongs to men, and it is not a "women" problem, solvable by some men[952].

[948] Parolari, P. (2014). La violenza contro le donne come questione (trans) culturale. Osservazioni sulla Convenzione di Istanbul, page 860.
[949] Ibidem.
[950] Gilbert, P. R. (2002). Discourses of female violence and societal gender stereotypes, page 1296.
[951] De Vido, S. (2016). *Donne, violenza e diritto internazionale*, page 43.
[952] Ibidem.

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