



Ca' Foscari
University
of Venice

Master's Degree
in Comparative International Relations

Final Thesis

**The Concept of Consent in
Articles 36 and 39 of the Istanbul
Convention: Implementation
and Compliance of the Notion in
the Legal Systems of the Parties**

Supervisor

Ch. Prof. Sara De Vido

Graduand

Jessica Norma Vettoretto

Matriculation Number 854448

Academic Year

2022 / 2023

*“I firmly believed then and still believe today that
the only way to stop violence against women is to
speak out and refused to be silenced.”*

Zainab Salbi, 2011

Table of contents

List of Abbreviations	5
Abstract.....	6
Introduction.....	11
CHAPTER 1	17
The Concept of Consent in Relation to Violence Against Women.....	17
1. The Definition of Consent in Philosophy, Social Sciences and Law.....	19
a) Consent in Ethics.....	19
b) Consent in Law.....	24
2. The Connection Between Gender-based Stereotypes and Consent.....	34
CHAPTER 2	40
Framing the Concept of Consent in Selected Crimes of Violence Against Women.....	40
1. Introduction to the Chapter	40
2. Consensual and non-Consensual, Desired and Undesired Sexual Intercourse.....	41
2.1. The Case of <i>M.C. v. Bulgaria</i> on the Concept of Consent in Sexual Violence.....	50
3. Informed Consent in Forced Abortion and Forced Sterilisation.....	53
CHAPTER 3	63
The Inclusion of the Notion of ‘Consent’ in the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention).....	63
1. Introduction to the Istanbul Convention and its Implementation	63
2. Defining Violence Against Women and Gender-based Violence in Relation to the Notion of Consent.....	68
3. The Inclusion of the Notion of ‘Consent’ in Article 36 on Sexual Violence	73

4. The Concept of ‘Informed Consent’ in Article 39 on Forced Abortion and Forced Sterilisation	78
CHAPTER 4	83
Consent in the Practice of the Group of Experts on Action Against Violence Against Women and Domestic Violence (GREVIO)	83
1. Introduction to the Monitoring Activity of the GREVIO and its Relevance	83
2. The Analysis of the Compliance of Article 36 on Sexual Violence in GREVIO’s Baseline Evaluation Reports.....	88
3. The Analysis of the Compliance of Article 39 on Forced Abortion and Forced Sterilisation in GREVIO’s Baseline Evaluation Reports.....	94
CHAPTER 5	100
The European Union Ratification of the Istanbul Convention: Legal Consequences for Gender-Based Crimes Against Women	100
1. The EU Accession to the Istanbul Convention and the Evolution of the Legal Path to its Ratification.....	100
2. Legal Consequences for Certain Consent-Based Crimes of the Istanbul Convention.....	111
Conclusion and final considerations.....	119
References	123

List of Abbreviations

CCA	Criminal Code of the Republic of Albania
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
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 Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
NGO	Non-Governmental Organisation
TEU	Consolidated version of the Treaty on European Union
TFEU	Consolidated version of the Treaty on the Functioning of the European Union
UN	United Nations

Abstract

Il concetto di consenso ha acquisito una crescente rilevanza nella tutela dei diritti fondamentali delle donne, in particolare nel contesto dell'autonomia sessuale e riproduttiva. Il consenso rappresenta infatti la forma attraverso cui ogni essere umano può esprimere la propria volontà e, negli ultimi anni, tale concetto è stato connesso al fenomeno della violenza contro le donne. Esso ha apportato un cambiamento nelle definizioni di numerosi reati di genere contro le donne e in alcuni casi ne è diventato l'elemento cardine, specialmente in crimini come la violenza sessuale, l'aborto forzato e la sterilizzazione forzata. In questo modo, il concetto non ha soltanto acquisito un valore etico-filosofico in quanto espressione dell'autodeterminazione di ciascuna donna, ma anche una connotazione giuridica che ha permesso una maggiore tutela delle vittime di violenza. Il fenomeno della violenza contro le donne rappresenta una delle violazioni di diritti umani più diffusa al mondo e i reati di violenza sessuale e aborto e sterilizzazione forzati sono alcune delle forme di violenza di genere più diffuse. In questo contesto diventa perciò fondamentale per gli Stati includere tale concetto nei sistemi legali nazionali al fine di tutelare i diritti delle donne.

Il consenso presenta molteplici caratteristiche e requisiti che ne complicano la concettualizzazione. Esso può essere definito come un comportamento, una scelta o uno stato mentale; inoltre, può essere espresso sia in forma non verbale, attraverso gesti concreti, sia in forma orale, con parole affermative. In filosofia, tale nozione non può essere elaborata se non in relazione al concetto di autonomia, ossia la capacità di una donna di fare scelte che riflettono i propri desideri. Il consenso diventa in questo modo espressione della volontà di una donna, purché non influenzato da fattori esterni. Per essere considerato valido, infatti, il consenso deve rispettare determinati requisiti: non coercizione, competenza e informazione. La presenza o mancanza di uno di questi fattori comporterebbe l'invalidazione del consenso e il riconoscimento dell'azione come violenza.

In diritto, invece, il consenso può essere considerato un principio organizzativo generale che stabilisce confini e regole normative in materia di violazione dei diritti (*volenti non fit iniura*). Tuttavia, il concetto non presenta una definizione giuridica universale e condivisa. Ciò potrebbe tradursi nell'incapacità di criminalizzare efficacemente gli atti di violenza contro le donne a causa di definizioni incomplete, che escludono forme più blande di

coercizione, o influenzate da presupposti stereotipati, come la convinzione che le donne siano ‘sessualmente passive.’

L’attribuzione di determinate caratteristiche e ruoli strettamente correlati al genere da parte della società può infatti dare vita a comportamenti stereotipati che hanno conseguente effetto negativo sui diritti delle donne. Gli stereotipi di genere sono, infatti, tra i maggiori fattori che contribuiscono alla discriminazione, alla disuguaglianza e alla violenza contro le donne, in quanto quest’ultime sono percepite come subordinate e/o inferiori. La perpetrazione di stereotipi di genere può avere anche un impatto a livello giuridico poiché i pregiudizi possono influenzare l’esito dei casi giudiziari. Si conferma perciò un nesso implicito tra gli stereotipi di genere e il concetto di consenso, secondo cui i primi contribuiscono a sminuire il consenso delle donne perché repute prive di potere.

Nella dottrina contemporanea sulla violenza sessuale, il concetto di consenso assume una crescente rilevanza. Il passaggio da una concezione della sessualità basata sulla coercizione a una basata sul consenso ha garantito la tutela dei diritti delle donne e della loro autonomia decisionale. Tuttavia, il consenso presenta una complessità concettuale. In primo luogo, esso non è sempre lineare, ossia, non tutti i rapporti sessuali consensuali sono voluti/desiderati e viceversa. In secondo luogo, la presenza di fattori esterni invalidanti come l’uso o la minaccia di uso della forza e la coercizione, sia fisica sia psicologica, limitano il pieno libero consenso. La coercizione sociale, ad esempio, impone aspettative sulle donne affinché soddisfino determinati obblighi sessuali nelle relazioni, pregiudicando il pieno esercizio della loro autonomia.

Il caso *M.C. c. Bulgaria* ha segnato un momento cruciale nel diritto europeo. La Corte europea dei diritti dell’uomo (CEDU) ha riconosciuto la violenza sessuale come una violazione dell’autonomia personale e ha identificato nella mancanza di consenso l’elemento chiave del reato, mettendo in discussione le nozioni tradizionali che si basavano esclusivamente sulla resistenza fisica. La sentenza ha quindi contribuito al cambiamento giuridico verso una definizione di violenza sessuale basata sul consenso.

Il consenso informato svolge, invece, un ruolo fondamentale nel definire i reati di aborto e sterilizzazione forzati. L’adozione di tale principio in medicina ha segnato infatti uno spostamento di potere decisionale dai medici ai pazienti, garantendo a questi ultimi maggiore tutela. In campo giuridico, tale concetto ha permesso di definire l’aborto forzato come

terminazione di una gravidanza senza consenso della donna e la sterilizzazione forzata quale permanente cessazione della capacità riproduttiva di una donna senza la sua autorizzazione. Quest'ultima pratica colpisce in particolare modo donne di gruppi emarginati, come donne con disabilità o appartenenti a minoranze etniche. Numerosi casi giuridici evidenziano la necessità di ottenere un consenso libero, completo e informato al fine di rispettare i diritti riproduttivi delle donne, dunque la loro autonomia, e di prevenire la violenza di genere.

La Convenzione di Istanbul è uno degli strumenti giuridici regionali più innovativi in materia di violenza contro le donne in quanto conferisce centralità al concetto di consenso in alcune disposizioni. Di fatto, il consenso svolge un ruolo cruciale nella definizione dei reati contenuti negli Articoli 36 e 39 e la Convenzione impone agli Stati l'obbligo di attuare tali disposizioni a livello nazionale. Inoltre, il testo fornisce anche la definizione di violenza contro le donne e violenza di genere, riconoscendone l'intercambiabilità ma non l'equivalenza. Tali definizioni sono necessarie per far sì che gli Stati parte adottino un approccio uniforme e per ribadire il legame tra violenza, violazione dell'autonomia e disuguaglianze storiche di genere.

L'analisi degli Articoli 36 e 39 è fondamentale per comprendere come il concetto di consenso sia stato inserito e adottato dalla Convenzione di Istanbul. L'Articolo 36 criminalizza ogni atto sessuale intenzionale e copre varie forme di penetrazione non consensuale e altri atti sessuali. Il concetto di consenso, definito volontario e frutto del libero arbitrio, è l'elemento centrale della disposizione, ma l'articolo non ne fornisce una definizione lasciando agli Stati parte l'onere di decidere quali siano le sue caratteristiche e i suoi requisiti. L'Articolo 39, invece, criminalizza l'aborto forzato e la sterilizzazione forzata, enfatizzando il consenso informato come elemento cardine della loro definizione. L'aborto forzato comporta l'interruzione intenzionale della gravidanza senza consenso informato. La sterilizzazione forzata criminalizza qualsiasi intervento chirurgico che termina la capacità riproduttiva naturale di una donna senza previo consenso informato. La mancanza del consenso informato in queste procedure rappresenta dunque una violazione dell'autonomia della donna e dei suoi diritti riproduttivi.

Il controllo dell'attuazione delle disposizioni contenute negli Articoli 36 e 39, dunque della loro conformità, da parte degli Stati parte è affidata ai meccanismi di controllo della Convenzione, come delineato negli Articoli 66 e 67. Tuttavia, l'attività di monitoraggio è

conferita in particolare al Gruppo di esperti sulla lotta contro la violenza nei confronti delle donne e la violenza domestica (GREVIO), che si occupa dell'esame e valutazione dell'attuazione delle disposizioni nei sistemi normativi nazionali degli Stati membri, verificando il rispetto degli obblighi derivanti dalla Convenzione. Il gruppo può anche ricevere informazioni a riguardo da parte di ONG, società civile e istituzioni per i diritti umani, definite 'relazioni ombra,' arricchendo il processo di valutazione.

L'analisi dei rapporti GREVIO in merito all'attuazione degli Articoli 36 e 39 della Convenzione ha evidenziato numerose lacune nei sistemi normativi nazionali. In particolare, molti Stati parte, tra cui Albania, Andorra, Bosnia-Erzegovina e altri, mantengono definizioni di violenza sessuale basata sull'uso della forza, anziché sul consenso come previsto dall'Articolo 36. Tale mancanza può comportare una protezione non efficace dei diritti delle donne e costituire un ostacolo nei procedimenti legali. Analogamente, altri Stati quali Italia, Finlandia, Francia, Norvegia e Polonia, includono nelle loro definizioni uno 'stato di impotenza,' ma tale formulazione non è sufficiente ad assicurare la completa criminalizzazione della violenza sessuale.

Per quanto riguarda l'Articolo 39, il GREVIO osserva come l'aborto forzato sia criminalizzato in tutti gli Stati parte, sebbene si identifichino delle sfide in merito alla pratica dell'aborto selettivo sulla base del sesso in Albania. Al contrario, la sterilizzazione forzata rivela carenze nei quadri giuridici nazionali. Alcuni Stati, come Belgio, Bosnia-Erzegovina, Francia, Serbia e Spagna, mancano di disposizioni specifiche e basano la criminalizzazione di questa pratica su reati generici come lesioni personali aggravate. Inoltre, si rilevano criminalizzazioni generalizzate, come nel caso del Lussemburgo, che potrebbero perciò potenzialmente colpire donne appartenenti a diverse categorie svantaggiate, specialmente le donne con disabilità.

Dunque, sebbene di natura non vincolante, i rapporti GREVIO contribuiscono in modo significativo all'attuazione della Convenzione evidenziando possibili lacune e fornendo una guida agli Stati parte al fine di migliorare le misure legislative adottate.

La recente adesione dell'Unione Europea alla Convenzione di Istanbul potrebbe costituire la risposta per una migliore attuazione delle disposizioni e un'armonizzazione in materia di lotta alla violenza di genere in Europa. Infatti, sebbene l'UE abbia sollecitato l'adozione di politiche volte a combattere la violenza contro le donne, tali azioni risultano spesso

frammentate. Tuttavia, nella Decisione No. 2023/1076, entrata in vigore il 22 giugno 2023, il Consiglio ha individuato come basi legali gli articoli 82(2), 84 e 78(2) TFUE, escludendo dunque l'articolo 83(1), precedentemente adottato per la conclusione della firma della Convenzione nel 2017. Di fatto, 82(2) TFUE conferisce all'UE il potere di stabilire norme minime nei procedimenti penali, in particolare per il riconoscimento reciproco delle sentenze e delle decisioni giudiziarie in materia penale trans-frontaliera; l'articolo 84 TFUE riguarda la prevenzione della criminalità e consente all'UE di sostenere le azioni degli Stati membri in questo settore; e l'articolo 78(2) TFUE riguarda l'istituzione di un sistema europeo comune in materia di asilo, comprendente uno status uniforme per l'asilo e la protezione sussidiaria.

L'esclusione dell'articolo 83(1) TFUE dalle basi giuridiche limita la capacità dell'UE di armonizzare la definizione di reati di genere e stabilire standard minimi all'interno dei quadri giuridici degli Stati Membri. A tal riguardo, nel marzo 2022, la Commissione Europea ha presentato una proposta sulla lotta contro la violenza contro le donne e la violenza domestica, adottando come base giuridica gli articoli 82(2) e 83(1) TFUE, con lo scopo di attuare alcune delle disposizioni della Convenzione e colmare le lacune del diritto dell'Unione. L'adozione della proposta di direttiva da parte del Parlamento Europeo e del Consiglio è ritenuta fondamentale per colmare le lacune giuridiche e conseguire gli obiettivi della Convenzione di Istanbul nel sistema europeo. Se adottata, infatti, potrà modificare l'ambito delle competenze dell'UE ai sensi della Convenzione, dando potenzialmente origine a competenze esclusive per l'UE nella lotta contro la violenza contro le donne.

Introduction

In the last decade, the concept of consent has become increasingly relevant at the legal level in ensuring women's full enjoyment of human rights, in particular to protect their right to decide on their sexual and reproductive life. As a matter of fact, when a woman autonomously and freely decides to give her consent to an act, she waives her rights to legal protection, so that the other person cannot be held responsible for a violation.¹ The concept of consent is, therefore, a pivotal element to fully conceptualise violence against women² in relation to certain gender-based crimes. Indeed, consent is the key element to define some acts, notably sexual violence, forced abortion and forced sterilisation, as crimes. In other words, this concept plays a key role in determining whether certain acts towards women can be considered lawful or not.³

Sexual violence can be considered as 'one of the most extreme manifestations of gender-based violence because those suffering it are mostly girls and women.'⁴ Indeed, although men are also victims of sexual violence, women are particularly and disproportionately affected by this type of gender-based crime.⁵ In general, sexual violence can be defined as any sexual act or attempt of sexual act performed by a partner, an acquaintance, or a stranger without the freely given consent of the victim; such an act is intended to disrupt the sexual autonomy or integrity of women.⁶ The introduction of the concept of consent in relation to sexual violence is a recent shift at the legal level.⁷ Indeed, the requirement for physical resistance in sexual violence, particularly in cases of rape, undermines the effective protection of women's sexual

¹ Thommen, M. (2022). Consent (Civil Law). In *Elgar Encyclopedia of Crime and Criminal Justice*. Cheltenham, UK: Edward Elgar Publishing.

² De Vido, S. (2020). *Violence against women's health in international law*. Manchester: Manchester University Press, p. 153.

³ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception. *Yale Law & Policy Review*, 35(2), p. 424.

⁴ Moyano, N., Sánchez-Fuentes, M. del M., Parra-Barrera, S. M., & Granados de Haro, R. (2023). Only "yes" means "yes": Negotiation of Sex and Its Link With Sexual Violence. *Journal of Interpersonal Violence*, 38(3-4), pp. 2759-2777. Retrieved Sep 12, 2023, from <https://doi.org/10.1177/08862605221102483>.

⁵ De Vido, S. (2020). *Violence against women's health*, cit., p. 36.

⁶ Fernet, M., et al. (2021). "When You're in a Relationship, You Say No, but Your Partner Insists": Sexual Dating Violence and Ambiguity Among Girls and Young Women. *Journal of Interpersonal Violence*, 36(19-20), p. 9437. Retrieved Sep 12, 2023, from <https://doi.org/10.1177/0886260519867149>; The Committee of Experts (CEVI). (2021). General Recommendation of the Committee of Experts of the MESECVI (No. 3): The Concept of Consent in cases of Gender-Based Sexual Violence Against Women. *MESECVI/CEVI/doc.267/21*, p. 9. Retrieved Mar 22, 2023, from <https://www.oas.org/en/mesecvi/meetingofexperts.asp>. For a direct access to the document, see https://www.oas.org/en/mesecvi/docs/MESECVI_CEVI_doc.267_21.ENG.RecomendacionGeneralConsentimientoSexual.XVIII%20CEVI.pdf.

⁷ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 413.

autonomy,⁸ as force is not always present. Thus, the concept of consent, especially lack of consent, has become the expression of women's sexual will, but also the constitutive element of the crime in case of violation. However, consent is a rather complex concept when referring to sexual violence,⁹ as there are several factors and elements that can invalidate women's sexual autonomy, some more visible and others more subtle, such as psychological coercion.¹⁰

At the EU level, the 2014 EU-wide survey established that 1 in 3 women have experienced physical or sexual violence in their lives since the age of 15 in the European Union.¹¹ In doing so, the survey highlighted the seriousness of the phenomenon and its extent in all EU Member States. The latest data collection of the EU-GBV survey for the period 2020-2023 (wave 2021) confirmed the trend of the previous research and identified high rates of sexual violence experienced by women aged 18-74 in the seven EU Member States that finalised the process so far.¹² The data show that women who have experienced physical or sexual violence range from 12% in Bulgaria to 41% in the Netherlands.¹³ However, it is important to stress that these data do not fully reflect the national reality, as many women do not report violence to the police.¹⁴

With regard to forced abortion and forced sterilisation, these practices are forms of gender-based violence that violate women's reproductive autonomy. Forced abortion can be defined as the intentional act of terminating a woman's pregnancy without her prior informed consent.¹⁵ Whereas, forced sterilisation refers to a surgical procedure aimed at terminating a woman's reproductive capacity without her prior informed consent or/and her full understanding of the consequences of the procedure.¹⁶ Importantly, sterilisation is a form of 'family planning' that should be 'free from discrimination' and 'based on the full, free and

⁸ De Vido, S. (2020). *Violence against women's health*, cit., p. 37.

⁹ Fernet, M., et al. (2021). "When You're in a Relationship, You Say No, but Your Partner Insists", cit., p. 9438.

¹⁰ De Vido, S. (2016). *Donne, violenza e diritto internazionale: la Convenzione di Istanbul del Consiglio d'Europa del 2011*. Udine: Mimesis, pp. 24-25.

¹¹ De Vido, S. (2017). 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. *European Journal of Legal Studies*, 9(2), p. 71. Retrieved Aug 21, 2023, from <https://hdl.handle.net/1814/46069>.

¹² Eurostat. (2022). EU survey on gender-based violence against women and other forms of inter-personal violence (EU-GBV) – first results – 2022 edition. Statistical Reports, Luxembourg: Publications Office of the European Union, p. 7. Retrieved Jul 5, 2023, from <https://ec.europa.eu/eurostat/web/products-statistical-reports/w/ks-ft-22-005>.

¹³ Uldry, M., and EDF Women's Committee. (2022). *Forced sterilisation of persons with disabilities in the European Union*, p. 7.

¹⁴ Ivi, p. 4.

¹⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 136.

¹⁶ Ivi, p. 79.

informed decision-making of the person concerned.¹⁷ Indeed, the procedure is one of the most widely used contraceptive methods in the world.¹⁸ However, if this practice is abused by States and imposed on women in certain countries,¹⁹ it constitutes a violation of their right to health and reproductive health,²⁰ thus amounting to a form of gender-based violence,²¹ since, in most cases, women do not receive sufficient information for their consent to be full and informed.²²

At the European level, the recent report published by the European Disability Forum (EDF) points out that forced sterilisation is still permitted in several EU countries.²³ The data show that forced sterilisation mainly affects women with disabilities or women from ethnic minorities.²⁴ In particular, the study noted that women with disabilities are subjected to the practice to a greater extent than other categories.²⁵ In Germany, for instance, 17% of women with disabilities have been sterilised compared to 2% of other categories of women.²⁶ However, research has also showed that forced sterilisation remains a very poorly analysed practice, as there is little or no information about it.²⁷

In recent decades, the international community has taken significant steps in ensuring women's protection from violence, as this phenomenon is widely recognised as a serious form of discrimination based on gender—although there is no specific international legal instrument addressing the issue.²⁸ One of the most striking and successful examples of this is certainly the Istanbul Convention. This instrument was able to address the issue of gender-based violence in a comprehensive and holistic manner, including not only criminalisation but

¹⁷ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*. World Health Organization, p. 1. Retrieved Jul 19, 2023, from <https://www.who.int/publications/i/item/9789241507325>.

¹⁸ Ibidem.

¹⁹ Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa. *Journal of Asian and African Studies*, 53(5), p. 723.

²⁰ Office of the UN High Commissioner for Human Rights. (2023). *Sexual and reproductive health and rights | OHCHR - UN human rights office*. UN Human Rights Office of The High Commissioner. Available at <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>.

²¹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 46.

²² OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization*, cit., p. 3.

²³ Uldry, M., and EDF Women's Committee. (2022). *Forced sterilisation of persons with disabilities in the European Union*, p. 12.

²⁴ Ivi, p. 14.

²⁵ Ibidem.

²⁶ Ibidem.

²⁷ Ibidem.

²⁸ The Office of the High Commissioner for Human Rights. (2022). Using the international and regional legal framework to stop all forms of violence against women and girls. *Statements | Multiple Mechanisms*, Strasbourg, Geneva, para 1.

also prevention and protection.²⁹ Fundamental was the decision to enhance the autonomy of women introducing the concept of consent in certain crimes, thus underlining how violence is not merely characterised by the use or threat of use of force. Even more important was the attribution of positive obligations to States Parties regarding violence against women.³⁰ Indeed, States can be held responsible for human rights violation under the Convention because they may, intentionally or unintentionally, ‘cause or create the conditions’ for violence against women by encouraging ‘the perpetuation of patterns of discrimination rooted in the society through policies and laws.’³¹

This notwithstanding, sexual violence and forced abortion and forced sterilisation remain some of the most widespread forms of gender-based violence against women. The dissertation thus aims to analyse the concept of consent as applied to the crimes of sexual violence, forced abortion, and forced sterilisation. In doing so, it seeks to demonstrate that several national legal systems of States Parties to the Istanbul Convention have not yet fully complied with their mandatory obligations under the provisions enshrined in Article 36, on sexual violence, and 39, on forced abortion and forced sterilisation, thereof.

Chapter 1 analyses the concept of consent in relation to violence against women. In particular, it examines meanings and elements that characterise the notion, taking into account different selected disciplines and practical examples. The analysis seeks to demonstrate that consent does not have one definition and meaning, but its characteristics are elaborated differently depending on the framework and subject within which the concept is applied.³² In Section 1, the concept of consent is examined through the theoretical explanations of academics with the aim of better understanding this notion. In Point a, consent is analysed through the lens of the concept of autonomy, which characterises philosophical and social science disciplines. In order to define consent, it is indeed fundamental to understand what is women’s autonomy and which are its elements as well as possible invalidating factors. The research will attempt to demonstrate that women’s autonomy is often disregarded. This aspect

²⁹ Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women. *Australian Law Journal*, 89(9), p. 9.

³⁰ 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. *Think Tank | European Parliament*, Policy Department C: Citizens’ Rights and Constitutional Affairs, p. 65. Retrieved Oct 16, 2023, from [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2017\)596815](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2017)596815).

³¹ De Vido, S. (2020). *Violence against women’s health*, cit., pp. 5-6.

³² Ferzan, K. K. (2006). Clarifying Consent: Peter Westen’s The Logic of Consent. *Law and Philosophy*, 25(2), p. 196.

is more evident when discussing the concept of consent in law, as of Point b. The analysis observes how the concept of consent draws a boundary between legal actions and criminal offences and seeks to determine what conditions must be met for a woman's consent to be valid and freely given.

Section 2, instead, discusses the connection between gender-based stereotypes and violence against women in order to demonstrate that stereotypical beliefs about women can contribute to violations of their right to decide, by not respecting their autonomy and consent.

Chapter 2 delves into the analysis of the concept of consent in relation to specific forms of violence against women, i.e. sexual violence, forced abortion, and forced sterilisation. The research will seek to demonstrate the relevance played by consent in these gender-based crimes, for which victims' rights can be protected and perpetrators prosecuted for the offence. The definition of consent in relation to sexual violence is deepened in Section 2, which aims to determine the requirements for women's sexual consent to be considered freely given, thus legally valid, considering a variety of forms of sexual intercourse: consensual, non-consensual, desired, and undesired. The case of *M.C. v. Bulgaria*, discussed in Section 2.1, is noteworthy as it lays the groundwork for changing the legal definition of the crime of sexual violence from force-based to consent-based.

Section 3 analyses the concept of consent in relation to forced abortion and forced sterilisation. In particular, the research focuses on 'informed consent' which can be considered as the constitutive element of these gender-based crimes against women. The analysis takes also into consideration women's right to health, especially the right to reproductive health, because women must be able to make decisions about their bodies, and any possible disregard for their consent constitutes a violation of their rights. Moreover, the research notes that forced sterilisation is often intertwined with other forms of discrimination against women, such as ethnicity or disabilities.

Chapter 3 examines the concept of consent through the lens of one of the most innovative legal instruments at the international and regional level, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention). The research broadly analyses the Convention and its innovations in the legal sphere in Section 1; while, it discusses the relevance of providing Parties with the definition of violence against women and gender-based violence in Section 2. The last two Sections

examine the definitions enshrined in Article 36, on sexual violence, and Article 39, on forced abortion and forced sterilisation. In doing so, this dissertation seeks to provide an analysis of the definitions and elements of these gender-based crimes by focusing particularly on the concept of consent, which is the key element in both offences.

Chapter 4 presents the monitoring mechanism of the Istanbul Convention: the Group of Experts on Action Against Violence Against Women and Domestic Violence (GREVIO). Section 1 introduces the GREVIO and it seeks to underline its relevance as a monitoring mechanism of the Convention. The main focus of this dissertation is however Sections 2 and 3, in which the implementation and compliance of Parties to the Convention with Articles 36 and 39 is examined through the Baseline Evaluation Reports of the GREVIO. The analysis will attempt to demonstrate that the concept of consent, which is included in both Articles of the Convention at issue, has not been included in several national legal systems. Thus, several States Parties to the Convention do not fully or sufficiently comply with the provisions enshrined in Articles 36 and 39.

The final chapter delves into the legal analysis of the European Union's recent accession to the Istanbul Convention (May 2023). Section 1 presents a brief legal overview of the different European legal stages leading up to ratification, highlighting the several changes made to the legal bases that were adopted for the conclusion of the accession. Section 2, instead, analyses legal consequences that the legal bases adopted by the Council in the concluding Decisions might have on European law.

CHAPTER 1

The Concept of Consent in Relation to Violence Against Women

The concept of consent is a pivotal element in order to fully conceptualise violence against women³³ in the context of certain crimes. Indeed, when referring to certain crimes of gender-based violence, consent plays a fundamental role in determining whether the act can be considered licit or not. The chapter therefore aims at providing a sufficient definitional framework on the notion of consent and its relation to violence against women. In particular, the chapter analyses two main issues: what consent is and how this notion interconnects with violence against women.

The concept of consent does not have only one definition and meaning.³⁴ Consent might have different requirements or definitional characteristics depending on the subject within which the notion is framed. Scholars have long debated on what consent is and which are the requirements to define genuine consent. Some define consent as a behaviour and a few identify it as a type of choice that is freely made by a person, while others describe consent as a state of mind³⁵ since it is the expression of an autonomous choice.³⁶ In *The Logic of Consent*, for instance, Peter Westen outlines a separation between what he labelled ‘factual consent’ and ‘prescriptive consent.’³⁷ On one side, the meaning of consent describes the actual decision made by the person in a specific state of mind; on the other side, the definition of the notion correspond to the modality in which such permission was given, thus whether consent was obtained by force or not.³⁸ By doing so, Westen differentiates the meaning of consent and thus he highlights that a person might give her consent to something, such as sexual intercourse, but the context in which this choice is made should be taken into consideration in order to understand whether the act can be deemed lawful or not. Furthermore, Westen distinguishes four different usages of the notion, demonstrating how there is not just one definition of the concept of consent, as it can be elaborated differently

³³ De Vido, S. (2020). *Violence against women's health in international law*. Manchester: Manchester University Press, p. 153.

³⁴ Ferzan, K. K. (2006). Clarifying Consent: Peter Westen's *The Logic of Consent*. *Law and Philosophy*, 25(2), p. 216. Retrieved Jul 21, 2023, from <http://www.jstor.org/stable/27639428>.

³⁵ *Ibidem*.

³⁶ De Vido, S. (2020). *Violence against women's health*, cit., p. 154.

³⁷ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 196.

³⁸ *Ibidem*.

depending on the meaning that is attached to it and the framework within which it is applied.³⁹

This notwithstanding, a general definition of consent can be summarised as the action of giving someone your permission for something, or as the agreement to do something.⁴⁰ Taking a step further, the notion of consent is commonly defined in law as the ‘agreement to sexual activity, given by someone who is free to choose and able to choose,’⁴¹ where the term ‘to choose’ stands for the capacity of taking such decision because the person is old enough to do so and she is able to think and communicate lucidly. The Cambridge Dictionary adds also that consent could be defined as the agreement to something that is acknowledged by law, or it could also be intended as the written document of the agreement that is recognised and signed by the person.⁴² The latter case refers, for instance, to the medical form that patients must complete in order to allow doctors to perform surgery or administer medications. An in-depth analysis of this particular type of consent, known as informed consent in medicine, is presented later on in Chapter 2, section 3.

As these definitions demonstrate, there is not a shared and clear meaning of the concept of consent in general. This chapter aims, therefore, at providing some theoretical and practical framework to lay the foundation for understanding the relevance and central role that the concept of consent has within this research.

In Section 1, the analysis will aim at defining the notion of consent in a broad and general way and it does so by taking into consideration theoretical explanations of certain academics and practical examples in selected legal cases. The notion of consent will be examined within the academic and legal domain and the research will highlight how the concept interconnects with violence against women.

Furthermore, the concept of consent will be analysed in connection with gender-based stereotypes (Section 2). In fact, understanding the causal nexus between stereotypes and violence against women will allow to comprehend the reasons why this concept is in the legal sphere.

³⁹ Ferzan, K. K. (2006). *Clarifying Consent*, cit., p. 196.

⁴⁰ Procter P. (2009). Consent. In *Longman Dictionary of Contemporary English* (5th ed.). Pearson Educational Limited, p. 357.

⁴¹ Cambridge University Press. (n.d.). Consent. In *Cambridge Dictionary*. Retrieved Aug 14, 2023, from <https://dictionary.cambridge.org/dictionary/english/consent>.

⁴² *Ibidem*.

1. *The Definition of Consent in Philosophy, Social Sciences and Law*

Consent holds an important role in moral and legal matters.⁴³ In philosophy, consent is connected to another notion, autonomy. This conception was elaborated by scholars to understand the decision-making process of a person, especially in connection to her desires. However, autonomy must respect certain conditions to be considered as such and the same rationale is applied to the concept of consent, as the two notions are strongly connected. In law, instead, consent creates a definitional framework to understand whether an act can be considered wrongful or not. Thus, from a legal perspective, the notion provides the potential victim of an unlawful act, such as rape, kidnapping or trespassing, with a defence.⁴⁴

The concept of consent plays a pivotal role in violence against women. It allows to evaluate the state of mind of the victim at the time of the accident, thereby defining whether consent was genuinely given or not. Moreover, it allows the courts to determine whether a perpetrator of a gender-based crime can be held responsible for violating women's rights, and thus to assess whether consent is legally valid.

a) *Consent in Ethics*

In ethics, the notion of consent cannot be separated from the concept of autonomy, yet the two conceptions have different meanings.⁴⁵ Scholars do not have a general definition of autonomy on which they agree, but this conception has several features that are common across its different meanings.⁴⁶ One central idea of autonomy is that a person must be capable to govern herself, namely she must be able to reflect upon herself and her values and to act according to them.⁴⁷ Indeed, autonomy is a term widely used in philosophy and ethics to describe the interconnection between the individual self and its choices and actions.⁴⁸ Marilyn Friedman associates autonomy with self-determination because, in her view, an individual always operates a form of self-reflection when deciding autonomously⁴⁹, meaning that a person takes her personal desires into consideration when making choices. It is precisely self-

⁴³ Ferzan, K. K. (2006). *Clarifying Consent*, cit., p. 194.

⁴⁴ *Ibidem*.

⁴⁵ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception. *Yale Law & Policy Review*, 35(2), pp. 420-421. Retrieved Aug 03, 2023, from <https://yalelawandpolicy.org/solving-riddle-rape-deception#bio>.

⁴⁶ Ivi, p. 420.

⁴⁷ *Ibidem*.

⁴⁸ Friedman, M. (2003). *Autonomy, Gender, Politics*. New York: Oxford UP, p. 3.

⁴⁹ Ivi, pp. 30-33.

determination that enables a person to freely express her desires and wants⁵⁰ and to act in relation to them. According to this idea, a woman is autonomous when the choices that she makes reflect her own values, desires, or preferences.⁵¹

To operate such choices as one's own reflection requires two main capacities.⁵² Firstly, a person must be able to critically assess her own values and desires.⁵³ Secondly, she must decide whether to act according to these preferences or to change them because of higher order desires,⁵⁴ namely to recognise that a choice might have multiple options to consider.⁵⁵ The latter emphasises a fundamental aspect concerning the concept of autonomy. Indeed, it might be possible to affirm that autonomy depends 'on the circumstances and conflicting interests at stake in any given [situation].'⁵⁶ For this reason, some scholars might challenge the concept of autonomy, as social relationships and cultural contexts can influence a person's choices.⁵⁷ The concept of 'relational autonomy' was indeed theorised specifically for women's autonomy.⁵⁸ Relational theories highlight how forces of oppression—such as interpersonal relations or unjust social conditions⁵⁹—are internalised by women when making a choice,⁶⁰ so that the decision cannot be considered as fully autonomous. Nevertheless, it is still possible to speak of autonomy, or autonomous choices, on the condition that a woman has validated the decision as her own⁶¹, thus not being forced by external conditions.⁶² Indeed, the presence of interfering conditions such as coercion, deception, and manipulation undermines the decision-making ability of a person because these factors distort the final outcome of individual choices.⁶³

Generally, autonomy must possess three fundamental features to be defined as such, namely that the concept must encompass the idea of non-coercion, competency, and information.⁶⁴ A person must be able to make a choice in the absence of coercion in order to

⁵⁰ Friedman, M. (2003). *Autonomy, Gender, Politics*. New York: Oxford UP, p. 4.

⁵¹ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 420.

⁵² Ibidem.

⁵³ Ibidem.

⁵⁴ Ibidem.

⁵⁵ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., p. 15.

⁵⁶ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 411.

⁵⁷ Friedman, M. (2003). *Autonomy, Gender, Politics*. New York: Oxford UP, pp. 4, 18.

⁵⁸ De Vido, S. (2020). *Violence against women's health*, cit., p. 154.

⁵⁹ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., p. 18.

⁶⁰ De Vido, S. (2020). *Violence against women's health*, cit., pp. 154-155.

⁶¹ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., pp. 4, 13.

⁶² Ivi, p. 5.

⁶³ Ibidem.

⁶⁴ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 422.

act autonomously.⁶⁵ Coercion can manifest itself in different forms. It usually involves the use or threat of using physical force against the person, but it can also include forms of psychological duress and different types of economic coercion.⁶⁶ Competency, instead, concerns the ability to think of a person.⁶⁷ As aforementioned, a person must be able to assess critically her own desires or values in order to make autonomous choices,⁶⁸ but to do so she must have a minimum level of rationality.⁶⁹ Some elements can therefore limit competency. For example, children do not have a fully rational capacity,⁷⁰ as it develops with their growth. The same applies to cases of intoxication in which the ability to behave rationally is adversely affected⁷¹ by the amount of alcohol or other substances consumed. Information is the third crucial aspect of autonomy. A person, indeed, must have all the necessary information in order to make a fully autonomous choice, namely she must be able to understand the nature and consequences of her action.⁷²

Nevertheless, the lack of one of these aspects that characterise autonomy does not result in a lack of autonomy itself. Different actions have multiple degrees of autonomy, consequently the more control, understanding, and information are lacking, the more a choice is not autonomous.⁷³ A clear distinction between autonomy and non-autonomy is present, instead, in legal contexts. In fact, courts reason about whether or not a person's autonomy can be considered legally effective in a particular situation.⁷⁴ For instance, forced marriage is considered as a form of violence against women, as it is generally concluded without the woman's genuine will.⁷⁵ Hence, from a legal perspective the choice lacks autonomy because 'a marriage is concluded to which at least one party has [...] not voluntarily consented to.'⁷⁶ From a conceptual point of view, however, the woman's autonomy is still present but her choice, namely to get married, can be considered less autonomous due to the fact that she is

⁶⁵ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 422.

⁶⁶ Ibidem.

⁶⁷ Ivi, pp. 422-423.

⁶⁸ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., p. 13.

⁶⁹ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., pp. 420, 422-423.

⁷⁰ Ivi, p. 423.

⁷¹ Ibidem.

⁷² Ibidem.

⁷³ Ivi, p. 424.

⁷⁴ Ibidem.

⁷⁵ European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European states, including ICT-facilitated violence : a special report*, Publications Office, pp. 112-114. Retrieved Apr 03, 2023, from <https://data.europa.eu/doi/10.2838/960650>.

⁷⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 2011, para. 196.

lacking control on the situation.⁷⁷ Different forms of coercion might indeed result in several degrees of autonomy,⁷⁸ affecting the final choice or action of a person.

Autonomy is a crucial concept in philosophy, ethics—especially modern bioethics—and law.⁷⁹ To understand the mechanisms underlying the decision-making process of a person means to comprehend the features of an autonomous behaviour. Thus, for the purpose of this analysis, autonomy can be generally defined as the ability of a woman to make choices that reflect her desires, wants and values in a particular situation,⁸⁰ provided that such decisions have not been vitiated by external factors as coercion, manipulation, or deception.⁸¹ The main issue with this regard arises when people fail to recognise women as capable of exercising autonomy, thus diminishing the respect that women's autonomy would otherwise deserve.⁸² Indeed, the incapacity to recognise someone's autonomous behaviour increases if a gender distinction is included in the observation,⁸³ thus highlighting how women's autonomy is usually disproportionately challenged.

Another important concept connected to autonomy is consent. As anticipated at the beginning of this section, these two conceptions cannot be separated from one another but they have different meanings and areas of application. Assuming that autonomy is self-determination and thus it is the manifestation of a person's desires and wants through choices and actions,⁸⁴ consent can be defined as one of the ways through which autonomy can be expressed.⁸⁵ Consent is indeed the vehicle through which autonomy can be translated into action by a person,⁸⁶ meaning that to consent is to make choices, which are based on her desires in a specific situation.⁸⁷ With this regard, it is important to make two important clarifications.

Firstly, consent shares some of the characteristics that define the concept of autonomy because of the strong connection between the two notions.⁸⁸ As a consequence, consent incorporates within its definition three pivotal features of autonomy, namely non-coercion,

⁷⁷ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., pp. 424-425.

⁷⁸ Ivi, p. 424.

⁷⁹ De Vido, S. (2020). *Violence against women's health*, cit., p. 154.

⁸⁰ Ibidem.

⁸¹ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., p. 6.

⁸² Ivi, p. 23.

⁸³ Ibidem.

⁸⁴ Ivi, pp. 30-33.

⁸⁵ De Vido, S. (2020). *Violence against women's health*, cit., p. 154.

⁸⁶ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 426.

⁸⁷ Ferzan, K. K. (2006). Clarifying Consent: Peter Westen's The Logic of Consent, cit., p. 204.

⁸⁸ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 426.

competency, and information.⁸⁹ Coercion plays a important role in defining consent.⁹⁰ Indeed, if consent was obtain by the use or threat of use of force,⁹¹ the act would be considered invalid, especially in legal contexts.⁹² So, when a choice is made under coercion, the action of consenting is *null ab void* and consent cannot be considered ‘neither morally nor legally efficacious.’⁹³ As for competency, some people may not be qualified to consent to specific actions such as sexual intercourse or medical treatments.⁹⁴ This could be better explained by taking as an example the case of a woman consenting to have sexual intercourse but lacking lucidity because she is highly intoxicated. Lastly, information plays a significant role in defining consent, especially in the medical area in which patients should be adequately informed before giving their permission for any medical treatment.⁹⁵ In addition, as for the concept of autonomy, consent has generally different degrees of efficacy depending on the features that prevail in a specific situation.⁹⁶ For instance, information has greater importance in a medical contexts than in the case of sexual intercourse,⁹⁷ meaning that consent has a greater weight in the first case compared to the second, particularly when assessing the lawfulness of the act from a legal perspective. The same rationale can be also applied to the non-coercive feature, so that, for instance, consent in sexual intercourse will be more significant than the consent given to medical treatment.⁹⁸

Secondly, it is important not to confuse consent with desire. As it has been analysed, autonomy is defined as the manifestation of a person’s desires, and such autonomous behaviour can be expressed through consent. In Peter Westen’s view, however, consent is not only the expression of the individual desire, but the latter is at the core of the notion itself.⁹⁹ Kimberly Kessler Ferzan, on the contrary, disagrees on this matter and she rightly points out that consent cannot be controlled by desire, as it is the expression of a mental state that is

⁸⁹ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 426.

⁹⁰ Ferzan, K. K. (2019). Consent and Coercion. *Arizona State Law Journal, Forthcoming, Virginia Public Law and Legal Theory Research Paper No. 2019-04*, p. 954. Retrieved Sep 03, 2023, from <https://arizonastatelawjournal.org/wp-content/uploads/2019/02/Ferzan-Pub.pdf>.

⁹¹ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 196.

⁹² Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 426.

⁹³ Ferzan, K. K. (2019). Consent and Coercion, cit., p. 954.

⁹⁴ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 426.

⁹⁵ Ibidem.

⁹⁶ Ibidem.

⁹⁷ Ibidem.

⁹⁸ Ivi, p. 427.

⁹⁹ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases. *Ohio State Journal of Criminal Law*, 2, pp. 335-337. Retrieved Jul 21, 2023, from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=637541.

capable of lucid reasoning.¹⁰⁰ As it will be analysed later in this section, this is an essential aspect when considering the definition of consent in law and the legal requirement of individual voluntariness.¹⁰¹ Therefore, for the purpose of this thesis, a woman makes a choice basing on her desire and her consent is the expression of her will.¹⁰²

For these reasons, consent can be described as a single concept and as a ‘multitude of [...] cross-cutting conceptions’¹⁰³ because the term can refer to the individual expression of will but it has also an important usage within the legal sphere.¹⁰⁴ With particular regard to the latter, consent allows courts to determine which actions are legally permissible and which are considered illegal, thus constituting a crime.¹⁰⁵

b) Consent in Law

In law, consent can be considered as a ‘general organising principle,’¹⁰⁶ as it sets normative boundaries and rules. However, it is important to note that when violence against women was conceptualised at international and regional level, no reference to consent was included in the definition, although the notion is relevant to the issue.¹⁰⁷ Moreover, it should be marked that laws on consent varies across all domestic normative systems,¹⁰⁸ meaning that the concept does not have a universal legal definition. Nevertheless, consent generally implies that a person is freely and willingly giving her permission to someone’s proposition and such choice must be made in absence of any form of coercion, fraud, or error.¹⁰⁹ Furthermore, the person who is consenting must respect certain legal aspects, namely a sufficient rational capacity and a minimum legal age.¹¹⁰ In case one of these two aspects is missing and despite the genuine voluntariness of the action, consent is lacking legal validity.¹¹¹

When investigating the concept of consent and its meanings in a legal perspective, it is necessary to consider the analysis provided by Peter Westen in *The Logic of Consent*. As

¹⁰⁰ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 205.

¹⁰¹ Ibidem.

¹⁰² Ivi, p. 206.

¹⁰³ Westen, P. (2004). Some Common Confusions About Consent in Rape , cit., p. 334.

¹⁰⁴ Ferzan, K. K. (2006). Clarifying Consent: Peter Westen’s The Logic of Consent, cit., p. 212.

¹⁰⁵ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 424.

¹⁰⁶ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 199.

¹⁰⁷ De Vido, S. (2020). *Violence against women’s health*, cit., p. 153.

¹⁰⁸ Ivi, p. 155.

¹⁰⁹ The Legal Information Institute of the Cornell Law School. (2022). Consent. In *Wex Legal Dictionary and Encyclopedia*. Retrieved Sep 8, 2023, from <https://www.law.cornell.edu/wex/consent>.

¹¹⁰ Ibidem.

¹¹¹ Ibidem.

anticipated at the beginning of this section, Westen identifies four typologies of consent.¹¹² The first, which he calls factual attitudinal consent, describes the state of mind of the individual¹¹³, which researchers refer as autonomy or self-determination in ethics. In other words, Westen is defining consent as the capacity to make choices according to the person's desires, which means that she must be fully conscious and she must have a 'capacity for judgement [along with the ability] to exercise that capacity for judgment.'¹¹⁴ The second conception is factual expressive consent.¹¹⁵ It is the direct expression of the first type of consent, in other words it is the physical act of consenting to a certain situation.¹¹⁶ This action could either be expressed physically or orally, for instance, through an affirmative statement such as 'yes.' The third type introduced by Westen is prescriptive attitudinal consent.¹¹⁷ Indeed, Westen correctly states that, according to law, consent must be voluntarily given by the person.¹¹⁸ He also adds that this particular conception of consent must suffice different requirements in order to be legally sufficient.¹¹⁹ Therefore, the presence or missing of these requirements allows to assess whether the person is forced into her decision and, particularly, whether she is 'intellectually capable'¹²⁰ to comprehend what she is consenting to.¹²¹ The fourth and final conception was dubbed as imputed consent and it encompasses different forms such as informed consent, hypothetical (or implied) consent, and so on. Thus, according to Westen's view, the notion of consent has different meanings and for this reason,¹²² it can be used to refer to different situations in which a person consents to something.¹²³

Consent is undeniably a choice. Specifically, prescriptive consent, that is the normative formulation of consent, is a voluntary choice made by a woman that allows the other person to 'engage in an action that would otherwise be wrongful and illegal.'¹²⁴ However, when examining crimes of violence against women, the notion of consent appears rather complicated to define, as consent might entail different meanings depending on the context in

¹¹² Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., pp. 333-337.

¹¹³ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 197.

¹¹⁴ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 197.

¹¹⁵ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., pp. 336-337.

¹¹⁶ Ivi, p. 336.

¹¹⁷ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 198.

¹¹⁸ Ibidem.

¹¹⁹ Ibidem.

¹²⁰ Ibidem.

¹²¹ Ibidem.

¹²² Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., pp. 333-334.

¹²³ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 199.

¹²⁴ Ivi, p. 204.

which it is given. Taking as example sexual violence, theorists have debated with respect to the concept of consent when applied to cases of fraud *in factum* and fraud in the inducement.¹²⁵ Let us consider, for instance, the crime of sexual violence in relation to the act of spousal impersonation. Despite having given her consent, a woman having sexual intercourse with a man who is pretending to be her husband is considered sexual violence since the act of spousal impersonation is fraud *in factum*.¹²⁶ In case of fraud *in factum*, therefore, it is irrelevant to the final judgement whether the woman consented or not to have sexual intercourse, as the action itself can be judged as a crime.

On the other hand, in case of sexual intercourse with HIV patient who purposely failed to declare his disease, the act can be deemed either as fraud *in factum* or as fraud in the inducement. In *Regina v. Cuerrier*, the Supreme Court of Canada ruled on a case of unprotected sexual intercourse between two women and a HIV male patient.¹²⁷ Even if both women consented to have unprotected sexual intercourse, the Court states that the failure of the man to declare his HIV disease is fraud *in factum*, whereby the act is judged as sexual assault under s. 265 of the Criminal Code of Canada.¹²⁸ Once again, acknowledging women's consent is not essential to the criminalisation of the act, as negligence in declaring HIV disease is *per se* a crime.¹²⁹ Indeed, the aim of the prosecution was to highlight whether the accused had deliberately omitted to declare his status, so that the consent given to sexual intercourse by both women had been vitiated by fraud.¹³⁰ Consent was not the main aspect of the prosecution, but dishonesty was.¹³¹ However, the act can also be labeled as fraud in the inducement since consent was freely given by both women, but it was obtained by the accused through deception, as he had failed to declare his disease.¹³² Deception usually nullifies consent, as the choice made is incompatible with the autonomy of the person.¹³³ The Supreme Court of Canada states indeed that it is necessary for both women to 'consent to have intercourse with a partner who is HIV-positive.'¹³⁴ So, in this instance, it is not sufficient

¹²⁵ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 204.

¹²⁶ Ibidem.

¹²⁷ *R. v. Cuerrier*. (1998). 2 S.C.R. 371. Retrieved Aug 28, 2023, from <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1646/index.do>.

¹²⁸ Ibidem. See also: Criminal Code, RSC 1985, c C-46, RSC 1985, c C-46, s 265. Available at <https://qweri.lexum.com/w/calegis/rsc-1985-c-c-46-en#!fragment/sec265>.

¹²⁹ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 200.

¹³⁰ *R. v. Cuerrier*. (1998). 2 S.C.R. 371.

¹³¹ Ibidem.

¹³² Ferzan, K. K. (2006). Clarifying Consent, cit., p. 200.

¹³³ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., pp. 410, 413.

¹³⁴ *R. v. Cuerrier*. (1998). 2 S.C.R. 371.

for women to broadly consent to have sexual intercourse, but according to the judgment, they must give their consent to the specific case.¹³⁵

Nevertheless, some other scholars disagree on this particular issue, as deception does not change the factual consent that the woman had given.¹³⁶ Moreover, deception cannot be compared with coercion, which on the contrary nullifies consent.¹³⁷ For these reasons, defining this concept might be rather difficult because consent is a contentious issue in criminal law.¹³⁸ Notwithstanding that, the relationship between violence against women and the notion of consent allows for a normative definition of whether or not there is a violation of women's rights in a given situation. Taking sexual violence again as an example, consent—especially the way it is given—is what determines whether the act can be defined as rape or not.¹³⁹ Therefore, a woman choosing voluntarily to have sexual intercourse does not suffer the harm of sexual violence; and conversely, a woman whose consent was not voluntary is subjected to sexual violence.¹⁴⁰

Westen demonstrates that it is necessary to understand the logic underneath the concept of consent in order to comprehend its complexity. The rationale of consent lies indeed in the past, as it has developed during the Middle Ages through the latin expression *volenti non fit iniura*, meaning that 'no (*non*) justice (*iniura*) is done (*fit*) to the willing (*volenti*).'¹⁴¹ Although this expression can be considered as customary law in the contemporary times, it fails in determining why consent should have any relevance in criminalising a perpetrator in case a victim has consented to the act. In the *Valdez* case, for instance, a rape charge was dismissed by the grand jury because the woman, Elizabeth 'Xan' Wilson, consented to have sexual intercourse on the condition that the perpetrator, Joel Rene Valdez, wore a condom.¹⁴² Despite the fact that the man had broken into the woman's house and threatened her with a knife,¹⁴³ the grand jury's reasoning focused on the fact that the decision to self-protect herself

¹³⁵ *R. v. Cuerrier*. (1998). 2 S.C.R. 371.

¹³⁶ Thommen, M. (2022). Consent (Civil Law). In *Elgar Encyclopedia of Crime and Criminal Justice*. Cheltenham, UK: Edward Elgar Publishing. Retrieved Jul 17, 2023, from <https://doi.org/10.4337/9781789902990.consent.civil.law>.

¹³⁷ *Ibidem*.

¹³⁸ Thommen, M. (2022). Consent, cit.

¹³⁹ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 418.

¹⁴⁰ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 206.

¹⁴¹ Thommen, M. (2022). Consent, cit.

¹⁴² Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 341. See also da Luz, C., & Weckerly, P. (1993). The Texas 'Condom-Rape' Case: Caution Construed as Consent. *UCLA Journal of Gender and Law*, 3. Retrieved Sep 8, 2023, from <http://dx.doi.org/10.5070/L331017578>.

¹⁴³ Ivi, p. 341.

by requesting the man to use a condom may have implied her consent. This case shows some important points concerning the concept of consent. Firstly, this is a clear example of how the traditional logic of the notion in law fails to capture the different nuances that this concept has¹⁴⁴—in this sense, the analysis provided by Peter Westen proves to be crucial in drawing distinctions between different typologies of consent. A woman may indeed consent to an act, but such consent does not represent the genuine expression of her desire since it was obtained by force, thus rendering it legally ineffective.¹⁴⁵ Secondly, when a woman gives her consent to something, she is actively deciding to waive her rights to legal protection so that the rationale of consent appears to be based on the ‘principle of human autonomy.’¹⁴⁶ As it has been widely explained, autonomy plays an important role in the decision-making process of a person and it represents the manifestation of a person’s will.¹⁴⁷ Provided that legal rights are deemed as a precondition in order to freely exercise human will, the waiving of these rights can be considered as an autonomous choice, so as an exercise of liberty itself as long as certain conditions are satisfied.¹⁴⁸

Both Westen and Thommen note that there are some essential requirements that the concept of consent must respect in order to be legally efficacious. On one side, Westen identifies freedom, knowledge, and competence as some of the conditions that are necessary to the validity of consent.¹⁴⁹ On the other side, Thommen introduces new important elements that are missing in Westen’s analysis. Thommen recognises, indeed, the capacity to give consent and the legal entitlement to do so as conditions for valid consent.¹⁵⁰ But he also presents two other pivotal requirements for the legal validity of the concept, namely the necessity for consent to be declared and its voluntary aspect.¹⁵¹ For the purpose of this research it is deemed necessary to provide a description of these requirements, as they are essential to comprehend the legal validity of a woman’s choice in a particular situation, especially when tackling the issue of violence against women.

¹⁴⁴ Thommen, M. (2022). Consent, cit.

¹⁴⁵ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 196.

¹⁴⁶ Thommen, M. (2022). Consent, cit.

¹⁴⁷ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., pp. 30-33.

¹⁴⁸ Thommen, M. (2022). Consent, cit.

¹⁴⁹ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 198.

¹⁵⁰ Thommen, M. (2022). Consent, cit.

¹⁵¹ Ibidem.

The first condition requires that the person has some competency to consent.¹⁵² This particular aspect has already been analysed in the previous paragraphs, as it has illustrated that competency is among the three main features that characterise autonomy, thus the concept of consent too.¹⁵³ From a legal perspective, a person has competency to give her consent if she has a capacity to judge.¹⁵⁴ In other words, consent is legally valid if a woman has the ability to understand the scope and consequences of an act and, given this, she is able to make a choice in accordance to her will.¹⁵⁵ However, this ability is related to a person's capacity to make rational decisions; plus, age, mental disorder, intoxication and other conditions constitute elements that affect this capacity.¹⁵⁶ For example, the majority of legal systems set a minimum legal age under which a person is not considered competent to make decisions.¹⁵⁷ Indeed, a minor girl who gives permission to have sexual intercourse still lacks 'the competence that the jurisdictions deem necessary' for her consent to be legally valid, regardless of her rational understanding of the circumstance.¹⁵⁸ Accordingly, if a person is incapable to give her consent, the responsibility to make decisions is given to her legal representatives that must act basing on the person's desires.¹⁵⁹

The second requirement concerns the legal ability that a person must have in order to give her consent.¹⁶⁰ Indeed, certain harmful practices concerning the human body have some restrictions, especially if they are serious.¹⁶¹ Minor injuries such as giving permission for the purpose of having one's body pierced or tattooed do not constitute an invalidating element of consent, provided that these practices do not 'cause a permanent decrease of physical integrity' and the person is adequately informed prior the operation.¹⁶² On the other side, certain medical practices are considered unnecessary and harmful as for the case of female genital mutilation (FGM).¹⁶³ Indeed, this practice is usually performed for aesthetic

¹⁵² Thommen, M. (2022). Consent, cit..

¹⁵³ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., pp. 422, 426.

¹⁵⁴ Thommen, M. (2022). Consent, cit.

¹⁵⁵ Ibidem.

¹⁵⁶ Ibidem.

¹⁵⁷ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 336.

¹⁵⁸ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 336.

¹⁵⁹ Thommen, M. (2022). Consent, cit.

¹⁶⁰ Ibidem.

¹⁶¹ Ibidem.

¹⁶² Conti, A., Bin, P., Casella, C., Capasso, E., Fedeli, P., Salzano, F. A., Terracciano, L., & Piras, M. (2018). Piercing and Tattoos in Adolescents: Legal and Medico-legal Implications. *Open medicine (Warsaw, Poland)*, 13, p. 149. Retrieved Aug 29, 2023, from <https://doi.org/10.1515/med-2018-0023>.

¹⁶³ De Vido, S. (2020). *Violence against women's health*, cit., p. 158-159.

purposes.¹⁶⁴ Moreover, FGM is criminalised in the majority of domestic legal systems, as it is a form of violence against women and a violation of human rights.¹⁶⁵ Although some scholars argue that women can still give their consent to this medical operation on the condition that they are fully informed of the consequences,¹⁶⁶ women's consent concerning this harmful practice is usually considered invalid.¹⁶⁷

Thirdly, consent must be declared since it is an 'unilateral expression of will' of the person.¹⁶⁸ Indeed, when declaring her consent, a woman decides to waive her legal rights so that the other person cannot be held responsible for a violation.¹⁶⁹ This particular aspect can be better explained with an example. In the case of sexual intercourse, a woman giving her full, clear and expressed consent results in the waiver of her legal rights, meaning that the man cannot be charged for sexual assault or sexual violence. On the contrary, if a woman does not give her consent, she does not give up her legal rights. This means that she can charge the man with sexual violence, as she did not express her free will to have intercourse. In addition, the declaration of consent does not bind a person while empowering the other.¹⁷⁰ Consent can be withdrawn at any given moment of the action.¹⁷¹ In fact, a woman that gives her consent to allow a medical treatment is not bound to carry out her decision to the end. It is possible for the woman to interrupt the action even right before it takes place, for instance, a surgery that she does not want to undertake anymore.¹⁷² For these reasons, the declaration of consent can have different forms, namely oral, written, or it can even be implied.¹⁷³

The forth and last condition for consent to be valid is voluntariness.¹⁷⁴ In order for a person to give her voluntary consent, she must be able to make autonomous choices that are based on the idea of freedom.¹⁷⁵ Indeed, liberty can be considered as a precondition to autonomy since it is the ability to make decisions without external influencing factors.¹⁷⁶ Consequently, consent depends on both the amount of information possessed and the coercion that is exerted

¹⁶⁴ Thommen, M. (2022). Consent, cit.

¹⁶⁵ De Vido, S. (2020). *Violence against women's health*, cit., p. 158.

¹⁶⁶ Ivi, p. 159.

¹⁶⁷ Thommen, M. (2022). Consent, cit.

¹⁶⁸ Ibidem.

¹⁶⁹ Ibidem.

¹⁷⁰ Thommen, M. (2022). Consent, cit.

¹⁷¹ Ibidem.

¹⁷² Ibidem.

¹⁷³ Ibidem.

¹⁷⁴ Ibidem.

¹⁷⁵ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 421.

¹⁷⁶ Ibidem.

on the person when giving consent.¹⁷⁷ The idea of freedom, thus of voluntary consent, characterises the legal formulations of many forms of violence against women. Article 16(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for instance, states that women have the same right to ‘freely [...] choose a spouse’ and that they have to give ‘their free and full consent’ in order for a marriage to be legally valid.¹⁷⁸ While Article 39 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), concerning forced abortion and forced sterilisation, states that women must express their informed consent in order for any operation to be performed.¹⁷⁹ This article clearly specifies that a woman must be adequately informed in order for her consent to be voluntary, thus legally valid.

Despite what has been analysed in the above paragraphs, the concept of consent has a wider application within the legal domain and in relation to violence against women. Consent, especially the lack of consent, might be detected in different legal contexts that however do not correspond to the predominant fields in which this concept is usually applied, namely sexual violence and medical treatment.

In the case of *I.M and Others v. Italy* decided by the European Court of Human Rights (ECtHR), a woman’s lack of consent was undeniably ignored by the judicial authorities, who forced her to meet with her abusive partner on the grounds of co-parenting.¹⁸⁰ The woman had indeed left her home and found refuge at an anti-violence center with her children, after having suffered domestic violence from her partner, who was a drug addict and alcoholic.¹⁸¹ Despite the dangerous situation, the Tribunale per i Minorenni di Roma authorised various meetings between the abusive father and the woman and her children, as the man had not seen them ever since they had left in 2014.¹⁸² These sessions had to be held in a protected and safe environment but the authorities failed to ensure it and the woman consequently opposed to the meetings.¹⁸³ Although the woman revoked her consent to meet with the man, who reportedly

¹⁷⁷ Thommen, M. (2022). Consent, cit.

¹⁷⁸ Convention on the Elimination of All Forms of Discrimination against Women. (1979).

¹⁷⁹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

¹⁸⁰ *I.M and Others v. Italy*. (2022). Application no. 25426/20. Retrieved Jul 18, 2023, from <https://hudoc.echr.coe.int/eng?i=001-220989>.

¹⁸¹ Ivi, paras. 5-6.

¹⁸² Ivi, para. 10.

¹⁸³ Ivi, paras. 10-18, 20-32, 37.

had an aggressive behaviour during the sessions, her decision was not taken into consideration by the Court.¹⁸⁴ Moreover, her parental responsibility was even suspended, as the woman continued to object to the sessions and she refused to present herself with the children.¹⁸⁵ The Court eventually authorised the suspension of the meetings in 2018, more than three years after the first complaint by the woman and the first reported aggressive behaviour of the man.¹⁸⁶ While in 2019, the Court decided to revoke the suspension of the mother's parental responsibility and it recognised the danger posed by the man's behaviour,¹⁸⁷ which had already been highlighted by the woman for years.

This particular case highlights a pivotal aspect. It shows how women's autonomy, thus the ability to make decisions that can be expressed through consent, might be challenged¹⁸⁸ even in the legal sphere. Indeed, the judge failed to acknowledge the woman's rational ability to recognise the danger that the meetings with the aggressive man posed to her and her children's safety. As a matter of fact, he belittled the woman's capacity for autonomous behaviour by disregarding her lack of consent and allowing the meetings to continue, despite the fact that the woman was also a victim of domestic violence. As analysed in the previous paragraphs, the recognition of a person's autonomy is strongly influenced by gender, meaning that it is more difficult to recognise women's autonomous behaviour, as in this case.¹⁸⁹

Another crucial issue concerning the concept of consent and violence against women is the non-consensual dissemination of intimate/private/sexual images in the digital realm. This crime is relatively new, as it is connected to the development of technologies, particularly in the recent decades. Moreover, it is an ICT-facilitated¹⁹⁰ form of violence that mainly targets women and girls.¹⁹¹ It is important to note that intimate/private/sexual images can be obtained with the person's consent at the time of creation, nonetheless their diffusion is often non-

¹⁸⁴ *I.M and Others v. Italy*. (2022). Application no. 25426/20, paras. 19, 32, 34-38.

¹⁸⁵ *Ivi*, para. 34.

¹⁸⁶ *Ivi*, para. 57.

¹⁸⁷ *I.M and Others v. Italy*. (2022). Application no. 25426/20, paras. 61-62.

¹⁸⁸ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., p. 23.

¹⁸⁹ *Ibidem*.

¹⁹⁰ The term ICT refers to 'information and communications technology' and it addresses all forms of violence against women and girls (VAWG) that take place within the digital realm and not exclusively online. This particular form of violence disproportionately affects women and girls compared to men, in particular it is mainly aimed at some groups of women such as bloggers, lesbians, women in politics and others. See: United Nations Entity for Gender Equality and the Empowerment of Women (UN Women). (2020). *Online and ICT-facilitated violence against women and girls during COVID-19*. Available at <https://www.unwomen.org/en/digital-library/publications/2020/04/brief-online-and-ict-facilitated-violence-against-women-and-girls-during-covid-19>.

¹⁹¹ European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European states*, cit., p. 12.

consensual and it aims at humiliating and inflicting damage on the victim.¹⁹² As an example, the Italian Prime Minister Giorgia Meloni published a video of a woman being raped on Twitter.¹⁹³ The Prime Minister was aiming at highlighting the danger posed by illegal migrants in the country, as the perpetrator was one of them.¹⁹⁴ However, by doing so she exposed the woman to the internet, thus damaging her dignity.

In addition, the non-consensual dissemination of private images is frequently labeled as ‘revenge pornography,’ namely the posting of intimate images online as a form of revenge against the partner. However, this concept fails to include all types of imagery creations within its definition.¹⁹⁵ Indeed, images do not have to be sexual in nature to represent an offence.¹⁹⁶ Media has often disregarded women’s consent by publishing private images or videos, thus violating their right to privacy too.¹⁹⁷ As an example, in the so-called ‘400 stitches’ case about a 18-years-old girl who was attacked by a man, the victim’s right to privacy was violated by the media, as they published her full name and photographs of her injuries without her consent.¹⁹⁸ In this regard, it is worth mentioning that in the General Recommendation No. 19 (CEDAW), the Committee on the Elimination of Discrimination against Women recommended States Parties ‘to ensure that the media respect and promote respect for women.’¹⁹⁹

To conclude, autonomy is an expression of self-determination in ethics²⁰⁰ and thus, it is at the basis of choices and actions that are the result of a woman’s desires, values or commitments, in lack of oppressions from an external actor.²⁰¹ In law, autonomy is conceptualised through the lens of consent. The analysis highlighted that no clear and universal definition of the concept exists in the legal sphere, as the notion captures different

¹⁹² European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European states*, cit., p. 135.

¹⁹³ Sessa, M. G. (2023). *Cases of Gender Disinformation in the Italian Context* [Seminar]. Gender Violence and Disinformation in the Digital Realm: Persistent Challenges and Necessary Responses, Venice, Italy.

¹⁹⁴ Ibidem.

¹⁹⁵ European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European*, cit., p. 135.

¹⁹⁶ Ivi, p. 140.

¹⁹⁷ Sessa, M. G. (2023). *Cases of Gender Disinformation in the Italian Context* [Seminar].

¹⁹⁸ Kuneva, L. (2023). *Harmful Gender Stereotypes and Misogynist Narratives in Bulgarian Online Media* [Seminar]. Gender Violence and Disinformation in the Digital Realm: Persistent Challenges and Necessary Responses, Venice, Italy.

¹⁹⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW). (1992). *CEDAW General Recommendation No. 19: Violence against women*. Retrieved Sep 27, 2023, from <https://www.refworld.org/docid/52d920c54.html>.

²⁰⁰ De Vido, S. (2020). *Violence against women’s health*, cit., p. 154.

²⁰¹ Friedman, M. (2003). *Autonomy, Gender, Politics*, cit., p. VIII.

meanings that, nonetheless, do not compete at conceptual level, but co-exist.²⁰² Despite this, consent set boundaries in the normative system concerning violence against women, so as to determine whether an act is lawful or not.

Having explained how the concept of consent and violence against women are interconnected, it is deemed necessary to investigate one more aspect before proceeding with the analysis, namely gender stereotypes. The research will show that gender-based stereotypes and violence against women share a casual connection. Indeed, the belief that women are subordinate to men or that they have certain attributes can lead to a lack of respect for their autonomy, and by extension of their consent in certain situations.

2. *The Connection Between Gender-based Stereotypes and Consent*

The preamble of the Convention on the Elimination of All Forms of Discrimination against Women (hereafter, the CEDAW Convention) specifically refers to the need for a ‘change in the traditional role of men as well as the role of women in society and in the family [...] to achieve full equality between men and women.’²⁰³ The Convention thus recognises that men and women do not have equal rights and equal treatments within the society. Moreover, Article 5(a) of the CEDAW Convention establishes the obligation for States Parties to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’²⁰⁴ This Article emphasises two aspects that are fundamental to the purpose of this analysis. On one side, it stresses the part played by ‘social and cultural patterns’ in shaping gender roles, meaning behaviours and attitudes that are attributed and considered appropriate to one gender over the other.²⁰⁵ Indeed, gender roles are influenced by the prevailing cultural norms in a given society,²⁰⁶ plus these gender models are learned ever since one’s childhood.²⁰⁷ On the other side, the Article focuses the attention on the connection between discriminatory practices against women and gender stereotypes, as well as the idea of

²⁰² Ferzan, K. K. (2006). Clarifying Consent, cit., p. 216.

²⁰³ Convention on the Elimination of All Forms of Discrimination against Women. (1979).

²⁰⁴ Ibidem.

²⁰⁵ Worthy, L. D., Lavigne, T., and Romero, F. (2020). *Culture and Psychology. How People Shape and are Shaped by Culture*. Phoenix: MMOER, p. 185. Available at <https://open.maricopa.edu/culturepsychology/>.

²⁰⁶ Ibidem.

²⁰⁷ Caneva, E., et al. (2021). La cultura della violenza. Curare le radici della violenza maschile contro le donne. *WeWorld*, in collaboration with IPSOS, p. 2.

hierarchy between sexes. If gender roles—that are socially constructed²⁰⁸—are perpetuated over time, they tend to crystallise in the social and cultural sphere, thus giving rise to gender stereotypes, for instance, the role of caregiver assigned to women and the one of breadwinner assigned to men.²⁰⁹

The term stereotype, indeed, refers to the presumption that all members of a social group share certain attributes or characteristics.²¹⁰ This generalised view is applied to all individuals in the group, who are believed to conform to this preconception, thus nullifying any dimension of personality.²¹¹ When these cultural and social generalised beliefs are applied to men and women, they give rise to gender stereotypes.²¹² Gender stereotypes and gender assumptions are inevitable in society, as they help to simplify reality,²¹³ but they might become harmful when they are used to violate human rights.²¹⁴ For instance, gender stereotypes can carry connotations that picture women as incapable of taking health care decisions.²¹⁵ This is the case, for instance, with women needing the authorisation of male third parties to undertake any medical treatment.²¹⁶ This belief is based on the assumption that women are unable to make medical decisions because they do not exercise full autonomy, as they are subordinate to men.²¹⁷

As a matter of fact, gender stereotypes negatively impact women by increasing inequalities, discrimination²¹⁸ and even by setting the preconditions for gender-based violence,²¹⁹ thus they can also affect men's perception of women's consent. In the General

²⁰⁸ Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat. (2006). *Ending violence against women: From words to action. Study of the Secretary-General*. United Nation Publication, p. 28. Retrieved May 26, 2023, from <https://www.un.org/womenwatch/daw/vaw/v-sg-study.htm>.

²⁰⁹ Caneva, E., et al. (2021). La cultura della violenza, cit., pp. 2, 11.

²¹⁰ Cook, R. J., and Cusack, S. (2010). *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press, p. 9.

²¹¹ Ibidem.

²¹² Leon, C. M., & Aizpurua, E. (2023). Do Youth Dream of Gender Stereotypes? The Relationship among Gender Stereotyping, Support for Feminism, and Acceptance of Gender-Based Violence. *International Journal of Environmental Research and Public Health*, 20(3), p. 2439. MDPI AG. Retrieved Jul 17, 2023, from <http://dx.doi.org/10.3390/ijerph20032439>.

²¹³ Caneva, E., et al. (2021). La cultura della violenza, cit., p. 2. See also: Cook, R. J., and Cusack, S. (2010). *Gender Stereotyping*, cit., pp. 13-18.

²¹⁴ International Commission of Jurists. (2015). *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*. Geneva, p. 2. Retrieved Aug 04, 2023, from <https://www.icj.org/icj-addresses-harmful-gender-stereotypes-and-assumptions/>.

²¹⁵ Cook, R. J., and Cusack, S. (2010). *Gender Stereotyping*, cit., p. 12.

²¹⁶ Ibidem.

²¹⁷ Ibidem.

²¹⁸ Leon, C. M., & Aizpurua, E. (2023). Do Youth Dream of Gender Stereotypes, cit., p. 2439.

²¹⁹ De Vido, S. (2016). *Donne, violenza e diritto internazionale: la Convenzione di Istanbul del Consiglio d'Europa del 2011*. Udine: Mimesis, p. 30.

Recommendation No. 19, the CEDAW Committee underlines that gender stereotypes contribute to ‘practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision,’ thus ‘help[ing] to maintain women in subordinate roles.’²²⁰ The idea of women’s subordination has historically been connected to a hierarchical view of gender roles, namely with men in positions of power and women subject to their control.²²¹ This conception is often found in patriarchal societies, in which the idea of male domination and female subordination is perpetuated both ideologically and in practice.²²² As a matter of fact, in cultures where masculinity is higher, women are perceived as passive compared to men,²²³ who in contrast are labelled as aggressive, competitive and dominant.²²⁴ Many scholars have therefore observed a causal connection between the presence of gender-based stereotypes, along with unequal power relations, and the risk of violence against women occurring.²²⁵ Consequently, it is possible to say that the roots of violence against women can be found in the gender-patriarchy and gender-power relationship.²²⁶

Gender stereotypes are perpetuated in different contexts such as cultural, religious, and even legal.²²⁷ In criminal judicial systems, women victims and survivors of gender-based violence might encounter barrier to justice in case of judicial stereotyping.²²⁸ The UN High Commissioner for Human Rights Navi Pillay affirmed that it is necessary to ‘ensure that government officials, especially those working in the justice system, do not deliver decisions based on harmful stereotypes and undermine the human rights of women and girls.’²²⁹ Judges dealing with gender-based violence cases may apply gender stereotypes to female victims of violence, thereby undermining the victims’ claims, such as lacking of consent in rape crimes,

²²⁰ UN Committee on the Elimination of Discrimination Against Women (CEDAW). (1992). *CEDAW General Recommendation No. 19: Violence against women*.

²²¹ Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat. (2006). *Ending violence against women: From words to action. Study of the Secretary-General*. United Nation Publication, p. 28.

²²² Ibidem.

²²³ Worthy, L. D., et al. (2020). *Culture and Psychology*, cit., p. 185.

²²⁴ Leon, C. M., & Aizpurua, E. (2023). Do Youth Dream of Gender Stereotypes?, cit., p. 2439.

²²⁵ Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat. (2006). *Ending violence against women*, cit., p. 28.

²²⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 43.

²²⁷ Cook, R. J., and Cusack, S. (2010). *Gender Stereotyping*, cit., p. 32.

²²⁸ Cusack, S. (2014). *Eliminating judicial stereotyping. Equal access to justice for women in gender-based violence cases*. Commissioned by the UN Office of the High Commissioner for Human Rights, p. ii. Retrieve Jul 26, 2023, from <https://rm.coe.int/1680597b20>.

²²⁹ Pillay, N. (2014). Equality and Justice in the Courtroom. *United Nations*. Retrieve Jul 26, 2023, from <https://www.ohchr.org/en/2014/06/equality-and-justice-courtroom>.

or reaching a judicial decision that is based on beliefs rather than relevant facts.²³⁰ An example can be provided by the assumption that sexual assault crimes are based on women's physical resistance, so in absence of opposition, sexual intercourse is considered consensual.²³¹ By focusing on the victim's conduct, courts place on the woman the burden to prove evidence of her consent, rather than holding the man liable for failing to ascertain it.²³² Furthermore, gender stereotypes can attribute certain sexual characteristics to women, such as passivity—that is, being always sexually available²³³ and ready to consent to intercourse. In rape cases, courts often focus on whether the victim acted or dressed promiscuously so as to manifest her consent to sexual intercourse with men, thus resulting in gender stereotyping.²³⁴

In some cases, judicial stereotyping can even result in secondary victimisation of women victims of violence.²³⁵ In *J.L. v. Italy* decided by the ECtHR, a woman who had been sexually assaulted by a group of acquaintances complained that judicial authorities had failed to comply with their positive obligations under Article 8(1), respect for private life, of the European Convention on Human Rights (hereafter, ECHR).²³⁶ In fact, during the trial the accused's lawyers asked the victim about her past family and sexual life.²³⁷ In addition, despite her capacity to give her consent to intercourse was judged as '*visiblement altérée*,' the judges reasoned that the woman's story lacked credibility because her motivations for presenting herself to the meeting and her narrative of the evening's subsequent events were fragmented.²³⁸ During the Court of Appeal's proceedings, the judges took into consideration the victim's family and sexual history for their reasoning.²³⁹ In addition, they stated that the victim had manifested some understanding of the situation, as she had refused the help of a girl the night in which the sexual assault had occurred.²⁴⁰ Therefore, her behaviour could be considered consensual to have intercourse with the group of men.²⁴¹ The ECtHR noted that questioning and referring to the woman's private matters to undermine the applicant's

²³⁰ Cusack, S. (2014). *Eliminating judicial stereotyping*, cit., pp. iii, 16, 26.

²³¹ International Commission of Jurists. (2015). *Sexual Violence Against Women*, cit., p. 22.

²³² *Ivi*, p. 24.

²³³ *Ibidem*.

²³⁴ *Ibidem*.

²³⁵ Cusack, S. (2014). *Eliminating judicial stereotyping*, cit., p. 26.

²³⁶ *J.L. v. Italy*. (2021). Application no. 5671/16, para. 1. Retrieved Jul 18, 2023, from <https://hudoc.echr.coe.int/fre?i=001-210299>.

²³⁷ *Ivi*, para. 24.

²³⁸ *Ivi*, paras. 30-34, 37.

²³⁹ *Ivi*, paras. 41-43.

²⁴⁰ *Ibidem*.

²⁴¹ *Ibidem*.

credibility was contrary to the principles of international law concerning the protection of the rights of the victims of sexual violence, plus it was irrelevant to the case.²⁴² Moreover, the ECtHR stated that ‘the language and arguments used by the Court of Appeal convey the prejudices about the role of women that exists in the Italian society’ and thus it is essential for judicial authorities to ‘avoid reproducing sexist stereotypes [...] [that] expose women to secondary victimisation.’²⁴³

This case is pivotal in drawing a nexus between gender stereotypes and human rights violations,²⁴⁴ especially women’s rights and violence against women. Indeed, the reasoning done by the Italian authorities on the basis of gender beliefs shifted the responsibility of the crime from the perpetrators to the victim, who suffers secondary victimisation.²⁴⁵ Moreover, if the State fails to hold a perpetrator of violence against women responsible, it perpetuates gender stereotypes such as the passivity of women, whereby they are believed to always give their consent to sexual intercourse.²⁴⁶ Consequently, it can also trigger to the idea that gender-based violence is acceptable and thus normalised in society.²⁴⁷

To resume, discriminatory behaviours that are based on gender stereotypes are widely criminalised within the international legal domain. Nevertheless, stereotyping practices are still occurring in society, including the legal sphere. Indeed, gender stereotypes can foster the idea that women are subordinated to men, thus they can increase a risk for violence against women to occur and the possibility for secondary victimisation in legal proceedings.

In addition, gender stereotypes and consent are implicitly connected. The former have negative repercussions on the latter, as the belief of male dominance can lead men to belittle or ignore the presence or absence of women’s consent in certain circumstances, such as sexual intercourse or marriage.

At this point, the concept of consent and its connection to violence against women has been widely analysed. The next chapter will dwell on the concept of consent when applied to sexual violence and rape, as well as, forced abortion and force sterilisation. The research will

²⁴² *J.L. v. Italy*. (2021). Application no. 5671/16, paras. 132, 137.

²⁴³ *Ivi*, paras. 141-142.

²⁴⁴ Mele, C. (2021). Stereotipi sessisti e vittimizzazione secondaria. La Corte di Strasburgo condanna l’Italia. *Centro Studi AMIStaDeS*. Retrieved Sep 3, 2023, from <https://www.amistades.info/post/stereotipi-sessisti-vittimizzazione-corte-strasburgo-condanna-italia>.

²⁴⁵ *Ibidem*.

²⁴⁶ Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat. (2006). *Ending violence against women: From words to action. Study of the Secretary-General*. United Nation Publication, p. 30.

²⁴⁷ *Ibidem*.

make use of several case law cases in order to demonstrate the importance of the notion of consent as founding element for the crimes of sexual violence, forced abortion and force sterilisation.

CHAPTER 2

Framing the Concept of Consent in Selected Crimes of Violence Against Women

1. Introduction to the Chapter

The previous chapter addressed the concept of consent in a broad way, in particular its definitions and meanings in ethics and law. Moreover, it highlighted the interconnection between this notion and violence against women. From a legal perspective, the analysis emphasised the central role played by consent in drawing normative boundaries in order to determine the lawfulness or otherwise of certain acts.

This chapter will delve into the connection between the concept of consent and certain forms of violence against women, namely sexual violence, and forced abortion and forced sterilisation. Consent is indeed of paramount importance with regard to these forms of gender-based violence, as it enables women to assert their rights in event of a violation, thus holding the perpetrator responsible for the crime.

In sexual violence, the concept of consent possesses various critical aspects, as a sexual act may be consensual but unwanted, or viceversa, thus increasing the complexity of the notion itself. In Section 1, the analysis will delve into a particular aspect of sexual violence, namely sexual assault, including rape. Sexual violence can indeed be defined as any sexual act or attempt of sexual act by acquaintances or strangers without the freely given consent of the victim and such act aims at disrupting women's sexual autonomy or integrity.²⁴⁸ At European level, for example, sexual violence is regulated by Article 36 of the Istanbul Convention as 'non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.'²⁴⁹ Sexual violence includes various forms of violation, including sexual assault, that refers to any type of unwanted sexual contact or experience,²⁵⁰

²⁴⁸ Fernet, M., et al. (2021). "When You're in a Relationship, You Say No, but Your Partner Insists", cit., p. 9437; The Committee of Experts (CEVI). (2021). General Recommendation of the Committee of Experts of the MESECVI (No. 3), cit., p. 9.

²⁴⁹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

²⁵⁰ Brockbank, M. (2019). The Myth of the "Gray Area" in Rape: Fabricating Ambiguity and Deniability. *Dignity: A Journal of Analysis of Exploitation and Violence*, 4(4), Article 2, p. 1. Retrieved Oct 10, 2023, from <https://doi.org/10.23860/dignity.2019.04.04.02>.

and rape, which refers to any sexual activity conducted against a person's will or without consent.²⁵¹ The research will demonstrate that consent is essential to determine sexual violence, as the use or threat of use of force is sometimes not needed to execute the offence. Coercion, for instance, can manifest through both physical and non-physical methods that aims at obtaining consent for any type of sexual activity.

The concept of consent has gained international relevance following the *M.C. v. Bulgaria* case, which will be examined in point 2.1. The ECtHR has developed for the first time a definition of sexual violence that includes the concept of consent as the element of the violation, instead of force. The judgement set therefore the basis for the present international definition of sexual violence, especially rape, that is based on lack of consent.

Consent is the key element of several crimes of violence against women, but it becomes of paramount importance when in relation to forced abortion and forced sterilisation. In Section 3, the research will examine the role played by informed consent in these crime in connection to women's right to health and reproductive health, and through the analysis of current case law.

2. *Consensual and non-Consensual, Desired and Undesired Sexual Intercourse*

In European contemporary law, sexual violence is characterised by the absence of consent of the victim.²⁵² Indeed, consent is the constituent element that makes sexual assault a crime.²⁵³ So, to determine consent regarding sexual intercourse is to settle 'the normative boundary between criminal rape and non-criminal [intercourse].'²⁵⁴ This legal evolution was introduced with the *M.C. v. Bulgaria* judgement (see Section 2.1) in which the ECtHR proposed for the first time a definition of sexual violence that set at its core the concept of consent, particularly the absence of consent of the victim, thus regardless the use of force or intimidation on her.²⁵⁵

This notwithstanding, assessing consent in sexual intercourse is a complex issue²⁵⁶ because the notion still possesses certain critical aspects and limits.²⁵⁷ As it has been widely discussed,

²⁵¹ Oxford Reference. (n.d.). Rape. In *World Encyclopedia : Philip's*. Retrieved May 7, 2023, from <https://www.oxfordreference.com/view/10.1093/acref/9780199546091.001.0001/acref-9780199546091-e-9682>.

²⁵² De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 126.

²⁵³ Ibidem.

²⁵⁴ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 334.

²⁵⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 126.

²⁵⁶ Fernet, M., et al. (2021). "When You're in a Relationship, You Say No, but Your Partner Insists", cit., p. 9438.

²⁵⁷ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 128.

scholars do not have a clear and general definition of the notion on which they agree and this problem applies to the concept of consent in sexual intercourse too.²⁵⁸ From a social point of view, indeed, the concept of sexual consent is usually interpreted differently by men and women.²⁵⁹ Women are more likely to communicate their consent before any sexual activity.²⁶⁰ Men, on the contrary, prefer assuming consent instead of orally confirming it.²⁶¹ This behaviour is further confirmed by the fact that men usually misinterpret women's friendly behaviour with sexual advance.²⁶² This issue is connected to the sexual construction of male and female roles in intimate relationships.²⁶³ According to these social rules, indeed, men are the initiators of sexual interactions, while women lack agency with this regard.²⁶⁴ Moreover, if rejected, men are assumed to ignore women's decision and persist in pursuing their sexual objective, thus setting the basis for potential gender-based violence.²⁶⁵ Violence is indeed connected to sexuality because the latter is a construction usually made from a male supremacy point of view.²⁶⁶

From a legal point of view, the distinction between consensual and non-consensual sexual intercourse appears to be defined, particularly in consent-based normative systems. In the General Recommendation No. 3, for instance, the Committee of Experts (CEVI) of the Convention to Prevent, Punish and Eradicate Violence against Women (hereafter Convention of Belém do Pará) recognises the importance of the concept of consent concerning sexual violence because it is a fundamental element in discerning the free exercise of women's sexuality from an act of abuse or violation.²⁶⁷ The CEVI states also that the concept represents the 'ability of women to indicate a willingness to engage in the act.'²⁶⁸ Hence, sexual violence

²⁵⁸ Moyano, N., et al. (2023). Only "yes" means "yes", cit., p. 2760.

²⁵⁹ Ivi, p. 2761.

²⁶⁰ Ibidem.

²⁶¹ Ibidem.

²⁶² Ibidem.

²⁶³ Ibidem.

²⁶⁴ Ibidem.

²⁶⁵ Ibidem.

²⁶⁶ Hakvag, H. (2010). Does Yes Mean Yes? Exploring sexual coercion in normative heterosexuality. *Canadian Woman Studies*, 28(1), p. 121. Retrieved Apr 18, 2023, from <https://cws.journals.yorku.ca/index.php/cws/article/view/30787>.

²⁶⁷ The Committee of Experts (CEVI). (2021). General Recommendation of the Committee of Experts of the MESECVI (No. 3), cit., p. 5.

²⁶⁸ The Committee of Experts (CEVI). (2021). General Recommendation of the Committee of Experts of the MESECVI (No. 3), cit., p. 5.

can be conceptualised as A committing a sexual offence if B expresses her disagreement or does not positively agree to have intercourse.²⁶⁹

However, the differentiation between wanted and unwanted sexual intercourse is posing an additional aspect that needs to be taken into consideration when addressing sexual violence, especially rape and sexual assault. In certain cases, in fact, a victim might behave as if she is insinuating or even expressing her consent to have sexual intercourse but she does not want it.²⁷⁰ In fact, a general agreement to have sexual intercourse does not imply genuine consent, particularly if the woman is coerced into giving it either because the man is in a position of authority or he is deceiving her.²⁷¹

In an attempt to clarify how this aspect increases the complexity of the concept of consent in the legal domain, Peter Westen proposes as example a judgment concerning consensual, unwanted sexual intercourse.²⁷² In the case of *People v. Burnham* decided by the Court of Appeals of California, a man was accused by his wife of sexual violence, particularly of marital rape.²⁷³ The woman's consent was the main issue to be examined during the proceedings, as the man had admitted that his wife had consented to sexual activities.²⁷⁴ The context in which the woman's consent was obtained, however, should have been relevant because she was also a victim of domestic violence.²⁷⁵ Nevertheless, the court reversed the previous judgment stating that if 'the defendant reasonably and in good faith believed [the woman] voluntarily consented to engage in sexual intercourse, [then] the defendant [has] the benefit of that doubt' and he can eventually be discharged of all accusations.²⁷⁶ This case clearly demonstrates that a woman can give her consent to sexual intercourse, for instance, because she fears a possible aggressive reaction from her partner, but such consent does not reflect her wants.²⁷⁷

²⁶⁹ Wertheimer, A. (2000). What Is Consent? And Is It Important? *Buffalo Criminal Law Review*, 3(2), p. 558. Retrieved Jul 23, 2023, from <https://doi.org/10.1525/nclr.2000.3.2.557>.

²⁷⁰ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 214.

²⁷¹ Wertheimer, A. (2000). What Is Consent?, cit., p. 558.

²⁷² Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 343.

²⁷³ *People v. Burnham*. (1986). Nos. F001305, F002404. Court of Appeals of California, Fifth Appellate District. Retrieved Jul 22, 2023, from <https://law.justia.com/cases/california/court-of-appeal/3d/176/1134.html>.

²⁷⁴ *Ibidem*.

²⁷⁵ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 343.

²⁷⁶ *People v. Burnham*. (1986). Nos. F001305, F002404. Court of Appeals of California, Fifth Appellate District, FN 2.

²⁷⁷ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 344.

In the dominant model concerning sexual wanting, wanted sexual intercourse is generally assumed to be consensual.²⁷⁸ In contrast, unwanted intercourse is commonly considered non-consensual.²⁷⁹ However, as Zoe D. Peterson and Charlene L. Muehlenhard argue in their article, wanting and consenting should be treated as separate conceptions concerning the same issue, namely sexual intercourse.²⁸⁰ Wanting describes one's desire or inclination, while consenting can be defined as the expression of one's will or the agreement to do something.²⁸¹ The blurring of these two conceptions can have as main consequence what Laura Sessions Stepp, in a 2007 *Cosmopolitan* article, refers to as 'gray rape.'²⁸² The journalist defines gray rape as '[sexual intercourse] that falls somewhere in between consent and denial' because 'often both parties are unsure of who wanted what.'²⁸³ Indeed, sexual intercourse should theoretically involve mutual consent and shared sexual desire.²⁸⁴ Yet, individuals engage in unwanted sexual activities, to which they may even give explicit consent, despite the fact that these activities are contrary to their wants and will.²⁸⁵ A good example could be provided by an intensifying phenomenon in contemporary societies, that is, dating violence or sexual dating violence.²⁸⁶ Although the issue is still understudied because of the scarcity of available data, studies show that dating violence is widespread across all age groups,²⁸⁷ yet this phenomenon increases among college students.²⁸⁸

When women report their dating experiences with current or past partners, the majority can be labelled as victim of certain types of sexual violence with regard to the concept of consent, as demonstrated by a study conducted in Spain.²⁸⁹ The concept of consent in dating violence, instead, was specifically explored by a Canadian study that revealed several findings

²⁷⁸ Peterson, Z. D., & Muehlenhard, C. L. (2007). Conceptualizing the "Wantedness" of Women's Consensual and Nonconsensual Sexual Experiences: Implications for How Women Label Their Experiences with Rape. *The Journal of Sex Research*, 44(1), p. 72. Retrieved May 02, 2023, from <http://www.jstor.org/stable/20620289>.

²⁷⁹ Ibidem.

²⁸⁰ Ivi, p. 73.

²⁸¹ Ibidem.

²⁸² Hakvag, H. (2010). Does Yes Mean Yes, cit., p. 122.

²⁸³ Ibidem.

²⁸⁴ 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), p. 1829. Retrieved 26 Jul, 2023, from <https://doi.org/10.1177/0886260514549050>.

²⁸⁵ Ibidem.

²⁸⁶ Fernet, M., et al. (2021). "When You're in a Relationship, You Say No, but Your Partner Insists", cit., p. 9438. See also: Kaukinen, C. (2014). Dating Violence Among College Students: The Risk and Protective Factors. *Trauma, Violence & Abuse*, 15(4), p. 285. Available at <https://www.jstor.org/stable/26876517>.

²⁸⁷ Moyano, N., et al. (2023). Only "yes" means "yes", cit., p. 2769.

²⁸⁸ Brockbank, Maddie (2019). The Myth of the "Gray Area" in Rape, cit., p. 3.

²⁸⁹ Moyano, N., et al. (2023). Only "yes" means "yes", cit., p. 2766.

regarding sexual consent.²⁹⁰ Nonetheless, research on sexual consent in dating violence share certain common results. Firstly, determining sexual consent in intimate relationships is a complex issue, as women fail in recognising certain partners' behaviours as aggressive or coercive.²⁹¹ Thus women do not refer to their experiences as sexual violence.²⁹² Second, victims of sexual violence are more likely to establish consent before any sexual activity, even with long-term partners; whereas women who have not experienced any kind of violence believe that sexual consent in relationships is implicit and it does not necessarily have to be expressed on each occasion.²⁹³ Thirdly, although victims prefer to freely give consent to any sexual activity, these women report feeling unable to negotiate or express it because of their vulnerable position in the relationship.²⁹⁴ As a matter of fact, women who experienced coercion in past relationships are more likely to comply with unwanted sexual intercourse.²⁹⁵ Finally, men avoid to ask directly about consent prior sexual intercourse, or any other sexual activity, as it is considered unusual in social contexts and it can create an uncomfortable atmosphere for both parties.²⁹⁶

These results confirm the blurring between the concept of wantedness and consent, particularly in intimate relationships. Indeed, as examined, women often give their consent to sexual activities, but their decisions are not an expression of their sexual wants.²⁹⁷ This can be explained by the fact that women do not recognise coercive patterns in their intimate relationships, that victims of violence perceive themselves as not entitled to express sexual consent, or that men do not ascertain consent as a consequence of constructed gender roles that depict women as subordinate.

The main consequences of the blurring between these concepts, namely consent and wantedness, acquires greater relevance in the legal sphere. The analysis briefly examined the case of *People v. Burnham* to discuss such blurring in intimate relationships, but the same rationale can be applied to other legal cases of sexual violence, especially sexual assault.²⁹⁸ The following case was decided by a national Court in the United States, thus it departs from

²⁹⁰ Fernet, M., et al. (2021). "When You're in a Relationship, You Say No, but Your Partner Insists", cit., p. 9436.

²⁹¹ Ivi, p. 9438.

²⁹² Ibidem.

²⁹³ Moyano, N., et al. (2023). Only "yes" means "yes", cit., p. 2765.

²⁹⁴ Ivi, p. 2766.

²⁹⁵ Conroy, N. E., et al. (2015). Reexamining issues of conceptualization and willing consent, cit., p. 1832.

²⁹⁶ Brockbank, Maddie (2019). The Myth of the "Gray Area" in Rape, cit., pp. 4-5.

²⁹⁷ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 344.

²⁹⁸ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 344.

the international and regional judicial examples proposed so far. However, this judgment is useful in illustrating the complexity of the concept of consent when applied to sexual violence.

In *State v. Thompson* a school's principal was accused of sexual violence and sexual assault on the basis of lack of consent of the victim.²⁹⁹ The student had been pressured by the man under the threat that she would not graduate unless she had sexual intercourse with him.³⁰⁰ However, the Montana Supreme Court did not hold the man responsible for the alleged crime at the time of the events, stating that the threats to the girl should have been of 'imminent death, bodily injury, or kidnapping' in order to initiate a sexual assault prosecution.³⁰¹ On one side, the assumption that women must physically resist any kind of sexual violence by fighting back or defending themselves is actually harmful, as in these situations victims behave differently depending on fear, shock, or other emotional stressing dynamics.³⁰² Consent is not present solely because women do not physically resist to the unwanted sexual intercourse.³⁰³ On the other side, the blurring between consent and wantedness makes the recognition of criminal responsibility more difficult and it can even result in blaming the victim for the incident,³⁰⁴ as she gave her consent and did not resist the violence at the time of the event. A clear definition of consent in the legal domain is necessary in order to protect victims of sexual violence, particularly sexual assault,³⁰⁵ as force-based normative systems are inadequate in doing so. Indeed, in some cases certain types of coercive behaviours or threats can be insufficient to initiate a legal response concerning sexual violence,³⁰⁶ as examined in *State v. Thompson*. Moreover, in case of judicial gender stereotyping (see Chapter 1, Section 3), these minor coercive behaviours can further challenge the criminalisation of sexual violence, thus having repercussions on legal proceedings.³⁰⁷

²⁹⁹ *State v. Thompson*. (1990). 792 P.2d 1103. Montana Supreme Court.

³⁰⁰ *Ibidem*.

³⁰¹ Nourse, V. (2000). "The "Normal" Successes and Failures of Feminism and the Criminal Law." *Georgetown Law Faculty Publications and Other Works*, pp. 955-957, 971. Retrieved Sep 3, 2023, from <https://scholarship.law.georgetown.edu/facpub/1212>. The Montana Criminal Code was eventually amended to provide victims with a clear definition of 'force,' thus including the requirements for valid consent. See *Montana Code Annotated*. (1999). 45-5-501. Available at https://leg.mt.gov/bills/mca/title_0450/chapter_0050/part_0050/section_0010/0450-0050-0050-0010.html.

³⁰² International Commission of Jurists. (2015). *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*. Geneva, p. 22.

³⁰³ *Vertido v. The Philippines*. (2010). CEDAW Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008, paras. 8,5. Retrieved Jun 18, 2023, from <https://juris.ohchr.org/casedetails/1700/en-US>.

³⁰⁴ Hakvag, H. (2010). Does Yes Mean Yes, cit., p. 122.

³⁰⁵ *Ibidem*.

³⁰⁶ Ferzan, K. K. (2019). Consent and Coercion, cit., p. 954.

³⁰⁷ Ferzan, K. K. (2019). Consent and Coercion, cit., p. 957.

When dealing with crimes of sexual violence, indeed, women are often blamed for the accident, as they ‘did not [expressly] say no.’³⁰⁸

Coercion can be classified under the umbrella of unwanted sexual activity,³⁰⁹ as it can influence women’s genuine consent;³¹⁰ moreover, among the different types, this form is the most recurrent.³¹¹ The aforementioned study conducted on male and female American university students reveals that around 70 percent of the participants has either experienced or used coercion to induce the partner into giving consent to sexual activity.³¹² However, women are reported to be more subjected to sexual coercion compared to men, thus the results even emphasise that the problem is gendered.³¹³ As a matter of fact, one of the main objective of contemporary sexual violence laws is to eliminate coercion in sexual relationships, which usually takes place in male-dominant society.³¹⁴ As it has been mentioned (see Chapter 1, Section 1), coercion is one of the factors that vitiates consent, thus rendering an act legally invalid,³¹⁵ particularly in case of use or threat of use of force.³¹⁶ Victims of sexual assault might indeed give their consent to have intercourse, but the choice is legally insufficient if it is the result of wrongful force.³¹⁷ So, in this case, the woman’s choice is not made voluntary and consent is not freely given.³¹⁸

The use or threat of use of physical force is only one of several modalities to violate women’s right to control their sexual autonomy.³¹⁹ Indeed, coercion can be exercised on women through the use of psychological tactics, such as manipulation, insistence or pressure.³²⁰ Thus, it manifests with less invasiveness and force compared to physical aggression.³²¹ This form of non-physical coercion is usually applied in intimate relationships as an attempt by the partner to prompt sexual activity.³²² This may be a consequence of

³⁰⁸ UN Women. (2019). When it comes to consent, there are no blurred lines. Originally published on *Medium*. Retrieved Jun 14, 2023, from <https://www.unwomen.org/en/news/stories/2019/11/feature-consent-no-blurred-lines>.

³⁰⁹ Conroy, N. E., et al. (2015). Reexamining issues of conceptualization and willing consent, cit., p. 1829.

³¹⁰ Wertheimer, A. (2000). What Is Consent?, cit., p. 558.

³¹¹ Conroy, N. E., et al. (2015). Reexamining issues of conceptualization and willing consent, cit., p. 1829.

³¹² Hakvag, H. (2010). Does Yes Mean Yes, cit., p. 122.

³¹³ Ibidem.

³¹⁴ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 410.

³¹⁵ Ivi, p. 426.

³¹⁶ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 196.

³¹⁷ Ivi, p. 211.

³¹⁸ Ibidem.

³¹⁹ Wertheimer, A. (2000). What Is Consent?, cit., p. 558.

³²⁰ Fernet, M., Hébert, M., Brodeur, G., & Théorêt, V. (2021). “When You’re in a Relationship, You Say No, but Your Partner Insists,” cit., pp. 9450-51.

³²¹ Ibidem.

³²² Conroy, N. E., et al. (2015). Reexamining issues of conceptualization and willing consent, cit., p. 1829.

cultural and social assumptions that consent is always implied in intimate relationships,³²³ setting the basis for men to claim satisfaction of their sexual needs. In fact, a study shows that, according to men, female partners should always be sexually available or, in the case of women with whom they have had intercourse, men are entitled to any sexual activity—the authors of the study refer to this phenomenon as men’s ‘sexual entitlement beliefs.’³²⁴ On the other hand, women themselves perceive that it is more difficult to express non-consent to the partner with whom they have shared sexual experiences.³²⁵ Therefore, the manifestation of coercion through psychological tactics makes it more difficult for victims of sexual violence to recognise the occurrence of a violation. Moreover, non-physical coercion is judicially more challenging to demonstrate, especially in the case of legal systems in which consent is missing from the definition of sexual violence.

There is another aspect of coercion that should be analysed for the scope of this research on the concept of consent, namely the internalisation of coercion itself by women. Social coercion—that is, expectations set upon women by society to conform to certain sexual obligations in relationships—is present in all societies and it applies pressure on women to fulfil their roles as partners.³²⁶ For this reason, women may internalise societal expectations regarding their sexuality³²⁷ and their sexual behaviour in intimate relationships. The internalisation of sexual coercion is indeed rather common.³²⁸ The aforementioned study conducted in Canada shows that over 50 percent of women victims of sexual violence would not define it as rape.³²⁹ On one side, the study highlights that the closer women are to their perpetrators, the less likely they are to consider their experiences as sexual violence.³³⁰ On the other side, these results depend on the perception that each woman has of the definition of sexual violence and coercive behaviour,³³¹ thus women are less likely to recognise coercion if it is internalised.

³²³ 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), p. 112. Retrieved Sep 21, 2023, from <https://doi.org/10.1177/1524838013517560>.

³²⁴ Fernet, M., Hébert, M., Brodeur, G., & Théorêt, V. (2021). “When You’re in a Relationship, You Say No, but Your Partner Insists,” cit., p. 9451.

³²⁵ Hakvag, H. (2010). Does Yes Mean Yes, cit., p. 122.

³²⁶ Conroy, N. E., et al. (2015). Reexamining issues of conceptualization and willing consent, cit., p. 1829.

³²⁷ Ivi, p. 1833.

³²⁸ Logan, T. K., et al. (2015). Silenced Suffering, cit., p. 115.

³²⁹ Fernet, M., Hébert, M., Brodeur, G., & Théorêt, V. (2021). “When You’re in a Relationship, You Say No, but Your Partner Insists,” cit., p. 9438.

³³⁰ Ibidem.

³³¹ Fernet, M., Hébert, M., Brodeur, G., & Théorêt, V. (2021). “When You’re in a Relationship, You Say No, but Your Partner Insists,” cit., p. 9438.

In western society, sexual coercion seems to be so normalised as to be intertwined with sexuality.³³² Indeed, if coercion is used ever since the first romantic and sexual experiences, it can be considered as a normal behaviour to apply to any type of intimate relationship.³³³ This social dynamic along with the social construction of female sexual passivity results in women's internalisation of sexual coercion, thus in women's compliance with unwanted sexual intercourse.³³⁴ For example, one of the reasons usually reported by women to explain consent to unwanted sexual intercourse is to accommodate their partner's needs.³³⁵ For this reason, it is possible to argue that genuine consent is debatable as long as women's subordinate status in society is not eradicated.³³⁶ As a matter of fact, consent is often presumed when conditions of unequal power relations exist³³⁷ whereby the construction of female sexuality is considered passive and lacking in agency.³³⁸ In other words, if coercion is internalised, the concept of consent becomes controversial because it is placed in a context of women's power inequality.³³⁹

Nevertheless, despite the idea of submission is embodied in female subjectivity in our society,³⁴⁰ the judicial evolution at regional and international level has allowed for a more specific definition of sexual violence, including some of the aforementioned forms of violence in the normative text. At European level, for example, sexual violence is defined as 'non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object'³⁴¹ in Article 36 of the Istanbul Convention. Moreover, the text further adds 'consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances',³⁴² thus underlining the importance of the concept of consent as a constituent element for the criminalisation of sexual violence. Furthermore, Article 36(2) requires the assessment of the context in which a woman's consent is given, therefore it recognizes the existence of possible invalidating elements. In the light of

³³² Hakvag, H. (2010). Does Yes Mean Yes, cit., p. 122.

³³³ Ibidem.

³³⁴ Ivi, pp. 122-123.

³³⁵ Ivi, p. 124.

³³⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 128.

³³⁷ The Committee of Experts (CEVI). (2021). General Recommendation of the Committee of Experts of the MESECVI (No. 3), cit., p. 8.

³³⁸ Hakvag, H. (2010). Does Yes Mean Yes, cit., p. 122.

³³⁹ Ivi, p. 121.

³⁴⁰ Ibidem.

³⁴¹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

³⁴² Ibidem.

the above analysis, a shift from a forced-based legal definition of sexual violence in favour of a consent-based one is necessary in order to guarantee the protection of women's sexual autonomy and women's rights, as sexual violence can manifest in different forms that do not always require force.

To conclude, consent is central in contemporary doctrine on sexual violence,³⁴³ as it is the key element that differentiates rape from permissible sexual intercourse.³⁴⁴ The concept of consent was introduced in most national legal systems as a result of the shift in the definition of sexual violence, particularly sexual assault and rape, from an act of violence to a violation of a person's autonomy.³⁴⁵ In other words, the shift allowed scholars to redefine the meaning of sexual violence in terms of sexual intercourse without consent.³⁴⁶ Indeed, sexual assault is a crime against sexual freedom, thus it does not specifically require physical violence or force to be defined as such. Normative systems should therefore abandon a definition of sexual violence based on forced acts in favour of nonconsensual acts.³⁴⁷ This change in definition will protect women victims of sexual assault as a result of intoxication or unconsciousness, as a person must be conscious and capable of reasoning to consent to sexual intercourse.³⁴⁸ A landmark case, that recognises the concept of consent as the element of the violation, is now analysed. The research argues that this case has been fundamental to the introduction of the concept of consent in modern legal systems, particularly within the text of the Istanbul Convention.

2.1. *The Case of M.C. v. Bulgaria on the Concept of Consent in Sexual Violence*

The concept of consent, in particular free and genuine given consent, has become legally essential for the definition of sexual violence at European level. One of the major contribution with this regard is the judgment decided by the ECtHR in the case of *M.C. v. Bulgaria*, in which the definition of rape, as well as other sexual offences, focuses on the lack of consent.³⁴⁹ The Court considers the case under Article 8 of the ECHR, thus recognising sexual

³⁴³ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 415.

³⁴⁴ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 212.

³⁴⁵ Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception, cit., p. 413.

³⁴⁶ Ibidem.

³⁴⁷ Ivi, p. 412.

³⁴⁸ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 208.

³⁴⁹ Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in *M.C. v. Bulgaria*. *Journal of International Criminal Justice*, 3(2), p. 457. Retrieved June 14, 2023, <https://doi.org/10.1093/jicj/mqi037>.

violence as a violation of personal autonomy.³⁵⁰ Indeed, the Court recognises that forced-based national laws can endanger the protection of the individual's sexual autonomy, as the victim's resistance is required to criminalise the act.³⁵¹

The case concerns the alleged rape of a fourteen-year-old Bulgarian girl by individuals who did not belong to the same household.³⁵² At the time of the events, the applicant was approached by three men, two of whom were her acquaintances, and following persistent advances, she was sexually abused by one of them at a nearby reservoir, despite having tried several times to physically resist without succeeding.³⁵³ Following the girl's testimony, the man stated to the contrary that sexual intercourse had been consensual.³⁵⁴ In addition, on the same night, the girl was forced by another man of the group to have sexual intercourse, to which she verbally, but not physically, objected.³⁵⁵

The applicant filed a complaint to the Bulgarian authorities, reporting the alleged rape.³⁵⁶ However, despite the confirmation of sexual penetration was given by the medical personnel of the local hospital the day following the rape,³⁵⁷ the investigator decided to close the case because there was 'no evidence demonstrating the use of force or threats' and 'no resistance on the applicant's part or attempts to seek help.'³⁵⁸ For this reason, the applicant turned to the ECtHR complaining that Bulgarian law did not provide effective protection against rape and that Bulgarian authorities did not effectively investigated her case.³⁵⁹ Indeed, the applicant alleged that her rights were violated under Article 3 and 8 of the ECHR because the Bulgarian legal framework required evidence of physical force and active resistance to prosecute cases of rape and sexual abuse.³⁶⁰

In *M.C. v. Bulgaria*, the Court recognises, on one side, that States have positive obligations in adopting effective measures concerning rape and sexual abuse.³⁶¹ On the other side, it

³⁵⁰ Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., pp. 457-458.

³⁵¹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 64.

³⁵² Ivi, p. 63.

³⁵³ *M.C. v. Bulgaria*. (2004). Application no. 39272/98, paras. 11-17. Retrieved Mar 28, 2023, from <https://hudoc.echr.coe.int/eng?i=001-61521>.

³⁵⁴ Ivi, para. 19.

³⁵⁵ Ivi, para. 30.

³⁵⁶ Ivi, para. 44.

³⁵⁷ Ivi, para. 35.

³⁵⁸ Ivi, paras. 60-61.

³⁵⁹ Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., p. 449.

³⁶⁰ Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: *M.C. V. Bulgaria*. *Feminist Legal Stud*, 13, p. 149. Retrieved June 14, 2023, from <https://doi.org/10.1007/s10691-005-1462-5>.

³⁶¹ *M.C. v. Bulgaria*. (2004). Application no. 39272/98, paras. 148-153.

confirmed the examination of the case under Article 3 and Article 8 of the ECHR, considering them jointly.³⁶² The Court examines the standards required by these Article by assessing the definition of sexual crimes in the domestic practice of other countries, the Council of Europe, and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY).³⁶³

Following its assessment, the Court finds that the requirement of physical resistance provided by Bulgarian authorities can result in an unpunished and jeopardised protection of individual's sexual autonomy.³⁶⁴ Moreover, given the standards observed, positive obligations arising from Article 3 and Article 8 of the ECHR require the investigation and prosecution of 'any non-consensual sexual act, including in the absence of physical resistance by the victim.'³⁶⁵ For this reason, the Court acknowledges that the Bulgarian authorities failed to effectively investigate the case,³⁶⁶ as in Bulgarian national practice, rape is prosecuted unless there is 'direct' evidence of the crime, as well as, the victim's resistance.³⁶⁷ It considers nonetheless that despite 'it may sometimes be difficult to prove lack of consent in the absence of 'direct' proof of rape,' authorities must concentrate their investigation 'on the issue of non-consent.'³⁶⁸ Indeed, as highlighted by Interights' submission, 'women, and more particularly minors, often did not physically resist rape' as a consequence of different dynamics, such as strength or fear.³⁶⁹ Thus, the resistance of the victim should not be *de facto* the constituent element of the crime.³⁷⁰

In the concurring opinion, judge Tulkens adds that the Court is able to recognise that rape is both a violation of the right to personal integrity, which is enshrined in Article 3, and the right to autonomy, which can be derived from Article 8 that guarantees the right to respect for private life.³⁷¹ For the first time, therefore, the Court recognises positive obligation deriving from these Articles of the ECHR for which the adoption of a specific definition for the offence is required, despite the margin of appreciation that States enjoy.³⁷² In other words, the

³⁶² Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., p. 450.

³⁶³ Ivi, pp. 450-451.

³⁶⁴ *M.C. v. Bulgaria*. (2004). Application no. 39272/98, para. 161.

³⁶⁵ Ivi, para. 166.

³⁶⁶ Ivi, para. 182.

³⁶⁷ Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., p. 451.

³⁶⁸ *M.C. v. Bulgaria*. (2004). Application no. 39272/98, para. 181.

³⁶⁹ Ivi, para. 126.

³⁷⁰ Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., p. 452.

³⁷¹ *M.C. v. Bulgaria*. (2004). Concurring opinion of Judge Tulkens, Application no. 39272/98, para. 1.

³⁷² Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., pp. 454, 459.

judgement marks a turning point in defining sexual violence in Europe, determining the lack of consent as key element for the crime.

3. *Informed Consent in Forced Abortion and Forced Sterilisation*

Women's autonomy can be violated in different ways, but another recurring form of gender-based violence is forced abortion and forced sterilisation. Forced abortion is the intentional act of performing an abortion on a woman without her prior informed consent.³⁷³ Forced sterilisation, instead, refers to a surgery that has the purpose and effect of terminating a woman's reproductive capacity without her informed consent or in the absence of her full understanding of the consequences of the practice in question.³⁷⁴

These practices are by extension a violation of women's right to health, which is the first right that undergoes limitations and violations in case of gender-based violence.³⁷⁵ At international level, the right to health is enshrined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and it 'recognise[s] the right of everyone to [enjoy] [...] the highest attainable standard of physical and mental health.'³⁷⁶ In General Comment No. 22, the definition of the right to health is expanded by the Committee on Economic, Social and Cultural Rights (CESCR) to encompass women's right to reproductive health.³⁷⁷ This right was first addressed in the 1994 Programme of Action of the International Conference on Population and Development and defined as 'the freedom to make informed, free and responsible decisions.'³⁷⁸ A further reference to women's health is included in Article 12 of the CEDAW General Recommendation No. 19, which recognises that violence against women endangers their health.³⁷⁹ Moreover, the expansion of the right to health to include women's reproductive rights, which is provided by the CESCR General Comment, and the following entry into force of the Optional Protocol to CEDAW have made it possible to receive individual complaints for violations of the Convention by States Parties to the

³⁷³ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 136.

³⁷⁴ Ivi, p. 79.

³⁷⁵ Ivi, p. 46.

³⁷⁶ International Covenant on Economic, Social and Cultural Rights. (1966). At present, 171 countries have ratified the ICESCR and thus have legal obligations to comply with its provisions, in this case, Article 12.

³⁷⁷ UN Committee on Economic, Social and Cultural Rights. (2016). *General comment No. 22 (2016). on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/22. Available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-22-2016-right-sexual-and-reproductive-health>.

³⁷⁸ De Vido, S. (2020). *Violence against women's health*, cit., p. 3.

³⁷⁹ UN Committee on the Elimination of Discrimination Against Women (CEDAW). (1992). *CEDAW General Recommendation No. 19: Violence against women*. Retrieved Sep 03, 2023, from <https://www.refworld.org/docid/52d920c54.html>.

Protocol.³⁸⁰ As a matter of fact, the Office of the UN High Commissioner for Human Rights recognises forced abortion and forced sterilisation as violations of women's sexual and reproductive health,³⁸¹ as these practices affect their reproductive autonomy, thus their right to decide.³⁸² This notwithstanding, women's right to health is not usually invoked, but is absorbed by other rights, such as the right to life, because it is not explicitly enshrined in any UN legal instrument.³⁸³

At the regional level, women's right to health is contained in Article 14(1)(a) and 14(1)(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which recognises women's 'right to control their fertility' and to 'decide whether to have children [...]'.³⁸⁴ Moreover, Article 1(j) states that violence against women includes all acts that could cause 'physical, sexual, psychological, and economic harm,' thus the definition implicitly encompass the criminalisation of forced abortion and forced sterilisation as forms of violence against women and violence against women's health. At European level, instead, women's reproductive rights are indirectly protected in Article 39 of the Istanbul Convention that criminalises forced abortion and forced sterilisation.³⁸⁵

The criminalisation of forced abortion and forced sterilisation becomes, therefore, pivotal in preventing any violation of women's reproductive health. The Istanbul Convention is the only regional legal instrument to have included these crimes within its text, setting the concept of consent, particularly informed consent, as the constituent element of the violations.³⁸⁶ In fact, the absence of consent is the crucial aspect of these crimes,³⁸⁷ as women can be forced or coerced into making a decision without having complete and clear

³⁸⁰ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 47.

³⁸¹ Office of the UN High Commissioner for Human Rights. (2023). *Sexual and reproductive health and rights | OHCHR - UN human rights office*. UN Human Rights Office of The High Commissioner. Available at <https://www.ohchr.org/en/women/sexual-and-reproductive-health-and-rights>.

³⁸² De Vido, S. (2020). *Violence against women's health*, cit., p. 8.

³⁸³ Ivi, p. 3.

³⁸⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. (2003).

³⁸⁵ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

³⁸⁶ The widespread or systematic deprivation of a person's biological reproductive capacity that is not medically justified or genuinely consensual is also enshrine in Article 7(g) on crimes against humanity of the Statute of Rome. However, the definition of the crime is gender neutral, thus it does not emphasise the women's violence, and it must the element of widespread intentional practice See, International Criminal Court. (2013). Article 7 (1) (g)-5. Crime against humanity of enforced sterilization. *Elements of Crimes*, p. 6. Retrieved Jul 11, 2023, from <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

³⁸⁷ De Vido, S. (2020). *Violence against women's health*, cit., p. 37.

information about the consequences of these medical procedures.³⁸⁸ The violation can occur in different forms such as signing forms during labor, undergo sterilisation without the woman's knowledge, or having a third person's consent that authorises the medical surgery on behalf of the woman.³⁸⁹

Forced abortion and forced sterilisation are usually performed in the stereotypical belief that women are weak and unable to make decisions.³⁹⁰ In *S.F.K. v. Russia*, for example, a woman was forced to have an abortion by her parents because they objected to their daughter's relationship with her partner.³⁹¹ The woman vigorously protested the decision imposed on her, but she was eventually beaten by her father and taken to the hospital to undergo the surgical procedure.³⁹² Once at the hospital, the woman objected again to the abortion at the presence of nurses and doctors, but contrary to her expectations, they attempted to persuade her to proceed with the surgery.³⁹³ In the end, the woman decided to have an abortion under her father's threat to kill her and her mother.³⁹⁴ The woman was not able to institute criminal proceedings under Articles 111 and/or Article 123 of the Russian Criminal Code, because the constituent elements of the offence were not sufficient according to the authorities, namely the medical examination establishing the degree of physical harm suffered and the twelve-weeks period required to consider abortion illegal.³⁹⁵ On one side, this case is a clear example of how women's reproductive autonomy can be violated on the basis of gender-based stereotypes, as the applicant did not freely consent to have abortion but she was forced by her parents, particularly by her father's threat, to do it. On the other side, this case emphasises the central role of the concept of consent. As aforementioned, the lack of informed consent is the key element in criminalising the practice of forced abortion.³⁹⁶ As a matter of fact, in the *S.F.K. v. Russia* case, the ECtHR confirmed that surgeries of 'mentally competent adults without their full and informed consent [...] amounted to treatment contrary

³⁸⁸ Gher, J. M., and Shah, P. K. (2023). Human Rights and Infertility. *The Office of the High Commissioner for Human Rights*, p. 18. Retrieved Nov 02, 2023, from <https://www.ohchr.org/sites/default/files/documents/issues/women/Research-Paper-HRs-Infertility.pdf>.

³⁸⁹ Ibidem.

³⁹⁰ De Vido, S. (2020). *Violence against women's health*, cit., p. 24.

³⁹¹ *S.F.K. v. Russia*. (2022). Application no. 5578/12, para. 1. Retrieved Jul 18, 2023, from <https://hudoc.echr.coe.int/fre?i=001-219642>.

³⁹² Ivi, para. 8.

³⁹³ Ivi, paras. 9-10.

³⁹⁴ Ivi, para. 10.

³⁹⁵ Ivi, paras. 21-27.

³⁹⁶ De Vido, S. (2020). *Violence against women's health*, cit., p. 37.

to Article 3 of the European Convention on Human Rights,³⁹⁷ which concerns inhuman and degrading treatment. The woman in this context repeatedly objected to the abortion, thus denying her consent, but her decision was not respected by either her parents or hospital personnel,³⁹⁸ thus constituting a violation of her rights.

This notwithstanding, informed consent has been introduced as medical practice only in the latter decades.³⁹⁹ Indeed, the concept of consent first appeared as a moral dimension in medicine as a result of scientific advances that improved medical techniques.⁴⁰⁰ The newly developed medical techniques could not be imposed on all patients and, for this reason, it was necessary to determine who was the legitimate subject of medical decision-making process.⁴⁰¹ While at the beginning this role was fulfilled by doctors, beginning in the 1950s and 1960s in the United States the decision shifted to patients, as a result of cultural and legal changes.⁴⁰² In this sense, informed consent can be defined in Gerald Dworkin's words as 'a creature of law.'⁴⁰³

However, the first reference to a doctrine of informed consent can be traced back to the early 20th century, more specifically to the 1914 *Schloendorff v. Society of New York Hospital* case.⁴⁰⁴ The case involved a woman, Mary Schloendorff, who underwent surgery against her will and later succeeded in suing the hospital, thus beginning the debate over the patient's autonomy in medicine, which led to the adoption of informed consent as a medical practice in the following decades.⁴⁰⁵ In his opinion of the case, in fact, Judge Benjamin Cardozo said that an adult and mentally healthy person should have the right to make decisions about her own body, thus he anticipated the modern definition of the principle of autonomy.⁴⁰⁶

At present, informed consent describes the practice of informing patients about the benefits and possible risks that they may encounter during any medical treatment.⁴⁰⁷ In particular,

³⁹⁷ *S.F.K. v. Russia*. (2022). Application no. 5578/12, para. 63.

³⁹⁸ Ivi, para. 9-10.

³⁹⁹ Green, D. S., & MacKenzie, C. R. (2007). Nuances of informed consent: the paradigm of regional anesthesia. *HSS journal : the musculoskeletal journal of Hospital for Special Surgery*, 3(1), p. 115. Retrieved Aug 30, 2023, from <https://doi.org/10.1007/s11420-006-9035-y>.

⁴⁰⁰ Casonato, C. (2009). Il consenso informato. *Profili di diritto comparato. Diritto Pubblico Comparato Ed Europeo*, 3, p. 1052. Retrieved Jul 30, 2023, from <https://www.cortecostituzionale.it/convegniSeminari.do>.

⁴⁰¹ Ivi, p. 1053.

⁴⁰² Ibidem.

⁴⁰³ Pugh, J. (2020). *Autonomy, Rationality, and Contemporary Bioethics [Internet]*. Oxford (UK): Oxford University Press, p. 149.

⁴⁰⁴ Green, D. S., & MacKenzie, C. R. (2007). Nuances of informed consent, cit., p. 115.

⁴⁰⁵ Ibidem

⁴⁰⁶ Ibidem

⁴⁰⁷ Ivi, p. 116.

informed consent must satisfy certain requirements, namely the patient's capacity to understand; the voluntariness of the patient, which must be free from any external pressure; information about the treatment, including available data on possible adverse consequences; and, most importantly, consent, which must be freely given.⁴⁰⁸ As a matter of fact, Article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention) states that interventions in the medical field can only be conducted 'after the person concerned has given free and informed consent to it.'⁴⁰⁹ It further states that information on the 'purpose and nature of the intervention as well as on its consequences and risks' should be given prior the intervention.⁴¹⁰

However, informed consent becomes a controversial issue in forced abortion as there is not a clear definition determining which information a woman must receive with regard to this procedure.⁴¹¹ Usually informational material includes possible alternatives to abortion, physical and psychological support, information on the foetal development, or risks and consequences of the surgery.⁴¹² Yet, the information provided is either misleading, thus encouraging women to proceed with the pregnancy, or inaccurate, meaning it is insufficient for women to give their full informed consent.⁴¹³ In addition, informed consent is further challenged by the recent introduction of telemedicine abortions, namely the possibility for women to be medically followed and treated through telecommunication technologies in order to have an abortion.⁴¹⁴ Although it provides easier access to abortion for disadvantaged women, this new practice increases the risk of forced abortion.⁴¹⁵ Indeed, in the absence of direct medical controls, abortion pills can be purchased, for example, by men who do not

⁴⁰⁸ Green, D. S., & MacKenzie, C. R. (2007). Nuances of informed consent, cit., p. 116.

⁴⁰⁹ Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164). (1997).

⁴¹⁰ Ibidem.

⁴¹¹ De Vido, S. (2020). *Violence against women's health*, cit., pp. 160-161.

⁴¹² Venkatraman, R. (2021). "Women's Right to Know" Informed Consent Informational Materials. *Embryo Project Encyclopedia*, Center for Biology and Society, Arizona State University, p. 1. Retrieved Jun 04, 2023, from <https://hdl.handle.net/10776/13275>.

⁴¹³ Ibidem.

⁴¹⁴ Endler, M., Lavelanet, A., Cleeve, A., Ganatra, B., Gomperts, R., & Gemzell-Danielsson, K. (2019). Telemedicine for medical abortion: a systematic review. *BJOG : an international journal of obstetrics and gynaecology*, 126(9), p. 1094. Retrieved Oct 29, 2023, from <https://doi.org/10.1111/1471-0528.15684>.

⁴¹⁵ Pike, G. K. (2023). Coerced Abortion – The Neglected Face of Reproductive Coercion. *The New Bioethics*, 29(2), p. 101. Available at [10.1080/20502877.2022.2136026](https://doi.org/10.1080/20502877.2022.2136026).

want their partners' pregnancies to proceed and secretly administered to women without their consent.⁴¹⁶

Another important issue concerning forced abortion and consent is sex selective abortion. This practice refers to the action of terminating a pregnancy on the basis of the foetus's sex and it is widely used in order to assure male offspring in different countries around the world, especially China and India where sex selection is widely applied.⁴¹⁷ Sex selective abortion is a form of discrimination against women and girls, as the practice disproportionately affects women compared to men.⁴¹⁸ As for the concept of consent, according to Kate Greasley, this practice is rarely consensual because of the pressure, duress, or coercion that women usually experience from society or individuals.⁴¹⁹ The presence of external pressure on women's decisions can effectively invalidate their consent to abortion,⁴²⁰ so under these conditions it is possible to define the practice as forced abortion.

Regarding forced sterilisation, the concept of consent is the key element in defining the practice a violation of human rights, especially as a form of violence against women, because it must be full, free and informed to be legally valid.⁴²¹ Sterilisation is one of the most widely used methods of contraception in the world, but as for abortion, it must respect certain requirements to be legally performed, namely women's informed consent.⁴²² Before proceeding, however, it is necessary to specify the different definitions of sterilisation. The expression 'forced sterilisation' refers, indeed, to the performance of the surgery on a woman who has previously expressed her refusal, or has not had the opportunity to consent.⁴²³ Whereas, 'coerced sterilisation' refers to the use of intimidating tactics, such as financial incentives or misinformation, in order to persuade a woman to undergo the surgery.⁴²⁴ For the

⁴¹⁶ Pike, G. K. (2023). Coerced Abortion, cit., p. 102.

⁴¹⁷ Weiss, G. (1995). Sex-Selective Abortion: A Relational Approach. *Hypatia*, 10(1), p. 203. Retrieved Sep 30, 2023, from <http://www.jstor.org/stable/3810465>.

⁴¹⁸ De Vido, S. (2020). *Violence against women's health*, cit., p. 10.

⁴¹⁹ Greasley, K. (2016). Is Sex-Selective Abortion against the Law? *Oxford Journal of Legal Studies*, 36(3), p. 553. Retrieved Oct 15, 2023, from <http://www.jstor.org/stable/26363507>.

⁴²⁰ Ivi, p. 555.

⁴²¹ Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa. *Journal of Asian and African Studies*, 53(5), p. 722. Retrieved Nov 25, 2023, from <https://doi.org/10.1177/0021909617714637>.

⁴²² OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*. World Health Organization. Retrieved Jul 19, 2023, from <https://www.who.int/publications/i/item/9789241507325>.

⁴²³ Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa, cit., p. 722.

⁴²⁴ Ibidem.

purpose of this analysis, the procedure of surgical removal of reproductive organs is referred as ‘involuntary sterilisation,’ as this expression includes both forced and coercive forms.⁴²⁵

Involuntary sterilisation is condemned at international level by international and regional human rights bodies. Nevertheless, this procedure is still in use in certain countries⁴²⁶ and in most cases, women do not receive sufficient information to give their full and informed consent to the procedure.⁴²⁷ This is mainly a consequence of stereotypical beliefs that women are incapable of making autonomous and rational reproductive decisions.⁴²⁸ In fact, this procedure disproportionately affects women and girls in the world compared to men and it usually intertwines with forms of discrimination based, for example, on ethnicity, sexually transmitted diseases (STDs) or disability.⁴²⁹ In many African countries, for instance, HIV-positive women are subjected to sterilisation as a form of health policy to prevent the diffusion of STDs.⁴³⁰ However, studies shows that this procedure is often practiced without women’s knowledge or informed consent.⁴³¹ Women in this region are generally poor and not educated, thus unable to properly understand the irreversible consequences of the surgery.⁴³² Moreover, this practice is further incentivised by stereotypical beliefs that consider HIV-positive women as ‘unfit for motherhood [...] and [...] promiscuous.’⁴³³

Another group that suffers discrimination in this regard is disabled women. Indeed, national laws allow third parties, such as parents, to consent to this procedure, so they do not take into account the will of women with disabilities.⁴³⁴ In *G.M. and Others v. The Republic of Moldova*, the ECtHR decided a case of involuntary sterilisation that had been performed on three women with intellectual disabilities.⁴³⁵ The Court noted that the women’s conditions had placed them in a position of vulnerability, for which they could be exposed to certain forms of violence,⁴³⁶ included involuntary sterilisation. Moreover, the Court recognises that medical

⁴²⁵ Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa, cit., p. 721.

⁴²⁶ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization*, cit., p. 3.

⁴²⁷ Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa, cit., p. 723.

⁴²⁸ Office of the United Nations High Commissioner for Human Right. *Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights. A review of case law*. Gender Stereotyping and the Judiciary: A Workshop Guide, p. 11.

⁴²⁹ De Vido, S. (2020). *Violence against women’s health*, cit., pp. 79-80.

⁴³⁰ Ivi, p. 80.

⁴³¹ Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa, cit., p. 721.

⁴³² Ivi, p. 722.

⁴³³ Gher, J. M., and Shah, P. K. (2023). Human Rights and Infertility, cit., p. 20.

⁴³⁴ Ivi, p. 21.

⁴³⁵ *G.M. and Others v. The Republic of Moldova*. (2022). Application no. 44394/15, para. 1. Retrieved May 28, 2023, from <https://hudoc.echr.coe.int/fre?i=001-220954>.

⁴³⁶ Ivi, paras. 74, 87-89.

interventions against a person's will and in absence of the person's free and informed consent may be considered a violation prohibited under Article 3 of the ECHR.⁴³⁷ It is interesting to note that the Court recognises consent, in this case written consent, as a requirement for this medical procedure, even in presence of intellectual disabled women.⁴³⁸ This case is helpful in understanding how disabled women are subjected to forced sterilisation on a discriminatory basis. In Europe, indeed, the Court has ruled on several similar cases.⁴³⁹ This highlights, on one side, how this procedure is still widely applied in the European region. On the other, the Court emphasises how the element of the violation is to be found in the victims' lack of informed consent.

As aforementioned, involuntary sterilisation has also affected women belonging to minorities, such as Roma women.⁴⁴⁰ This ethnic group has been particularly targeted by national governments with the intention of safeguarding the majority of the local population, especially during the Second World War.⁴⁴¹ At present, Roma women are still largely affected by involuntary sterilisation without their informed consent, for instance, during caesarean sections.⁴⁴² Moreover, consent is usually obtain during labour or delivery, thus when women are not fully capable of understanding the consequences of the sterilisation procedure.⁴⁴³ In *V.C. v. Slovakia* case, decided by the ECtHR, the applicant, a Slovak national of Roma ethnic origin, was sterilised in a public hospital while she was giving birth to her second child via caesarean section.⁴⁴⁴ The woman signed a delivery record indicating that she was given her consent to sterilisation.⁴⁴⁵ However, on one side, she was in a condition in which her rational capacity was obfuscated by labour and pain, which had begun hours earlier.⁴⁴⁶ On the other side, being of Roma origin and speaking Roma dialect on a daily basis, she did not comprehend the full meaning of the term sterilisation.⁴⁴⁷ Moreover, when she expressed her desire to have a third child, the hospital personnel told her that a further pregnancy could lead

⁴³⁷ *G.M. and Others v. The Republic of Moldova*. (2022). Application no. 44394/15, para. 85.

⁴³⁸ *Ivi*, para. 117.

⁴³⁹ De Vido, S. (2020). *Violence against women's health*, cit., p. 82.

⁴⁴⁰ *Ivi*, p. 83.

⁴⁴¹ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization*, cit., p. 4.

⁴⁴² *Ivi*, pp. 4-5.

⁴⁴³ *Ivi*, p. 5.

⁴⁴⁴ *V.C. v. Slovakia*. (2011). Application no. 18968/07, paras. 9-10. Retrieved May 15, 2023, from <https://hudoc.echr.coe.int/fre?i=001-107364>.

⁴⁴⁵ *Ivi*, para. 15.

⁴⁴⁶ *Ivi*, para. 15.

⁴⁴⁷ *Ivi*, paras. 1, 15.

to her or the baby's death.⁴⁴⁸ In doing so, the staff convinced the woman to give her consent to the procedure out of fear for her life in case of future pregnancy, but such consent was not given freely with all due information.⁴⁴⁹ The Court notes, indeed, that the hospital personnel failed in considering other options to safeguard the woman's life and that there was no imminent emergency for which a sterilisation procedure was needed at the time.⁴⁵⁰ The Court rightly recognises that the procedure lacked the woman's free, full and informed consent and added that even if the hospital personnel's intention was not to mistreat the patient, they 'displayed gross disregard for her right to autonomy and choice.'⁴⁵¹ The Court highlights two important elements concerning involuntary sterilisation. Firstly, it notes the use of the words 'Patient is of Roma origin' in the medical records of the woman, which may be an indicator of a discriminatory attitude towards ethnic groups.⁴⁵² In fact, Roma women are often victims of forced sterilisation in European countries.⁴⁵³ Secondly, it recognises free, full, and informed consent as medical standard at international and regional level, thus a 'prerequisite to the procedure.'⁴⁵⁴ A further conclusion can be drawn from the Court's view, namely that it is the concept of consent that determines, if absent or coerced, sterilisation as a crime.

In conclusion, women's autonomy is expressed through free, full and informed consent in case of medical intervention, particularly surgery concerning women's reproductive system. A violation with this regard affects women's health and reproductive health. As a matter of fact, forced abortion and involuntary sterilisation are forms of violence against women, particularly women's health and reproductive health, which disproportionately affect women compared to men. The concept of consent in forced abortion is often violated on the basis of stereotypical beliefs that women are unable to make rational, autonomous decisions. Whereas, involuntary sterilisation presents also an intersectional dimension, as women undergoing the procedure often belong to minority groups, are disabled, or particularly vulnerable. As repeatedly mentioned by the United Nations interagency statement, the concept of free, full and informed consent is therefore fundamental in determining the legality of medical procedures concerning

⁴⁴⁸ *V.C. v. Slovakia*. (2011). Application no. 18968/07, para. 15.

⁴⁴⁹ *Ivi*, paras. 88, 118.

⁴⁵⁰ *Ivi*, paras. 89, 110-112.

⁴⁵¹ *Ivi*, para. 119.

⁴⁵² *V.C. v. Slovakia*. (2011). Application no. 18968/07, para. 17.

⁴⁵³ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization*, cit., p. 5.

⁴⁵⁴ *V.C. v. Slovakia*. (2011). Application no. 18968/07, para. 110.

women's reproductive systems. So the non-inclusion in national legal systems could constitute a violation of women's rights as well as gender-based violence.

At this point, the concept of consent has been analysed with regard to two specific forms of violence against women that represent the focus of this research. Sexual violence, particularly sexual assault and rape, and forced abortion and involuntary sterilisation have the concept of consent as a central and key element of criminalisation. The next chapter will focus the analysis of the concept of consent, in relation to these forms of violence examined, at the regional level. Specifically, the research will consider the Istanbul Convention, one of the most comprehensive legal instruments on violence against women. In particular, it will examine the provisions of the Istanbul Convention in which the term consent is explicitly mentioned, i.e., crimes of sexual violence and forced abortion and sterilisation, in Article 36 and 39, respectively.

CHAPTER 3

The Inclusion of the Notion of ‘Consent’ in the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

1. Introduction to the Istanbul Convention and its Implementation

The analysis of this chapter delves into one of the most comprehensive legal instrument at regional level on violence against women, namely the Istanbul Convention, as it adopts the concept of consent as a key element in certain provisions.

As a matter of fact, consent is of great importance in defining the offences included in the criminal law part of the Istanbul Convention. However, the concept of consent is specifically included and expressed only in Article 36 and Article 39, whereas the other provisions make reference to the use of force or coercion to establish the crime, for instance, Article 37 on forced marriage. This chapter will therefore focus especially on Article 36 and Article 39 of the Convention, as the notion of consent is included in the legal wording of these provisions. Indeed, the specific use of the term ‘consent’ in the text of the articles underlines the importance of this concept for the criminalisation of sexual violence, forced abortion and forced sterilisation.

The Istanbul Convention was adopted by the Committee of Ministers of the Council of Europe on April 7, 2011, in Istanbul⁴⁵⁵ and, since it opened for signature in the same year, 37 states and, recently, an international organisation, the European Union, have ratified the Convention.⁴⁵⁶ The Istanbul Convention is the result of a long process of increasing awareness regarding violence against women both in Europe and at international level.⁴⁵⁷ In

⁴⁵⁵ McQuigg, R.J.A. (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), p. 947. Retrieved Apr 24, 2023, from <https://doi.org/10.1080/13642987.2011.638288>.

⁴⁵⁶ *Chart of signatures and ratifications of Treaty 210*. Council of Europe - Treaty Office. Available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=210>.

⁴⁵⁷ De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence, cit., p. 76.

particular, the main role of the Convention is to fill the legal gap concerning violence against women that exists in Europe⁴⁵⁸ by setting legally binding standards concerning the issue.⁴⁵⁹

The Istanbul Convention has demonstrated to be one of the most innovative regional legal instrument that directly addresses violence against women.⁴⁶⁰ At the international level, in fact, the CEDAW does not contain a definition of violence against women or gender-based violence, although this issue was recognised in the subsequent General Recommendation No. 19.⁴⁶¹ Moreover, the majority of legal instruments produced by UN bodies on violence against women are soft laws, i.e. they do not establish legal obligations on States Parties.⁴⁶² Consequently, the Convention is one of most successful legislative step at regional level,⁴⁶³ as it prohibits violence against women and sets obligations for States Parties to prevent, protect and prosecute gender-based violence.⁴⁶⁴ In other words, States Parties are required to design or implement ‘a comprehensive framework, policies and measures’ in order to tackle violence against women at national level.⁴⁶⁵

The Istanbul Convention is a legal instrument that presents several innovations. Firstly, the text of the Convention includes the principle of due diligence, which has been elaborated in the jurisprudence of regional courts.⁴⁶⁶ Indeed, Article 5 of the Convention states that 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.’⁴⁶⁷ It also adds that States Parties must adopt all necessary legislative and other measures in order to ‘exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence [...] perpetrated by non-state actors.’⁴⁶⁸ In doing so, the Convention recognises that States have due diligence obligations to treat

⁴⁵⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 88.

⁴⁵⁹ McQuigg, R.J.A. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, cit., p. 947.

⁴⁶⁰ Jurasz, O. (2015). The Istanbul Convention, cit., p. 1.

⁴⁶¹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 89.

⁴⁶² Ivi, p. 95.

⁴⁶³ Jurasz, O. (2015). The Istanbul Convention, cit., p. 1.

⁴⁶⁴ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence. (2011). Council of Europe Treaty Series - No. 210, para. 30. Retrieved June 26, 2023, from <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatyid=210>.

⁴⁶⁵ McQuigg, R.J.A. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, cit., p. 947.

⁴⁶⁶ De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence, cit., p. 83.

⁴⁶⁷ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁴⁶⁸ Ibidem.

violence against women as any other criminal offence that is present in national jurisdictions.⁴⁶⁹ Therefore, in the event of the commission of acts of violence against women, a State can be held responsible for violations of the provisions of the Istanbul Convention both in the public and private spheres.⁴⁷⁰

Secondly, another important aspect of the Istanbul Convention is Article 73, which recognises the possibility for national legal systems to provide more effective provisions compared to those enshrined in the text of the legal instrument.⁴⁷¹ In other words, States Parties can adopt more favourable measures than the ones established by the Convention.⁴⁷² Moreover, the Istanbul Convention recognises the existence of other legal instruments, such as the CEDAW, and it does not preclude these instruments from providing more effective measures,⁴⁷³ thus creating the possibility of mutual reinforcement in the area of gender-based violence.

Thirdly, the Istanbul Convention has a universal aspiration.⁴⁷⁴ Indeed, the Convention can be accessible to countries that are not members of the Council of Europe (hereafter CoE).⁴⁷⁵ This possibility is enshrined in Article 76, which allows non-member states of the CoE to accede to the Convention, upon invitation by the Committee of Ministers and consultation and consent of the Parties.⁴⁷⁶ The decision of the Committee of Ministers is taken by majority vote as provided by Article 20(d) of the CoE Statute and by unanimity of the representatives of the Parties entitled to sit on the Committee of Ministers.⁴⁷⁷ Moreover, the Istanbul Convention is open to non-member States, that participated in the negotiations and have observer status in the CoE, and the European Union (Article 75).⁴⁷⁸ For these reasons, the Istanbul Convention could potentially become an international legal standard-setting instrument.⁴⁷⁹

⁴⁶⁹ Jurasz, O. (2015). *The Istanbul Convention*, cit., p. 2.

⁴⁷⁰ Ivi, p. 3.

⁴⁷¹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 104.

⁴⁷² Ibidem.

⁴⁷³ Ivi, p. 105.

⁴⁷⁴ Ivi, p. 183.

⁴⁷⁵ Jurasz, O. (2015). *The Istanbul Convention*, cit., p. 1.

⁴⁷⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁴⁷⁷ Ibidem.

⁴⁷⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 183.

⁴⁷⁹ Jurasz, O. (2015). *The Istanbul Convention*, cit., p. 1.

Fourthly, and most importantly, the Istanbul Convention criminalises several forms of violence against women,⁴⁸⁰ which are regulated by the provisions contained in Chapter V that deals with substantive civil and criminal law and must be implemented at national level by States Parties.⁴⁸¹ Thus, the Convention consists in positive obligations for States Parties,⁴⁸² meaning that they have a specific obligation to criminalise intentional conducts contained in the seven Articles (Article 33 to 39).⁴⁸³ Indeed, these crimes become substantive when the provisions of the international instrument are incorporated by States Parties in their national legal systems.⁴⁸⁴ This requires States to amend their criminal codes in order to effectively prevent and combat violence against women.⁴⁸⁵ However, these legislative provisions against gender-based crimes can be considered effective provided that they are clearly defined in criminal codes. Otherwise, these legislative gaps result in incomplete national measures to criminalise and combat violence against women,⁴⁸⁶ thus they do not guarantee the protection of victims of violence and the prosecution of perpetrators.

In addition, the Istanbul Convention recognises as crime both general offences, such as sexual violence, and specific gender-based offences, like female genital mutilation.⁴⁸⁷ States Parties must encompass both forms of these crimes in their jurisdictions in order to fulfil their obligations under the Convention,⁴⁸⁸ although the implementation of the provisions can be gender-neutral.⁴⁸⁹ Nonetheless, several national legal systems have not aligned themselves with the standards of the Convention and provided victims with the services that it requires yet.⁴⁹⁰ Indeed, violence against women is not a crime *per se* in several legal systems,⁴⁹¹ as the definition lacks the element of intent in the Istanbul Convention.⁴⁹² Yet, national legal frameworks do not provide for the explicit criminalisation of certain offences in some cases or

⁴⁸⁰ Jurasz, O. (2015). The Istanbul Convention, cit., p. 5.

⁴⁸¹ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 11.

⁴⁸² De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 19.

⁴⁸³ Ivi, p. 162.

⁴⁸⁴ Ivi, p. 50.

⁴⁸⁵ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence. (2011). Council of Europe Treaty Series - No. 210.

⁴⁸⁶ Ibidem.

⁴⁸⁷ Jurasz, O. (2015). The Istanbul Convention, cit., p. 5.

⁴⁸⁸ Ibidem.

⁴⁸⁹ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 11.

⁴⁹⁰ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 185.

⁴⁹¹ Ivi, p. 20.

⁴⁹² De Vido, S. (2020). *Violence against women's health*, cit., p. 5.

they provide incomplete national definitions that do not comply with those included in the Convention.⁴⁹³

With the ratification of the Convention by the European Union, a further legal aspect must be taken into account. In this specific case, indeed, the implementation of the Istanbul Convention to combat violence against women will be reinforced within the European Union and it ‘will strengthen the EU legal framework in this area.’⁴⁹⁴ Furthermore, in accordance with the Convention, the measures put in place by the European Union can provide a coherent legal framework for combating gender-based violence,⁴⁹⁵ especially an harmonisation of legal definitions of all forms of violence against women across all Member States.⁴⁹⁶ However, the implementation of the Convention’s provisions depends entirely on the legal competences of the European Union.⁴⁹⁷ In particular, it relies on the legal basis that the Council of the European Union identifies in the Directives concluding the accession to the Istanbul Convention, which determines by extension the legislative capacity of the European Union regarding violence against women.⁴⁹⁸ An in-depth discussion of the legal debate and consequences of the European Union’s accession to the Istanbul Convention will be presented in Chapter five.

In general, States follow different approaches to regulate violence against women under the Istanbul Convention, from specific regulations to general criminal provisions that encompass several forms of violence against women.⁴⁹⁹ For instance, the crime of bodily harm can be considered a form of gender-based violence, as it includes the crime of forced sterilisation.⁵⁰⁰ But it also applies to all cases to physical harm, thus not only to those that are gendered.⁵⁰¹ In other words, in some national criminal codes, violence against women is not specifically criminalised, but it falls under more general offence provisions, such as physical integrity.⁵⁰² Under the Istanbul Convention, States Parties must align their domestic law ‘with the substantive and procedural law requirements of both civil and criminal law included in the

⁴⁹³ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 11.

⁴⁹⁴ Ibidem.

⁴⁹⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 196.

⁴⁹⁶ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 12.

⁴⁹⁷ Ivi, p. 11; De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 194.

⁴⁹⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 194.

⁴⁹⁹ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 18.

⁵⁰⁰ Ibidem.

⁵⁰¹ Ibidem.

⁵⁰² Ivi, pp. 19-20.

Convention.⁵⁰³ Hence, States Parties must adopt specialised legislation with the most appropriate form and terminology in order to properly implement the provisions of the Istanbul Convention.⁵⁰⁴

The provisions' implementation and compliance by States Parties are crucial to combat gender-based violence and to protect victims.⁵⁰⁵ In the following paragraphs this dissertation delves into two forms of violence that are the focus of the research, sexual violence and forced abortion and sterilisation. In particular, it examines how these offences are elaborated in the Istanbul Convention, emphasising at the same time the central position of the concept of consent in these crimes. However, before proceeding to the analysis of Article 36 on sexual violence and Article 39 on forced abortion and forced sterilisation of the Istanbul Convention, it is deemed necessary to examine the definition of 'gender' and 'violence against women,' that the Convention proposes, to better grasp the legal formulations adopted in these articles.

2. *Defining Violence Against Women and Gender-based Violence in Relation to the Notion of Consent*

For the purpose of this analysis, it is fundamental to understand and discern 'violence against women' from 'gender-based violence'. Indeed, 'gender-based violence' is often used as an interchangeable expression of 'violence against women,' but the two expressions are not completely equivalent. For instance, rights' violations and abuses are often associated with and mostly experienced by women, but the expression 'gender-based violence' does not refer to this case only, as it can also be performed against men.⁵⁰⁶ Thus, gender-based violence can be considered a general expression encompassing all form of violence directed against a person based on his or her gender.⁵⁰⁷

The dissertation deems thus necessary to analyse the definitions of 'violence against women' and 'gender-based violence' that are enshrined in the Istanbul Convention in order to clarify any possible confusion on the matter before proceeding. Indeed, besides aiming at eradicating all forms of violence against women and placing positive obligations upon

⁵⁰³ Ivi, p. 53.

⁵⁰⁴ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 19.

⁵⁰⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 19.

⁵⁰⁶ Malik, J. S., & Nadda, A. (2019). A Cross-sectional Study of Gender-Based Violence against Men in the Rural Area of Haryana, India. *Indian journal of community medicine : official publication of Indian Association of Preventive & Social Medicine*, 44(1), p. 35. Available at https://doi.org/10.4103/ijcm.IJCM_222_18.

⁵⁰⁷ The United Nations High Commissioner for Refugees (UNHCR). (n.d.). Gender-based violence. Available at <https://www.unhcr.org/what-we-do/protect-human-rights/protection/gender-based-violence>.

States Parties to comply with its provisions,⁵⁰⁸ the Istanbul Convention, as all human rights treaties, provides for specific definitions of ‘violence against women,’ as well as ‘gender-based violence,’ and ‘gender.’⁵⁰⁹ There are two important observations to make in this regard. Firstly, the adoption of common definitions of violence against women and gender-based violence against women contributes to uniformly address the issue,⁵¹⁰ as it provides States Parties, and more in general the European legal sphere, with clear and broad understandings of the phenomenon and its elements.

Secondly, in providing such definitions, the Convention recognises the connection between violence against women—in this specific case the violations of women’s autonomy—and historically unequal power relations between men and women, which often give rise to gender stereotypes.⁵¹¹ Indeed, the Convention considers violence against women as a phenomenon that ‘violates and impairs or nullifies the enjoyment by women of their rights’⁵¹² and it also states that such connection must be eradicated in order to guarantee women the full enjoyment of their rights.⁵¹³

In Article 3(a), violence against women is defined as ‘violation of human rights and a form of discrimination against women,’⁵¹⁴ which reflects one of the purposes of the Istanbul Convention enshrined in Article 1(b) regarding the elimination of all forms of discrimination and the promotion of equality between men and women.⁵¹⁵ The second part of Article 3(a) further adds that violence against women ‘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.’⁵¹⁶ This definition reflects the denotation given by the Committee of Ministers in the Council of Europe Recommendation Rec (2002) 5 on the protection of women against violence, by the CEDAW Committee in General

⁵⁰⁸ Explanatory Report to the Council of Europe Convention, cit., para. 25-29.

⁵⁰⁹ Jurasz, O. (2015). The Istanbul Convention, cit., p. 1.

⁵¹⁰ European Parliament. (2022). How the EU is tackling gender-based violence. News | European Parliament. Available at <https://www.europarl.europa.eu/news/en/headlines/society/20210923STO13419/how-the-eu-is-tackling-gender-based-violence>.

⁵¹¹ Jurasz, O. (2015). The Istanbul Convention, cit., p. 1.

⁵¹² Explanatory Report to the Council of Europe Convention, cit., para. 26.

⁵¹³ Ivi, para. 25-29.

⁵¹⁴ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵¹⁵ Explanatory Report to the Council of Europe Convention, cit., para. 31, 40.

⁵¹⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

Recommendation No. 19, and contained in Article 1 of United Nations Declaration on the Elimination of Violence against Women.⁵¹⁷ However, Article 3(a) has broadened the definition of violence against women by including a phenomenon that is often missing in human rights treaties.⁵¹⁸ The Istanbul Convention considers, indeed, economic harm as a form of violence against women,⁵¹⁹ thus it offers an inclusive definition that aims at encompassing all forms of violence.⁵²⁰ In fact, violence against women can be considered a socio-legal definition that serves as a ‘container’ to encompass different forms of gender-based violence, some more visible and others more subtle.⁵²¹ Therefore, the definition provided by Article 3(a) enables violence against women to be understood in its multiple forms, and it brings under this definition the offences that are specified in Chapter V of the Convention,⁵²² in particular sexual violence, forced abortion, and forced sterilisation that are the focus of this dissertation.

In addition, Article 3(d) of the Istanbul Convention provides States Parties with a definition of ‘gender-based violence against women,’ which is understood as ‘violence directed against a woman because she is a woman or which disproportionately affects women.’⁵²³ Violence against women is indeed motivated by gender-related aspects, such as the necessity to assert control on women, so it does not just occurs to them by accident.⁵²⁴ Therefore, the definition contained in Article 3(d) places gender as the main reason for these acts of violence, as women are more affected compared to men due to unequal power relations, which are based on the stereotypical belief in the difference in status between men and women in both the private and public spheres.⁵²⁵ In other words, the Istanbul Convention recognises that the attribution of stereotypical roles to women in society creates the conditions—or causes—of violence against women.⁵²⁶ This is the case, for instance, with violations of women's sexual and reproductive autonomy in the crimes of sexual violence, forced abortion and forced sterilisation. As analysed, women’s consent is often disregarded based on the

⁵¹⁷ Explanatory Report to the Council of Europe Convention, cit., para. 40.

⁵¹⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 40.

⁵¹⁹ Ibidem.

⁵²⁰ Jurasz, O. (2015). The Istanbul Convention, cit., p. 4.

⁵²¹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., pp. 24-25.

⁵²² Ivi, p. 41.

⁵²³ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵²⁴ De Vido, S. (2020). *Violence against women's health*, cit., p. 5.

⁵²⁵ Explanatory Report to the Council of Europe Convention, cit., para. 44.

⁵²⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 31.

stereotypical belief that women are passive, subordinate or incapable of making rational choices. As a matter of fact, the Convention acknowledges that gender-based violence is ‘deeply rooted in the social and cultural structures, norms and values’ of society,⁵²⁷ thus grasping the sociological causes of the issue. But above all, it recognises the gender-based nature of violence against women, which at the international level has only been codified in non-binding instruments.⁵²⁸

As it has been discussed in the previous chapters, gender is closely related to consent in violence against women, as it affects the constructed assumption that women are subordinated to men, therefore lack autonomy.⁵²⁹ Thus, it also affects female sexuality by extension because it is considered passive.⁵³⁰ As a matter of fact, research shows that specific roles and stereotypical ideas can result in harmful practices and in the acceptability of violence against women (see Chapter 1, Section 2).⁵³¹ The Istanbul Convention provides for a definition of the term ‘gender,’ which was deemed important by the drafter of the Convention in order to achieve equality between women and men.⁵³² Article 3(c) defines gender as ‘the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.’⁵³³ Among the international instruments dealing with women’s rights, the Istanbul Convention is the only that provides for a definition of gender.⁵³⁴ Although the term was defined for the first time in Article 7(3) of the Rome Statute of the International Criminal Court (ICC),⁵³⁵ this definition has been strongly criticised for its limits, as it fails in recognising gender as a social construction of roles of males and females.⁵³⁶ Indeed, the Rome Statute understands gender as analogous to biological sexes rather than as a socially constructed set of assumptions.⁵³⁷ Consequently, equating the meaning of gender with that of biological sex identity results in a misconception that excludes other gender-based

⁵²⁷ Explanatory Report to the Council of Europe Convention, cit., para. 44.

⁵²⁸ Jurasz, O. (2015). The Istanbul Convention, cit., p. 5.

⁵²⁹ Cook, R. J., and Cusack, S. (2010). *Gender Stereotyping*, cit., p. 12.

⁵³⁰ Hakvag, H. (2010). Does Yes Mean Yes? , cit., p. 122.

⁵³¹ Explanatory Report to the Council of Europe Convention, cit., para. 43.

⁵³² Explanatory Report to the Council of Europe Convention, cit., para. 43.

⁵³³ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵³⁴ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 35.

⁵³⁵ Ibidem.

⁵³⁶ Oosterveld, V. (2005). The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice? *Harvard Human Rights Journal*, 18, pp. 56, 71. Retrieved Nov 29, 2023, from <https://ir.lib.uwo.ca/lawpub/93>.

⁵³⁷ Ibidem.

crimes, for example, against homosexuals or transgender people.⁵³⁸ Nonetheless, according to an author, the Rome Statute's definition is broad enough to ensure different interpretation by the ICC, so as to include different genders, as well as, sexual orientations.⁵³⁹

In this regard, instead, the Istanbul Convention provides States Parties with a more encompassing definition of the term gender when compared to the Rome Statute of the ICC.⁵⁴⁰ As aforementioned, the Convention does not limit the definition of gender to biological sexes, male and female, but it takes a step forward recognising that the term encompasses also socially constructed roles and assumptions that society deems appropriate for men and women.⁵⁴¹ Furthermore, the Explanatory Report specifies that 'gender' does not replace the terms 'women' and 'men' used in the Convention,⁵⁴² and in doing so, it recognises that gender-based violence does not exclusively refer to violence against women.⁵⁴³ Furthermore, Article 3(c) assumes even more importance in the light of Article 12(1) concerning the elimination of practices and traditions, which are based on a stereotypical view of the role of women, and the implementation of socio-cultural change in order to prevent gender-based violence.⁵⁴⁴

As discussed, gender stereotypes are at the roots of possible acts of violence against women as they attribute to women a subordinate status whereby their decision-making and/or sexual autonomy, such as giving consent to sexual activities, is not respected. To this end, Article 3(a), 3(c), and 3(d) of the Istanbul Convention provide States Parties with comprehensive definitions of 'violence against women,' 'gender,' and 'gender-based violence against women' in order to properly fulfil the purposes of the Convention contained in the Preamble and to respond to the phenomenon with appropriate measures.⁵⁴⁵ Whereas, Article 12 lays the foundations for the obligations of States Parties to combat stereotypes of social

⁵³⁸ Rosenthal, I., Oosterveld, V., and SáCouto, S. (2022). What Is 'Gender' in International Criminal Law? In Indira Rosenthal, Valerie Oosterveld, and Susana SáCouto (eds), *Gender and International Criminal Law*, Oxford, online edn, Oxford Academic, p. 14. Retrieved Nov 24, 2023 from <https://doi.org/10.1093/oso/9780198871583.003.0002>.

⁵³⁹ Oosterveld, V. (2005). The Definition of "Gender" in the Rome Statute of the International Criminal Court, cit., p. 84.

⁵⁴⁰ Jurasz, O. (2015). The Istanbul Convention, cit., p. 5.

⁵⁴¹ Explanatory Report to the Council of Europe Convention, cit., para. 43.

⁵⁴² Explanatory Report to the Council of Europe Convention, cit., para. 43.

⁵⁴³ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 33.

⁵⁴⁴ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011); Explanatory Report to the Council of Europe Convention, cit., para. 43, 85.

⁵⁴⁵ Explanatory Report to the Council of Europe Convention, cit., para. 43-44.

and cultural roots that cause the perpetration of the forms of violence criminalised by the Istanbul Convention, such as sexual violence or forced sterilisation.⁵⁴⁶

The following paragraphs will observe how the Convention has defined the crimes of sexual violence, forced abortion, and forced sterilisation in Articles 36 and Article 39. In particular, the analysis will focus on the use of the concept of consent in the definitions of these two crimes, emphasising the importance that the notion of consent has as a key element of these offences.

3. The Inclusion of the Notion of 'Consent' in Article 36 on Sexual Violence

In the preceding chapter, the importance of the concept of consent in relation to sexual violence has been discussed. In particular, the analysis has highlighted the importance that the notion plays as key element of the offence of sexual violence.⁵⁴⁷ In other words, consent sets the legal boundary between permissible acts of sexual nature and sexual offences.⁵⁴⁸ Sexual violence is indeed defined by an author as A being responsible for a sexual offence if B does not agree or positively consent to the sexual activity.⁵⁴⁹ However, as demonstrated, the notion of consent is rather complex to define, as it encompasses several aspects that must be assessed in the specific context. For example, consent can be vitiated by coercion, therefore, it cannot be regarded as an expression of a person's free will.

The Istanbul Convention places obligations of result upon States Parties regarding the criminalisation of sexual violence, i.e. they must adopt, amend or repeal national laws to comply with specific provisions enshrined in the legal instrument.⁵⁵⁰ Sexual violence is regulated by Article 36 of the Istanbul Convention and it is defined as follows:

'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;*

⁵⁴⁶ Explanatory Report to the Council of Europe Convention, cit., para. 85.

⁵⁴⁷ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 126.

⁵⁴⁸ Westen, P. (2004). Some Common Confusions About Consent in Rape Cases, cit., p. 334.

⁵⁴⁹ Wertheimer, A. (2000). What Is Consent?, cit., p. 558.

⁵⁵⁰ De Vido, S. (2020). *Violence against women's health*, cit., p. 197.

- 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.⁵⁵¹

Article 36 places obligations on States Parties to criminalise sexual violence and rape.⁵⁵² It is interesting to note that this Article provides for a more detailed and specific provision in comparison to other articles of the Convention.⁵⁵³ Indeed, Article 36(1) establishes criminal offence of sexual violence for all forms of sexual acts that 'are performed on another person without her or his freely given consent' and are characterised by intentionality. It is necessary to make two observations with this regard. Firstly, this provision is articulated in a gender-neutral manner. As a matter of fact, gender neutrality is considered one of aspects of all criminal provisions of the Istanbul Convention, which means that the sex of the victim or perpetrator does not have to be a constitutive element of the crime.⁵⁵⁴ However, this does not necessarily imply that States Parties cannot include gender-specific provisions within their national legal frameworks,⁵⁵⁵ as women are disproportionately affected by violence.⁵⁵⁶

Secondly, the provision specifically requires for the conduct to be 'intentional' in order to criminalise the act.⁵⁵⁷ In sexual violence, the criminal 'intent,' also known as *mens rea*, occurs when the act is performed in pursuit of one's own sexual gratification, and the offence is therefore not incidental.⁵⁵⁸ In Article 36 of the Istanbul Convention, the element of intentionality is relevant in accessing individual responsibility for the crime of sexual violence.⁵⁵⁹ However, the term 'intentional' is not defined in the provision of the Istanbul

⁵⁵¹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 36.

⁵⁵² Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 65.

⁵⁵³ Ibidem.

⁵⁵⁴ Explanatory Report to the Council of Europe Convention, cit., para. 153.

⁵⁵⁵ Ibidem.

⁵⁵⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 3(d). ; De Vido, S. (2020). *Violence against women's health*, cit., p. 36.

⁵⁵⁷ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵⁵⁸ Sex Crimes - "Sexual or Aggressive Intent" - Defined. (n.d.). *North Star Criminal Defense*. Available at <https://www.northstarcriminaldefense.com/sex-crimes-sexual-or-aggressive-intent-defined/>.

⁵⁵⁹ De Vido, S. (2020). *Violence against women's health*, cit., p. 5.

Convention; on the contrary, the interpretation of intentional conduct is left to the national law of each State Party.⁵⁶⁰ Nonetheless, this element is required for all forms of sexual acts listed in Article 36.⁵⁶¹

To continue with the analysis, lit. a makes reference to different forms of penetration of a person's body, i.e. vaginal, anal or oral, to which the person has not consented.⁵⁶² It further specifies that such penetration can be performed with any bodily part or object,⁵⁶³ thus including every type of sexual activity within the scope of Article 36. As for the 'sexual nature' requirement for the penetration, the term underlines the limits of the provision to all acts that have a sexual connotation, but not to those that lack this aspect.⁵⁶⁴ To be specific, an act of 'sexual nature' in criminal law is performed by a person who understands that the 'gesture counts as a sexual practice' and decides to use this to satisfy herself or himself sexually, to degrade the other person, or to impose control on the other.⁵⁶⁵ For this reason, it is not possible to define an act as a crime of sexual violence under Article 36(1)(a) if the penetration is not of 'sexual nature.'

Lit. b refers to all acts of sexual nature that are performed without the 'freely given consent' of the other person.⁵⁶⁶ While, lit. c covers the eventuality for acts of sexual nature to be performed on the victim by a third person, which is not the perpetrator.⁵⁶⁷ By doing so, lit. c covers cases in which the victim is forced to comply with or engage in sexual activity with a person that is not the perpetrator, provided that this conduct can be considered intentional, as specified under Article 36(1).⁵⁶⁸

Paragraph 3 of Article 36 of the Istanbul Convention places positive obligations on States Parties to adopt all legislative and other measures in order to apply the provisions included in paragraph 1 to any non-consensual acts of sexual nature committed against a former or current partner.⁵⁶⁹ Hence, the provision applies to all cases of sexual violence and rape,

⁵⁶⁰ Explanatory Report to the Council of Europe Convention, cit., para. 189.

⁵⁶¹ Ibidem.

⁵⁶² Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵⁶³ Explanatory Report to the Council of Europe Convention, cit., para. 190.

⁵⁶⁴ Ibidem.

⁵⁶⁵ Corrêa Camargo, B., & Renzikowski, J. (2021). The Concept of an "Act of a Sexual Nature" in Criminal Law. *German Law Journal*, 22(5), p. 767. Available at <https://doi.org/10.1017/glj.2021.37>.

⁵⁶⁶ Explanatory Report to the Council of Europe Convention, cit., para. 190.

⁵⁶⁷ Ibidem.

⁵⁶⁸ Ibidem.

⁵⁶⁹ Explanatory Report to the Council of Europe Convention, cit., para. 194.

regardless of the relationship between the victim and the perpetrator.⁵⁷⁰ Article 36(3) aims at encompassing all cases of sexual violence and rape with no exceptions to the criminalisation of acts committed against former or current partners. Thus, on one side, it recognises the possibility for sexual violence to occur both between strangers and between acquaintances or partners. On the other side, it includes within its scope the crime of marital rape, also known as spousal rape or intimate partner rape.⁵⁷¹ In several countries, indeed, marital rape is not explicitly criminalised under the law, while in others this is a rather recent development.⁵⁷² Paragraph 3 recognises the occurrence of sexual violence and rape as forms of exerting power and control over one's partner and, consequently, the need to ensure that these acts are criminalised.⁵⁷³

The provision contained in Article 36(2) of the Istanbul Convention results from a recent shift from a coercion-based towards a consent-based understanding of sexuality in the sex crimes sphere.⁵⁷⁴ The concept of consent is indeed placed at the core of Article 36(2),⁵⁷⁵ thus it is the constituent element for the criminalisation of sexual violence and rape.⁵⁷⁶ The Explanatory Report makes reference to the ECtHR's case-law,⁵⁷⁷ in particular to the *M.C. v Bulgaria* judgement, in which the definition of rape, and in general of sexual offence, focuses on the lack of consent.⁵⁷⁸ Indeed, as analysed (see Chapter 2, Section 2.1), the ECtHR notes that a requirement of physical resistance may result in some types of rape going unpunished and the protection of an individual's sexual autonomy being compromised.⁵⁷⁹ Consequently, the Court states that an effective prosecution has to be conducted for 'any non-consensual sexual act, even in the absence of physical resistance on the part of the victim,' in accordance with Articles 3 and 8 of the ECHR.⁵⁸⁰ As a matter of fact, physical resistance does not always occur in sexual violence and rape, as victims react differently according to different emotional

⁵⁷⁰ Explanatory Report to the Council of Europe Convention, cit., para. 194.

Article 36(3) can also be related to Article 43 on the application of criminal offence. Indeed, this article states 'the offences established in accordance with this Convention shall apply irrespective of the nature of the relationship between victim and perpetrator,' thus it further strengthens the provisions contained in Article 36(3).

⁵⁷¹ De Vido, S. (2020). *Violence against women's health*, cit., p. 38.

⁵⁷² Ibidem.

⁵⁷³ Explanatory Report to the Council of Europe Convention, cit., para. 194.

⁵⁷⁴ Corrêa Camargo, B., & Renzikowski, J. (2021). The Concept of an "Act of a Sexual Nature" in Criminal Law, cit., p. 768.

⁵⁷⁵ European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European states*, cit., p. 76.

⁵⁷⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 126.

⁵⁷⁷ Explanatory Report to the Council of Europe Convention, cit., para. 191.

⁵⁷⁸ Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence, cit., p. 457.

⁵⁷⁹ *M.C. v Bulgaria*. (2004). Application no. 39272/98, para. 161.

⁵⁸⁰ Ivi, para. 166.

stress dynamics.⁵⁸¹ Furthermore, it is important to recall that the use or threat of use of force is not the only modality by which one can violate a person's sexual autonomy⁵⁸² and possibly obtain consent. For this reason, the provision provides for the prosecution to be conducted on a case-by-case basis, assessing the context in which the victim gave consent, in order to determine whether it was the result of the person's free will or not.⁵⁸³ A victim of sexual violence may indeed give her consent to an act of sexual nature, for instance, but if such consent is obtained by force, it is not the expression of her free will.⁵⁸⁴

This context-sensitive assessment must therefore not rely on 'assumptions of typical behaviour in such situation,' and gender-based stereotypes and myths regarding male and female sexuality must not influence the prosecution of rape cases.⁵⁸⁵ This behaviour is rather common in judicial proceedings, as it has been explained in the preceding chapters. The *J.L. v. Italy* judgement is indeed a case in which judicial authorities failed to respect the victim's private life because they took into consideration her family and sexual life during the trial.⁵⁸⁶ In general, the victim's sexual history is often used by the defence to challenge the credibility or lack of consent of the victim.⁵⁸⁷ However, Article 54 of the Istanbul Convention states that 'evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.'⁵⁸⁸ In doing so, Article 54 ensures, together with the provisions enshrined in Article 36 on sexual violence and rape, that the victim's sexual history is not adopted to exonerate the perpetrator in criminal proceedings and it restricts the use of this evidence where it is relevant to the trial.⁵⁸⁹

In addition, and most importantly, pursuant to Article 36(2), States Parties are required to implement this provision by encompassing the concept of 'lack of freely given consent' for any sexual act contained in lit. a to lit. c in their national criminal codes.⁵⁹⁰ However, this paragraph does not provide for a legal definition of consent.⁵⁹¹ It only mentions that consent must be 'given voluntarily as the result of the person's free will assessed in the context of the

⁵⁸¹ International Commission of Jurists. (2015). *Sexual Violence Against Women*, cit., p. 22.

⁵⁸² Wertheimer, A. (2000). What Is Consent?, cit., p. 558.

⁵⁸³ Explanatory Report to the Council of Europe Convention, cit., para. 192.

⁵⁸⁴ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 196.

⁵⁸⁵ Explanatory Report to the Council of Europe Convention, cit., para. 192.

⁵⁸⁶ *J.L. v. Italy*. (2021). Application no. 5671/16.

⁵⁸⁷ Explanatory Report to the Council of Europe Convention, cit., para. 277.

⁵⁸⁸ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵⁸⁹ Explanatory Report to the Council of Europe Convention, cit., 277.

⁵⁹⁰ Ivi, para. 193.

⁵⁹¹ Ivi, para. 193.

surrounding circumstances.⁵⁹² Thus, the provision delegates to States Parties the decision concerning the specific wording of the legislation and the elements that they consider as precluding freely given consent.⁵⁹³ As analysed, the concept of consent does not have a universal definition, as it varies across national legal systems.⁵⁹⁴ For this reason, in some cases national legal frameworks are not fully aligned with the provisions of Article 36, despite they should reflect the Convention's understanding of this gender-based crime as closely as possible.⁵⁹⁵

To conclude, Article 36 of the Istanbul Convention regulates the criminalisation of sexual violence, including rape, by encompassing a wide range of acts of a sexual nature and by placing the concept of consent, in particular lack of consent, as the constitutive element of the crime. The shift in the sexual crimes sphere from a coercion-based towards a consent-based understanding of sexuality⁵⁹⁶ has ensured the protection of women's rights, thus their autonomy, in the legal domain.⁵⁹⁷ However, the lack of a legal definition of freely given consent leaves it entirely up to States Parties to determine the wording and characteristics that constitute this notion, thus resulting in legislation that is sometimes unclear or not fully compliant with Article 36 of the Istanbul Convention.

In the next paragraph, the text of Article 39 regarding forced abortion and forced sterilisation is analysed to determine the characteristics and constitutive elements of these crimes, with a particular focus on the notion of consent.

4. The Concept of 'Informed Consent' in Article 39 on Forced Abortion and Forced Sterilisation

The concept of consent is of fundamental importance in forced abortion and forced sterilisation. As examined, informed consent has entered the legal domain quite recently and it is defined as the practice of informing a patient of the possible consequences of a medical procedure.⁵⁹⁸ Informed consent is the key element for the criminalisation of forced abortion and forced sterilisation as forms of violence against women. Indeed, these practices can also

⁵⁹² Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁵⁹³ Explanatory Report to the Council of Europe Convention, cit., para. 193.

⁵⁹⁴ De Vido, S. (2020). *Violence against women's health*, cit., p. 153.

⁵⁹⁵ Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 11.

⁵⁹⁶ Corrêa Camargo, B., & Renzikowski, J. (2021). The Concept of an "Act of a Sexual Nature" in Criminal Law, cit., p. 768.

⁵⁹⁷ De Vido, S. (2020). *Violence against women's health*, cit., p. 199.

⁵⁹⁸ Green, D. S., & MacKenzie, C. R. (2007). Nuances of informed consent, cit., p. 116.

be considered as violations of women's right to health, thus by extension of women's sexual and reproductive health in general, as they affect their reproductive autonomy.⁵⁹⁹ The practice of forced sterilisation, for instance, interferes with a woman's reproductive system,⁶⁰⁰ thus with her rights to decide about her reproductive options,⁶⁰¹ as it has lasting and permanent consequences.⁶⁰² The invasiveness of this type of surgery on women's body, for instance, is as serious as to sufficiently qualify as an offence of bodily harm.⁶⁰³

The Istanbul Convention requires States Parties to criminalise these types of violence against women by adopting, amending or repealing domestic law.⁶⁰⁴ Forced abortion and forced sterilisation are regulated by Article 39 as follows:

'Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:

- a) performing an abortion on a woman without her prior and informed consent;*
- b) performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.'*⁶⁰⁵

This article of the Istanbul Convention refers to the concept of 'intentionality' as Article 36. In other words, the conduct must prove to be 'intentional' to consider the act a crime.⁶⁰⁶ In this particular case, *mens rea* occurs when the victim is coerced or misled into undergoing an abortion or a surgical sterilisation, thereby violating the woman's autonomy and natural reproductive capacity. However, although the Istanbul Convention considers gender neutrality an important aspect of the criminal law part,⁶⁰⁷ the formulation of Article 39 is not gender-neutral.⁶⁰⁸ This provision, indeed, 'breaks with the principle of gender neutrality of the criminal law part' of the Istanbul Convention, as these offences necessarily require the victim to be a woman or a girl.⁶⁰⁹ However, it is important to add a clarification: by defining forced

⁵⁹⁹ De Vido, S. (2020). *Violence against women's health*, cit., p. 8.

⁶⁰⁰ Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 69.

⁶⁰¹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 137.

⁶⁰² Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 69.

⁶⁰³ Ibidem.

⁶⁰⁴ De Vido, S. (2020). *Violence against women's health*, cit., p. 197.

⁶⁰⁵ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 39.

⁶⁰⁶ Ibidem.

⁶⁰⁷ Explanatory Report to the Council of Europe Convention, cit., para. 153.

⁶⁰⁸ Ivi, para. 203.

⁶⁰⁹ Explanatory Report to the Council of Europe Convention, cit., para. 203.

sterilisation as a gendered phenomenon, it also concerns individuals belonging to particularly vulnerable groups, such as transgender people.⁶¹⁰ In this regard, the decision to transcend the principle of gender neutrality of this provision is to be found in the objective of the article of the Convention itself.⁶¹¹ Article 39, indeed, aims to emphasise the importance of respecting women's reproductive rights, especially women's decision-making autonomy, as women are disproportionately subjected to forced sterilisation compared to other categories.⁶¹²

In lit. a forced abortion is defined as the intentional termination of a women's pregnancy without her prior and informed consent.⁶¹³ The term 'termination of pregnancy' refers any procedure that results in the elimination of any product of conception.⁶¹⁴ Indeed, it exists numerous medical techniques to perform abortion, either through medication or surgical aspiration or removal, depending on the number of weeks of pregnancy.

Lit. b defines the crime of forced sterilisation.⁶¹⁵ Article 39(b) establishes criminal offence for any surgery aiming at effectively terminating the natural reproductive capacity of a woman without her prior and informed consent.⁶¹⁶ By the term 'sterilisation,' lit. b refers to any type of medical procedure that results in a detrimental and irreversible effect on a woman's reproductive capacity.⁶¹⁷

Key element in establishing the criminal offence of forced abortion and forced sterilisation is the lack of consent prior to the medical procedure and lack of due information.⁶¹⁸ Lit. a and lit. b make specific reference to 'informed consent,' which can be defined as the practice of informing a patient about the benefits and possible risks of any medical treatment.⁶¹⁹ Thus, the crime of forced abortion and forced sterilisation cover any procedure that is performed without the fully informed decision of the woman.⁶²⁰ Article 39 does not provide for a definition of informed consent, nonetheless this provision must follow the standards included in the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and

⁶¹⁰ De Vido, S. (2020). *Violence against women's health*, cit., p. 136.

⁶¹¹ Ibidem.

⁶¹² Ivi, pp. 136-137.

⁶¹³ Explanatory Report to the Council of Europe Convention, cit., para. 204.

⁶¹⁴ Ibidem.

⁶¹⁵ Ivi, para. 205.

⁶¹⁶ Ibidem.

⁶¹⁷ Ibidem.

⁶¹⁸ Ivi, para. 204.

⁶¹⁹ Green, D. S., & MacKenzie, C. R. (2007). Nuances of informed consent: the paradigm of regional anesthesia, cit., p. 116.

⁶²⁰ Explanatory Report to the Council of Europe Convention, cit., para. 204.

Biomedicine (Oviedo Convention) with regard to the notion.⁶²¹ This confirms what has been discussed in the previous paragraphs in the light of Article 73 of the Istanbul Convention, which states:

‘The provisions of this Convention shall not prejudice the provisions of internal law and binding international instruments which are already in force or may come into force, under which more favourable rights are or would be accorded to persons in preventing and combating violence against women and domestic violence.’⁶²²

As analysed, the Convention does not preclude the existence of other legal instruments that can provide more effective measures;⁶²³ on the contrary, it recognises the possibility of creating mutual reinforcement in specific legal fields.⁶²⁴ In the Oviedo Convention, indeed, consent is considered as a ‘well-established rule,’ according to which the patient’s autonomy must be respected in the medical sphere, and it should be free and informed.⁶²⁵ Whereby a patient’s ‘informed consent’ must encompass the relevant facts about the medical intervention to be considered valid, including ‘the purpose, nature and consequences [...] and the risks.’⁶²⁶ Furthermore, the standards set by the Oviedo Convention require the information given to the patient to be clear and suitably worded, namely understandable.⁶²⁷ Article 39 of the Istanbul Convention must therefore be interpreted in the light of Article 5 of the Oviedo Convention, as the latter provides for a more comprehensive explanation of the requirements and elements of a patient’s ‘informed consent.’

To conclude, Article 39 of the Istanbul Convention regulates the crime of forced abortion and forced sterilisation. However, this specific article breaks from the gender-neutral principle that characterises the criminal law part of the Convention because these offences

⁶²¹ Explanatory Report to the Council of Europe Convention, cit., para. 204.

⁶²² Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 73.

⁶²³ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 105.

⁶²⁴ Article 5 of the Oviedo Convention states:

‘An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time.’

⁶²⁵ Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. (1997). European Treaty Series - No. 164, para. 34-35.

⁶²⁶ Ivi, para. 35.

⁶²⁷ Ivi, paras. 36-37.

disproportionately affect women and girls. This is due in part to the fact that the crime of forced abortion can be perpetrated only on women, for instance.⁶²⁸ Furthermore, the provision aims to underline the importance of respecting women's reproductive rights, which can be seriously or permanently violated by these practices, and to allow women to freely decide on their reproductive life.⁶²⁹

In this chapter, the most comprehensive and holistic regional legal instrument, the Istanbul Convention,⁶³⁰ has been presented in order to provide the definition of 'violence against women,' 'gender-based violence,' and 'gender,' as well as, to observe the legal formulation of the crimes of sexual violence, and forced abortion and forced sterilisation. In particular, the research observed how the concept of consent, the object of this research, has been included in Article 36 on sexual violence and Article 39 on forced abortion and forced sterilisation of the Istanbul Convention.

The dissertation will now consider the Baseline Reports of the Convention's monitoring mechanism, namely the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), in order to discuss and examine the compliance of national legislation of States Parties with the provisions of Article 36 and Article 39.

⁶²⁸ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 69.

⁶²⁹ Explanatory Report to the Council of Europe Convention, cit., para. 206.

⁶³⁰ Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women, cit., p. 9.

CHAPTER 4

Consent in the Practice of the Group of experts on Action Against Violence Against Women and Domestic Violence (GREVIO)

1. Introduction to the Monitoring Activity of the GREVIO and its Relevance

Article 66 to Article 70 concern the monitoring mechanisms of the Istanbul Convention.⁶³¹ Chapter IX, indeed, establishes the Group of Experts on Action against Violence against Women and Domestic Violence (hereafter GREVIO), an expert body, under Article 66, and a Committee of the Parties, a political body composed of representatives of States Parties, under Article 67.⁶³² Thus, the monitoring mechanism is composed of two pillars that are responsible for ensuring the compliance of States Parties with the Convention's obligations.⁶³³ For the purpose of this research, it is deemed necessary to provide an introduction to one of these pillars, namely the GREVIO, as this dissertation relies on the evaluation reports concluded by the body of experts. The dissertation will indeed analyse States Parties' compliance with the provisions contained in Article 36 and Article 39 of the Istanbul Convention through these reports in order to demonstrate that several Parties are yet to align with these provisions.

As aforementioned, the GREVIO is established by Article 66 of the Convention in order to monitor the correct implementation and compliance of States Parties with mandatory obligations.⁶³⁴ At present, the body is composed of 15 members,⁶³⁵ as Article 66(3) requires the election of five additional members to the initial ten following the 25th ratification or accession to the Convention.⁶³⁶ The group of experts is elected by the Committee of the Parties among the national candidates proposed by States Parties.⁶³⁷ Paragraph 4 specifies the

⁶³¹ McQuigg, R.J.A. (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), p. 954. Retrieved Dec 07, 2023, from <https://doi.org/10.1163/22131035-00102007>.

⁶³² De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence, cit., p. 85; Explanatory Report to the Council of Europe Convention, cit., para. 337, 345.

⁶³³ Jurasz, O. (2015). The Istanbul Convention, cit., p. 78.

⁶³⁴ Ibidem; Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁶³⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 179.

⁶³⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁶³⁷ Ibidem, Article 66(2).

principles of the election of GREVIO's members.⁶³⁸ Indeed, each candidate must respect certain requirements and competencies in order to be elected as a member of the monitoring body.⁶³⁹ The GREVIO's members must therefore meet specific criteria, i.e. independence, impartiality, and expertise.⁶⁴⁰ In other words, the GREVIO must be independent and impartial in the exercise of its function.⁶⁴¹ In addition, the members selected must demonstrate a 'recognised competence in the fields of human rights, gender equality, violence against women and domestic violence, or assistance to and protection of victims' or, simply, 'experience in the areas covered by the Convention.'⁶⁴² Furthermore, they should represent important actors or agencies dealing with violence against women, for example, NGO representatives.⁶⁴³

The Convention establishes two monitoring procedures in order to assess the States Parties' compliance with mandatory obligations.⁶⁴⁴ Article 68, indeed, provides the procedure for a country-by-country evaluation that must be conducted through the sending of questionnaires to States Parties and it is concluded with the final report and conclusions of the GREVIO.⁶⁴⁵ Whereas, the second procedure consists of an urgent inquiry, that is required by the GREVIO under Article 68,⁶⁴⁶ paragraphs 13 to 15, in the case of possible serious or persistent patterns of violations of the Convention by a State Party.⁶⁴⁷ In this sense, the GREVIO's competencies resemble those of the Committees established by the United Nations human rights treaties.⁶⁴⁸

This nonetheless, the reporting procedure is the most widely employed by the monitoring mechanism.⁶⁴⁹ Under Article 68(1), States Parties are required to submit to the independent expert body reports based on a questionnaire developed by the GREVIO.⁶⁵⁰ These initial

⁶³⁸ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁶³⁹ Explanatory Report to the Council of Europe Convention, cit., para. 341.

⁶⁴⁰ Ibidem.

⁶⁴¹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 66, para. 4, lit. e.

⁶⁴² Ibidem.

⁶⁴³ Explanatory Report to the Council of Europe Convention, cit., para. 341.

⁶⁴⁴ Jurviste, U., Members' Research Service, & Shreeves, R. (2018). The Istanbul Convention: A tool to tackle violence against women and girls. *Think Tank | European Parliament*, p. 2. Available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630297/EPRS_ATA\(2018\)630297_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630297/EPRS_ATA(2018)630297_EN.pdf).

⁶⁴⁵ Ibidem.

⁶⁴⁶ Ibidem.

⁶⁴⁷ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 68(13).

⁶⁴⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 180.

⁶⁴⁹ McQuigg, R.J.A. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, cit., p. 954.

⁶⁵⁰ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

reports aim to assess the national legislative and other measures adopted by States Parties to implement the provisions of the Convention.⁶⁵¹ As of December 2023, more than thirty baseline evaluation reports have been published by the GREVIO so far, with the exception of Ukraine because the publication and assessment were postponed following the invasion of the country by Russia in 2022.⁶⁵² Article 68(3) specifies that States Parties must periodically submit subsequent reports on specific provisions selected by the GREVIO.⁶⁵³ At the end of the evaluation process, the GREVIO adopts its report and conclusions on the measures implemented by each State Party,⁶⁵⁴ including proposals concerning the modality to address the difficulties that are identified.⁶⁵⁵ It is important to remark on three aspects of the country-to-country monitoring procedure of the GREVIO. Firstly, the reporting mechanism is more detailed compared to other human rights treaties, as the Convention provides specific information concerning the steps that States Parties must take during the reporting procedure.⁶⁵⁶ For example, besides providing all the information requested by the GREVIO, States Parties must respond to questionnaires regarding specific provisions selected by the monitoring body in each evaluation round following the initial reports' submissions.⁶⁵⁷

Secondly, under article 68(5) the GREVIO can receive information and reports on the implementation of the provisions of the Istanbul Convention from non-governmental organisations (NGOs), civil society, and national institutions protecting human rights.⁶⁵⁸ This type of information is commonly known as 'shadow reports' and it has helped to provide insights into legislative and other measures adopted by a State Party in relation to the provisions of the Convention.⁶⁵⁹ For example, four shadow reports from national NGOs were received by the GREVIO during the evaluation procedure of Croatia.⁶⁶⁰ These reports provided comprehensive information on Croatian legislative measures and their practical

⁶⁵¹ Explanatory Report to the Council of Europe Convention, cit., para. 350.

⁶⁵² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, pp. 81-82.

⁶⁵³ Explanatory Report to the Council of Europe Convention, cit., para. 351.

⁶⁵⁴ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 68(11).

⁶⁵⁵ McQuigg, R. (2012). A Contextual Analysis of the Council of Europe's Convention on Preventing and Combating Violence Against Women. *International Human Rights Law Review*, 1(2), p. 378. Available at <https://doi.org/10.1163/22131035-00102007>.

⁶⁵⁶ Ibidem.

⁶⁵⁷ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 68, para. 3, 4.

⁶⁵⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 180.

⁶⁵⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, p. 71.

⁶⁶⁰ Ibidem.

implementation in the national legal system.⁶⁶¹ Thus, NGOs are deemed essential to the monitoring process, as they co-operate with the GREVIO during the reporting period, but they also contribute to making progress in the area of violence against women, by ‘shaping political and public awareness.’⁶⁶²

Thirdly, the GREVIO makes use of different verbs to determine different levels of urgency in its reports, i.e. ‘urges,’ ‘strongly encourages,’ ‘encourages,’ and ‘invites.’⁶⁶³ For instance, the verb ‘urges’ calls for immediate action in the States Parties’ legislation or policy in order to comply with or implement the Convention.⁶⁶⁴ Whereas, ‘strongly encourages’ is used when States Parties must remedy weaknesses in national systems that need to be addressed in the near future, as they prevent the full implementation of the Convention.⁶⁶⁵

Furthermore, the GREVIO may subsidiarily decide to organise country visits with the assistance of national authorities and experts.⁶⁶⁶ However, this particular monitoring aspect should be applied when necessary.⁶⁶⁷ In other words, country visits are conducted in case the information gathered is insufficient, or if it exists reliable information on a potentially problematic situation in a State Party that requires an immediate response in order to avoid or limit violations of the provisions of the Convention,⁶⁶⁸ i.e. in the case of urgency provided for in Article 68(14).⁶⁶⁹

Under Article 69, lastly, the group of experts may adopt, when necessary, general recommendations concerning the implementation of the Convention.⁶⁷⁰ However, it is important to note that these recommendations are not ‘country-specific’ and, most importantly, they are not of a binding nature, thus they do not have binding effects on States Parties.⁶⁷¹ This notwithstanding, general recommendations must be taken into consideration

⁶⁶¹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, p. 71.

⁶⁶² Ibidem.

⁶⁶³ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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)*, Ireland, p. 4.

⁶⁶⁴ Ibidem.

⁶⁶⁵ Ibidem.

⁶⁶⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 68(9).

⁶⁶⁷ Explanatory Report to the Council of Europe Convention, cit., para. 355.

⁶⁶⁸ Ibidem.

⁶⁶⁹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 180.

⁶⁷⁰ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁶⁷¹ Explanatory Report to the Council of Europe Convention, cit., para. 359.

by States Parties, as they offer guidance for the implementation of the Convention.⁶⁷² Moreover, they should be included in the future monitoring rounds of States Parties by the GREVIO.⁶⁷³

In general, the GREVIO monitoring activity produces non-binding acts and recommendations.⁶⁷⁴ The non-binding nature of the GREVIO's baseline reports can, therefore, challenge the full implementation of the Istanbul Convention by States Parties, as they have no obligations to respect the conclusions made in these acts. However, it must be noted that treaty bodies have generally demonstrated to be effective in ensuring compliance with mandatory obligations under each convention, despite producing non-binding acts.⁶⁷⁵ In this sense, treaty bodies have the ability to encourage States Parties to fulfil their commitments.⁶⁷⁶

In conclusion, despite the non-binding nature of the GREVIO's baseline reports, it is possible to say that the effectiveness of the Istanbul Convention depends on the establishment of this monitoring mechanism, whose aim is to assess the implementation of legislative and other measures by States Parties, as well as, their compliance with the treaty provisions.⁶⁷⁷ The GREVIO has, indeed, established itself as an authoritative voice in the field of preventing and combating violence against women.⁶⁷⁸ As a matter of fact, the reports of the GREVIO provide States Parties with clear and individual, namely state-by-state, guidance on where to focus their efforts to improve the implementation and compliance of national legal systems with the Convention.⁶⁷⁹ It is also worth noticing that the GREVIO has the possibility to concentrate on specific aspects of States' compliance with the provisions of the Convention, compared to other treaty bodies.⁶⁸⁰ Thus, the group of experts can examine these areas in depth and provide efficient conclusions in each individual report.⁶⁸¹ Furthermore, the

⁶⁷² Explanatory Report to the Council of Europe Convention, cit., para. 359.

⁶⁷³ Ibidem.

⁶⁷⁴ De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence, cit., p. 85.

⁶⁷⁵ Ibidem.

⁶⁷⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 181.

⁶⁷⁷ De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence, cit., p. 84.

⁶⁷⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 13.

⁶⁷⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 13.

⁶⁸⁰ McQuigg, R.J.A. (2012). What potential does the Council of Europe Convention on Violence against Women hold as regards domestic violence?, cit., p. 955.

⁶⁸¹ Ibidem.

GREVIO identifies ‘promising practices that can serve as inspiration for any government seeking to ensure’ the protection of women’s rights, thus individual reports have a guiding aim both for the specific State Party, as well as, for all the Parties to the Convention.⁶⁸²

Having briefly introduced the main monitoring mechanism and its reporting procedures, as well as its relevance, the next chapters will delve into the analysis of the compliance of national legal systems with the provisions of Articles 36 and 39 of the Convention.

2. *The Analysis of the Compliance of Article 36 on Sexual Violence in GREVIO’s Baseline Evaluation Reports*

In the definition provided by the Istanbul Convention, the concept of consent is the fundamental legal element to criminalise sexual violence, including rape.⁶⁸³ As mentioned in the previous chapter, sexual violence is regulated by Article 36 of the Istanbul Convention, which defines crimes on the basis of the lack of consent.⁶⁸⁴ Indeed, consent must ‘be given voluntarily as a result of the person’s free will’ in order for an act not to be considered a sexual violence offence.⁶⁸⁵ Under Article 36, therefore, States Parties have positive obligations to criminalise all forms of non-consensual acts of sexual nature, including rape,⁶⁸⁶ meaning that they must adopt legislative and other measures to implement the provisions contained in this article.⁶⁸⁷

The monitoring of the implementation and compliance of States Parties with the provisions included in Article 36 of the Istanbul Convention is entrusted to the independent group of experts, GREVIO, under Article 66. Over the years since its establishment, the GREVIO has published several baseline reports with the aim of providing comprehensive guidance to improve provisions’ compliance in States Parties.⁶⁸⁸ By doing so, the GREVIO has not only ensured the fulfilment of mandatory obligations by States Parties, but it has also enabled the improvement of the implementation of the provisions of the Convention.

⁶⁸² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 13.

⁶⁸³ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO’s activities*, p. 27.

⁶⁸⁴ Ibidem.

⁶⁸⁵ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).

⁶⁸⁶ Explanatory Report to the Council of Europe Convention, cit., para. 190.

⁶⁸⁷ Ivi, para. 194.

⁶⁸⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 13.

Since 2017, the group has published 35 reports.⁶⁸⁹ Although most States Parties are found to have sufficiently implemented the provisions included in Article 36, some still have substantial shortcomings in this respect, particularly with regard to the inclusion of the concept of consent in national criminal codes. The GREVIO identified four different approaches in criminalising sexual violence, including rape, in the national legal frameworks of States Parties.⁶⁹⁰ The definition of sexual violence based on the use of force and other violent behaviours is considered one of the most traditional and implemented criminal law approaches. As a matter of fact, in the 4th General Report on GREVIO's Activities, the GREVIO recognises that several states have encompassed in their legal framework the definition of sexual violence, particularly rape, based on the lack of consent, as required under Article 36.⁶⁹¹ However, a consistent number of national legal definitions of sexual violence still require the use of violence, coercion, threats, and so forth as a constitutive element of the offence.⁶⁹²

In particular, Albania, Andorra, Bosnia and Herzegovina, Estonia, France, Georgia, Italy, the Netherlands, Norway, Poland, Romania, San Marino, Serbia, and Switzerland still have force-based legal systems to criminalise sexual violence.⁶⁹³ In other words, 'the use of violence, coercion, compulsion, threat, intimidation or a state or situation of the victim which makes them incapable of resisting' is the constituent element of this offence in these national legal frameworks.⁶⁹⁴ In the Baseline Report of Albania, for instance, the GREVIO recognises that requiring resistance in the force-based definition of sexual violence, including rape, does not protect women's rights, especially sexual autonomy.⁶⁹⁵ During prosecutions, indeed, a context-sensitive assessment of the evidence must be adopted in order to determine whether the victim has freely given her consent or not.⁶⁹⁶ Moreover, prosecutions must take into

⁶⁸⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, pp. 81-82.

⁶⁹⁰ Ivi, p. 31.

⁶⁹¹ Ivi, p. 29.

⁶⁹² Ivi, p. 31; Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 108.

⁶⁹³ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, p. 31.

⁶⁹⁴ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 108.

⁶⁹⁵ 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), Albania*, p. 47.

⁶⁹⁶ Ibidem.

consideration different behavioural responses to sexual violence and rape,⁶⁹⁷ as victims do not always physically resist the perpetrator.⁶⁹⁸ Thus, the judicial analysis should not be based on assumptions or stereotypical beliefs about women's sexuality and women's behaviour in these situations.⁶⁹⁹ The crime of sexual violence, including rape, is encompassed in Section VI of the Criminal Code of the Republic of Albania (hereafter CCA), but the requirement established under Article 36 of the Istanbul Convention, i.e. lack of consent, is not present as a constituent element in the national legal definition of the crime.⁷⁰⁰ As a matter of fact, Article 102 of the CCA states that engaging 'in sexual activity by use of force with adult females or between spouses or cohabitants, without the consent of either of them, shall be punishable.'⁷⁰¹ Hence, lack of consent is recognised by the CCA as a constituent element of the crime only between spouses or couples, but not when the Article is applied to other cases of sexual violence.⁷⁰² Article 104 of the CCA regulates sexual assault, but as for Article 102, the definition lacks the concept of consent as the key element of the crime.⁷⁰³ Indeed, this article criminalises conducts of sexual nature that are obtained through intimidation with the use of weapons,⁷⁰⁴ but no reference is specifically made to the lack of consent. With this regard, the GREVIO urges the Albanian authorities to include a definition of sexual violence, including rape, based on lack of freely given consent and overcome the requirement of resistance of the victim.⁷⁰⁵ As aforementioned, the GREVIO uses specific verbs depending on the urgency of the situation.⁷⁰⁶ With regard to the case of Albania, the group of experts is calling for immediate action in the national legislation to comply with Article 36 of the

⁶⁹⁷ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO's (Baseline) Evaluation Report, Albania*, p. 47.

⁶⁹⁸ International Commission of Jurists. (2015). *Sexual Violence Against Women*, cit., p. 22.

⁶⁹⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO's (Baseline) Evaluation Report, Albania*, p. 47.

⁷⁰⁰ Ibidem.

⁷⁰¹ Criminal Code of the Republic of Albania. Section VI, Sexual Crimes, Article 102.

⁷⁰² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO's (Baseline) Evaluation Report, Albania*, p. 47.

⁷⁰³ Criminal Code of the Republic of Albania. Section VI, Sexual Crimes, Article 104.

⁷⁰⁴ Ibidem.

⁷⁰⁵ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO's (Baseline) Evaluation Report, Albania*, p. 47.

⁷⁰⁶ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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)*, Ireland, p. 4.

Istanbul Convention,⁷⁰⁷ so as to ‘ensure that certain types of sexual violence do not go unpunished.’⁷⁰⁸

The requirement for the use of force in sexual violence is present also in the Criminal Code of Finland. Chapter 20 on sexual offences was reformed in 1998 with the adoption of the Finnish Sexual Offences Act, which defines the crime of rape under different degrees of physical violence and coercion.⁷⁰⁹ In Sections 1 and 2, rape is criminalised on the basis of force.⁷¹⁰ In particular, Section 1(1) defines rape as ‘sexual intercourse by the use or threat of violence,’⁷¹¹ while paragraph 2 refers to certain conditions that aggravate the sexual act, namely ‘unconsciousness, illness, disability, state of fear or other state of helplessness’ and it also includes the inability of a person to ‘defend [...] herself or to formulate or express [...] her will.’⁷¹² Once again, the legal approach adopted by the Finnish authorities does not comply with the requirement of lack of consent as included in Article 36 of the Istanbul Convention.⁷¹³ Firstly, in the Criminal Code of Finland rape is defined in relation to different ‘degrees of physical violence used or threatened by the perpetrator.’⁷¹⁴ Secondly, this approach requires victims to demonstrate proof of their resistance, as the definition of rape is based on violence, coercion, or use or threat of use of force.⁷¹⁵ The GREVIO recognises that a woman’s ability to consent to acts of sexual nature depends on different factors, not exclusively on force or violence.⁷¹⁶ For this reason, the Finnish authorities are encouraged to word the Sections concerning sexual offences on the basis of freely given consent, taking into

⁷⁰⁷ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO’s (Baseline) Evaluation Report, Albania*, p. 47; Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *GREVIO’s (Baseline) Evaluation Report, Ireland*, p. 4.

⁷⁰⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO’s activities*, p. 28.

⁷⁰⁹ Amnesty International. (2010). Rape and Human Rights in Finland. In *Case Closed*, London : Amnesty International Publications, pp. 90-91. Retrieved March 3, 2023, from <https://www.amnesty.org/en/documents/act77/001/2010/en/>.

⁷¹⁰ 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*, p. 43.

⁷¹¹ Criminal Code of Finland, Chapter 20, Sex offences, Section 1, Rape, 563/1998.

⁷¹² Ivi, Section 2, Rape, 495/2011.

⁷¹³ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2019) *GREVIO’s (Baseline) Evaluation Report, Finland*, p. 44.

⁷¹⁴ Ibidem.

⁷¹⁵ European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European states*, cit., p. 78.

⁷¹⁶ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2019) *GREVIO’s (Baseline) Evaluation Report, Finland*, p. 44.

consideration a wide range of possible invalidating elements to women's consent other than force or coercion.⁷¹⁷

Similar shortcomings regarding compliance with Article 36 were identified in the Norwegian Criminal Code.⁷¹⁸ The GREVIO noted, indeed, that a force-based model is applied to the criminalisation of sexual violence in both legal systems, the Finnish and Norwegian one (exception made for Section 297 of the Criminal Code of Norway on 'Sexual act performed without consent').⁷¹⁹ Chapter 26 of the Norwegian Criminal Code covers sexual offences and a general definition of the crime of sexual assault is included in Section 291, which regulates cases of sexual activity obtained through violence or threatening conduct, or in cases of unconsciousness or helplessness state.⁷²⁰ According to the GREVIO, this approach leads to the demand for higher levels of evidence of physical resistance of the victim, thus a 'shifting of the focus onto the victim's behaviour rather than on the accused's actions.'⁷²¹ In other words, these legal models do not capture the definition of sexual violence that is set out in Article 36 of the Istanbul Convention, as well as, the realities of women's experiences in situations of sexual violence.⁷²²

It is worth noticing that in some States Parties—for instance, Italy, Finland, France, Norway, and Poland—national legal systems refer to a 'state of helplessness' as either aggravating or invalidating factor of consent for acts of sexual nature.⁷²³ This helpless state is considered as encompassing different cases in which the victim cannot freely give her consent because she is either unconscious, in an altered state due to the abuse of alcohol or other substances, or because she suffers from some kind of mental or physical disability.⁷²⁴ In Poland, for example, Article 198 of the Criminal Code regulates offences against sexual liberty on the basis of the vulnerability of the victim due to her inability to recognise the

⁷¹⁷ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2019) *GREVIO's (Baseline) Evaluation Report, Finland*, p. 44.

⁷¹⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *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), Norway*, p. 53.

⁷¹⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *GREVIO's (Baseline) Evaluation Report, Norway*, p. 53..

⁷²⁰ Section 291. Sexual assault. The Penal Code of Norway.

⁷²¹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *GREVIO's (Baseline) Evaluation Report, Norway*, p. 53.

⁷²² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 108.

⁷²³ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, p. 32.

⁷²⁴ Ibidem.

significance of the act in question.⁷²⁵ The GREVIO noted, however, that the provisions provided under Chapter XXV of the Polish Criminal Code are not exclusively based on the concept of consent.⁷²⁶ In particular, Article 198 refers to the victim's helplessness, but such legal formulation can prevent the criminalisation of all forms of sexual violence in Poland.⁷²⁷ For this reason, the GREVIO urges Poland to amend the Criminal Code so as to introduce a consent-based definition of sexual violence in compliance with Article 36 of the Convention.⁷²⁸

In some cases, States Parties do not entirely base the definition of sexual violence on force, but neither on consent. The GREVIO has, indeed, noted that certain national legal systems adopt a two-tiered approach, meaning that the criminal code possesses both a forced-based and a consent-based provision on sexual violence.⁷²⁹ In Greek law, for instance, sexual crimes are regulated by different provisions that provide two definitions.⁷³⁰ Article 336(1) of the Criminal Code of Greece covers the crime of rape when committed by 'physical violence or by threat of serious and imminent danger to life or physical integrity,' whereas Article 336(4) criminalises 'sexual intercourse without the consent of the victim.'⁷³¹ Although the concept of freely given consent is present as the constituent element in the crime of sexual violence, in particular rape, the GREVIO notes that its application in criminal law is still challenging and inconsistent.⁷³² As a consequence, the number of convictions for rape is low, for which the GREVIO encourages the Greek authorities to remove all barriers to the effectiveness of the definition of rape as provided by Article 36 of the Istanbul Convention⁷³³ so that the concept of consent is the sole element of the offence.

⁷²⁵ The Criminal Code of Poland, Rozdział XXV, Offences against Sexual Liberty and Decency, Article 198.

⁷²⁶ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2021). *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), Poland*, p. 62.

⁷²⁷ Ibidem.

⁷²⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2021). *GREVIO's (Baseline) Evaluation Report, Poland*, p. 62.

⁷²⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, p. 30.

⁷³⁰ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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), Greece*, p. 51.

⁷³¹ The Penal Code of Greece, law 4619/2019, Article 336.

⁷³² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *GREVIO's (Baseline) Evaluation Report, Greece*, p. 51.

⁷³³ Ivi, p. 52.

In conclusion, the GREVIO's monitoring activity has highlighted several shortcomings that States Parties have with concern to the inclusion of the concept of consent in relation to sexual violence—as provided by Article 36 of the Istanbul Convention—in their national criminal codes. The group of experts observes that several national legal systems favour a force-based approach rather than a consent-based one. As a consequence, the GREVIO has emphasised in several baseline reports the need 'to ensure that the legal definitions of sexual offences fully capture' the key element set out in Article 36 of the Istanbul Convention, namely freely given consent.⁷³⁴ Furthermore, national authorities must recognise different possible scenarios of violence, as well as women's reactions in such situations, and include all forms of sexual violence in the definition of the crime.⁷³⁵ These changes in national legal systems will guarantee compliance with the provisions set out in Article 36 of the Istanbul Convention by States Parties and, most importantly, ensure the punishment of all types of sexual violence.⁷³⁶

In the following paragraphs, the compliance of States Parties with Article 39 of the Istanbul Convention is examined through the analysis of GREVIO's baseline reports in order to demonstrate the shortcomings of national systems with regard to the criminalisation of forced abortion and forced sterilisation.

3. The Analysis of the Compliance of Article 39 on Forced Abortion and Forced Sterilisation in GREVIO's Baseline Evaluation Reports

Article 39 of the Istanbul Convention protects and ensures the respect of women's sexual autonomy, in particular in relation to women's right to health and reproductive health. Indeed, this article provides for the respect of women's dignity, and physical and mental integrity criminalising the practices of forced abortion and forced sterilisation, thus giving women the 'opportunity to make autonomous reproductive choices.'⁷³⁷ Article 39, paragraph 1, regulates the crime of forced abortion and defines it as the intentional termination of pregnancy of a woman or girl without her prior and informed consent.⁷³⁸ Paragraph 2, instead, provides the

⁷³⁴ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, para. 365.

⁷³⁵ Ibidem.

⁷³⁶ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, p. 28.

⁷³⁷ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization*, cit., p. 9.

⁷³⁸ Explanatory Report to the Council of Europe Convention, cit., para. 204.

definition of the forced sterilisation offence and requires States Parties to criminalise the performance of a surgery on a woman or girl that has the purpose or effect of terminating permanently a woman's capacity to reproduce.⁷³⁹ Under Article 39, States Parties have thus positive obligations to criminalise non-consensual acts that might result in the termination of a person's pregnancy or in permanent negative consequences for a woman's reproductive system.⁷⁴⁰

During the monitoring activity, the GREVIO notes that all the reviewed States Parties to the Convention have adequately criminalised forced abortion in their national legal systems.⁷⁴¹ However, in the Albanian Baseline Report the GREVIO notes that, although forced abortion is criminalised under Article 93 of the CCA, available information demonstrates that women may be pressured to undergo sex-selective abortions.⁷⁴² This practice is deeply discriminatory for women and, unfortunately, it has been documented in several European countries other than Albania.⁷⁴³ The imbalance in the sex ratio at birth is indeed considered an evidence of sex selective abortions of female foetus in these states.⁷⁴⁴ This practice is not specifically criminalised by the Convention, as highlighted by the GREVIO.⁷⁴⁵ Nonetheless, selective abortion clearly places pressure on women 'not to pursue their pregnancy because of the sex of the embryo/foetus,' thus it can also be considered as a form of psychological violence, which is regulated by Article 33 of the Convention.⁷⁴⁶ For this reason, the GREVIO invites Albanian authorities to raise awareness on the practice in order to detect and prevent it.⁷⁴⁷

On the other side, the GREVIO has highlighted several shortcomings with regard to the criminalisation of forced sterilisation based on the lack of prior and informed consent of the victim.⁷⁴⁸ In some States Parties, forced sterilisation can be prosecuted under other criminal

⁷³⁹ Explanatory Report to the Council of Europe Convention, cit., para. 205.

⁷⁴⁰ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 113.

⁷⁴¹ Ibidem.

⁷⁴² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO's (Baseline) Evaluation Report, Albania*, p. 50.

⁷⁴³ Muižnieks, N. (2014). Sex-selective abortions are discriminatory and should be banned. *The Commissioner's Human Rights Comment*, Council of Europe, Strasbourg, p. 1. Retrieved Jul 05, 2023, from <https://www.coe.int/en/web/commissioner/-/sex-selective-abortions-are-discriminatory-and-should-be-bann-1>.

⁷⁴⁴ Ibidem.

⁷⁴⁵ Ibidem.

⁷⁴⁶ Muižnieks, N. (2014). Sex-selective abortions are discriminatory and should be banned, cit., p. 1.

⁷⁴⁷ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2017). *GREVIO's (Baseline) Evaluation Report, Albania*, p. 50.

⁷⁴⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 113.

offences, usually less specific and more general, such as aggravated personal injury, bodily harm or bodily assault.⁷⁴⁹ This decision can have two main consequences. Firstly, the lack of a specific provision on forced sterilisation, as in the case of Italy, makes it difficult for the GREVIO to assess the extent to which this national provision can be applied in combating forms of violence against women, as required by Article 39 of the Convention.⁷⁵⁰ Indeed, in the Criminal Code of Italy, forced sterilisation is included in Article 583 as ‘aggravated personal injury’ that results in the loss of capacity to procreate.⁷⁵¹ Moreover, the key element of the definition of forced sterilisation, i.e. prior and informed consent, is not encompassed in the text of the article. A similar approach is observed in the Greek legal system, where the GREVIO notes that forced sterilisation is not explicitly criminalised but it is encompassed in the more generic crimes of serious bodily harm.⁷⁵²

Secondly, some States Parties do not provide a clear or complete definition of consent as required under Article 39 of the Istanbul Convention, i.e. including the ‘informational’ dimension, notably Belgium, Bosnia and Herzegovina, France, Serbia, and Spain.⁷⁵³ As for Serbia, for instance, an incomplete, unclear, or generic definition of the crime of forced sterilisation has as effect a low level of convictions due to the interpretation given by judicial authorities to the term ‘consent.’⁷⁵⁴ Indeed, forced sterilisation is encompassed under Article 12(1) of the Criminal Code of Serbia, that covers criminal offences of bodily harm in general.⁷⁵⁵ In addition, the GREVIO observes that women with disabilities are more likely to undergo the practice of forced sterilisation on the assumption that they are unable to make autonomous decisions that concern their best interests, thus such choices are left to legal

⁷⁴⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, p. 113.

⁷⁵⁰ 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), Italy*, p. 64.

⁷⁵¹ 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 583.

⁷⁵² Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *GREVIO’s (Baseline) Evaluation Report, Greece*, p. 54.

⁷⁵³ Alaattinoğlu, D. (2023). Article 39: Forced abortion and forced sterilisation. In *Preventing and Combating Violence Against Women and Domestic Violence*. Cheltenham, UK: Edward Elgar Publishing, p. 478. Retrieved Jan 2, 2024, from <https://doi.org/10.4337/9781839107757.ch45>.

⁷⁵⁴ 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), Serbia*, p. 46.

⁷⁵⁵ Ivi, p. 47.

guardians.⁷⁵⁶ For this reason, the GREVIO urges the authorities to ensure that women's free and informed consent is respected by legal guardians and health professionals when deciding whether to undergo abortion and sterilisation.⁷⁵⁷

Another example in this regard is Bosnia and Herzegovina. The Criminal Codes of the Federation of Bosnia and Herzegovina and Brčko District dedicates a specific article to the criminalisation of forced sterilisation. Nonetheless, the definition provided by Article 134 of its Criminal Code criminalises surgeries performed on ‘another person for the purpose of preventing natural reproduction without the consent of that person.’⁷⁵⁸ Thus, the concept of consent is not clarified under the national legal system, as it does not encompass the informational dimension concerning the procedure and following permanent consequences of sterilisation.⁷⁵⁹ This information is considered fundamental to allow women to make an informed choice.⁷⁶⁰ Once again, the GREVIO also notes that women with disabilities are more affected and their right to decide is not respected, as they are assumed to be incapable of making autonomous decisions about themselves.⁷⁶¹ The group of experts thus encourages national authorities to include in the national criminal code the criminalisation of forced abortion based on the lack of prior and informed consent as required by Article 39 of the Convention.⁷⁶²

In other national legal systems, instead, forced sterilisation is explicitly included ‘in the context of crimes against humanity, war crimes, a large-scale attack or an armed conflict’⁷⁶³ and, if it does not fall under these criteria, it can be derived from other articles concerning the crimes of assault and battery that result in ‘the full loss of use of an organ.’⁷⁶⁴ As a result, although Luxembourg does not fully comply with the provisions contained in Article 39 of the Convention, the crime of forced sterilisation can be derived from general national provisions.

⁷⁵⁶ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2019) *GREVIO's (Baseline) Evaluation Report, Serbia*, p. 47.

⁷⁵⁷ Ibidem.

⁷⁵⁸ The Criminal Code of Republika Srpska, Special Part, Chapter XII, Crimes against Life and Limb, Article 134, para. 1.

⁷⁵⁹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *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), Bosnia and Herzegovina*, p. 68.

⁷⁶⁰ Ibidem.

⁷⁶¹ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *GREVIO's (Baseline) Evaluation Report, Bosnia and Herzegovina*, p. 68.

⁷⁶² Ibidem.

⁷⁶³ Code Pénal Luxembourgeois, Livre II, Titre Ibis., Article 136 ter.

⁷⁶⁴ Ivi, Titre VII, Chapitre Ier., Section II, Article 400.

However, this approach could be detrimental to women, in particular women with disabilities.⁷⁶⁵ The GREVIO observes the use of forced sterilisation as a common practice in some institutions in Luxembourg, for which victims are not adequately informed before the operation.⁷⁶⁶ An increased legal control over sterilisation procedures, especially in medical facilities, will ensure the protection of the principle of women's self-determination with regard to their reproductive system.⁷⁶⁷

It is worth noticing that in some of the States Parties monitored by the GREVIO, the group of experts was not able to assess the effectiveness of the law in practice because there was no data on forced sterilisation.⁷⁶⁸ It is possible to formulate two conclusions in this regard. On one side, GREVIO considers the possibility that such practices are poorly reported as an explanation for the lack of statistical information on forced sterilisation.⁷⁶⁹ As consequence, the group encourages authorities to collect further information on the number of cases concerning the offence.⁷⁷⁰ On the other side, as an author has observed, this demonstrates an evolution in the monitoring of the GREVIO from a 'law in the book' to a 'law in practice' analysis.⁷⁷¹ In other words, most recent baseline reports mark a change in the method of investigation adopted by the group of experts in assessing States Parties compliance with Article 39 of the Istanbul Convention.⁷⁷² The GREVIO does not just recognise the absence of available data, but it also elaborates possible reasons and meanings of this shortcoming.⁷⁷³

In conclusion, the GREVIO national reviews have highlighted possible shortcomings regarding the compliance of States Parties with the provisions contained in Article 39 of the Istanbul Convention. In particular, all national legal systems have criminalised forced abortion, although in some cases, i.e. Albania, national data show the possible use of sex-selective abortion as a practice to encourage the birth of males. With regard to forced sterilisation, instead, in several national legal systems the offence is not criminalised by a

⁷⁶⁵ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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), Luxembourg*, p. 41.

⁷⁶⁶ Ibidem.

⁷⁶⁷ Ivi, p. 42.

⁷⁶⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *GREVIO's (Baseline) Evaluation Report, Greece*, p. 54.

⁷⁶⁹ Ibidem.

⁷⁷⁰ Ibidem.

⁷⁷¹ Alaattinoğlu, D. (2023). Article 39: Forced abortion and forced sterilisation, cit., p. 478.

⁷⁷² Ibidem.

⁷⁷³ Ibidem.

specific article but is often derived from other provisions present in the national criminal codes, that, however, generally refer to aggravated personal injury, bodily harm, or bodily assault crimes. As for the inclusion of the concept of consent, national legal systems do not provide for it as the constituent element of the crime and where it is included, it is often unclear or incomplete, thus left to judicial interpretation, as it is missing its informational dimension. Informed consent is indeed of fundamental importance in order to ensure the protection of women's rights to decide on their reproductive systems,⁷⁷⁴ so by extension the safeguard of women's health and reproductive health.

In the final chapter, this dissertation will take into consideration one of the latest Parties to the Convention, the European Union. The analysis will delve into the legal basis adopted by the EU to accede the Convention and discuss the possible legal consequences regarding the implementation of the Convention's provisions, in particular Articles 36 and Article 39.

⁷⁷⁴ Explanatory Report to the Council of Europe Convention, cit., para. 206.

CHAPTER 5

The European Union Ratification of the Istanbul Convention: Legal Consequences for Gender-Based Crimes Against Women

1. The EU Accession to the Istanbul Convention and the Evolution of the Legal Path to Ratification

As has been widely discussed in the preceding chapters, the Council of Europe Istanbul Convention is one of the most comprehensive and advanced legal instruments in combating and criminalising violence against women and domestic violence at the international and regional levels.⁷⁷⁵ The dissertation has highlighted the relevance played by the concept of consent in defining certain crimes of violence against women, namely sexual violence and forced abortion and forced sterilisation, that are criminalised in Article 36 and Article 39, respectively. Furthermore, through the analysis of the GREVIO in its Baseline Evaluation Reports, it has also demonstrated that several States Parties to the Convention still have shortcomings regarding the implementation and compliance with the provisions included in Articles 36 and 39 of the Convention.

At the European level, the combat against violence against women is neither included in the European Treaties nor in the ECHR.⁷⁷⁶ In the 2007 Declaration No. 19 on Article 8 of the Treaty on the Functioning of the European Union, adopted during the final act of the Lisbon Conference, the European Union (EU) set as its aim the need to adopt policies to combat violence against women.⁷⁷⁷ Furthermore, the EU invited Member States to ‘take all necessary measures to prevent and punish these criminal acts and to support and protect the victims.’⁷⁷⁸ However, EU actions on violence against women have been fragmented between binding and non-binding legal instruments, resulting in a lack of unified responses to gender-based violence against women.⁷⁷⁹ As a matter of fact, the report by the European Agency for Human Rights confirmed that approximately 62 million women have ‘experienced physical and/or

⁷⁷⁵ Jurasz, O. (2015). *The Istanbul Convention*, cit., p. 1.

⁷⁷⁶ De Vido, S. (2017). *The Ratification of the Council of Europe Istanbul Convention by the EU*, cit., p. 79.

⁷⁷⁷ European Union. (2007). *Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. Official Journal of the European Union*, 2008/C 115/01. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:C2008/115/01>.

⁷⁷⁸ *Ibidem*.

⁷⁷⁹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 99.

sexual violence since the age of 15.⁷⁸⁰ The alarming fact is that the majority of cases of violence against women are not reported, so they are not included in these statistical analyses,⁷⁸¹ even today. In this context, therefore, the recent accession to the Istanbul Convention by the European Union may finally lead to more coordinated actions in the protection of women from violence.⁷⁸² In particular, regarding the crime of sexual violence and forced sterilisation, the accession to the Convention of the European Union may ensure higher protection for women, as these crimes are still poorly or insufficiently criminalised in several EU Member States. However, this final chapter will also emphasise some limits to a possible European legal harmonisation in the field of violence against women.

The Istanbul Convention is open to non-member States of the Council of Europe, under Article 76 thereof, and to international organisations.⁷⁸³ The accession of the European Union is however specifically regulated by Article 75 of the Convention, which states that the regional legal instrument ‘is open for signature not only by Council of Europe member states but also the European Union.’⁷⁸⁴ Article 75 provides therefore the legal basis for the accession of the European Union to the Istanbul Convention.⁷⁸⁵

Shifting to the EU legal system, Article 47 of the Treaty of the European Union (hereafter TEU) confers to the EU legal personality,⁷⁸⁶ thus ‘making it an independent entity in its own right.’⁷⁸⁷ In other words, this means that the European Union has the ability to conclude, negotiate, and sign international agreements or treaties.⁷⁸⁸ More specifically, under Article 216(1) of the Treaty on the Functioning of the European Union (hereafter TFEU) the European Union may:

‘[...] conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a

⁷⁸⁰ De Vido, S. (2017). The Ratification of the Council of Europe Istanbul Convention by the EU, cit., p. 71.

⁷⁸¹ Ibidem.

⁷⁸² De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 99.

⁷⁸³ Jurasz, O. (2015). The Istanbul Convention, cit., p. 1.

⁷⁸⁴ Explanatory Report to the Council of Europe Convention, cit., para. 373.

⁷⁸⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 194.

⁷⁸⁶ Consolidated version of the Treaty on European Union. Official Journal of the European Union, C 202/1, Article 47.

⁷⁸⁷ Publications Office of the European Union. (2023). Legal personality of the EU. Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:union_legal_personality.

⁷⁸⁸ Ibidem.

*legally binding Union act or is likely to affect common rules or alter their scope.*⁷⁸⁹

Therefore, pursuant to Article 216(1) TFEU, the EU has the ability to conclude international agreements with other countries or international organisations.⁷⁹⁰ However, it may do so provided that the conclusion of such agreement is necessary to attain one of the objectives enshrined in the Treaties and on condition that it falls within the framework of the policies of the Union.⁷⁹¹

Thus, on the basis of the requirements laid down in Article 216(1), the European Union might have competence in the field of violence against women,⁷⁹² as ‘equality between women and men’ is one of the values and objectives enshrined in the Founding Treaties of the Union.⁷⁹³ In fact, violence is a form of discrimination based on gender, and gender equality, as well as the fight against discrimination, are objectives present in the Treaties.⁷⁹⁴ Specifically, Article 8 TFEU provides the elimination of inequalities and the promotion of equality between men and women.⁷⁹⁵ Article 19 TFEU, on the other hand, states that the Council of the European Union (hereafter the Council) ‘may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’⁷⁹⁶ The provision does not introduce a general rule of equality or specific prohibitions of discrimination based on gender, but it aims to promote concrete equality between men and women.⁷⁹⁷

In 2016, in its proposal for a Council Decision, the European Commission (hereafter the Commission) reiterated that gender equality is one of the objectives of the Union and it determined the areas of the Istanbul Convention where the Union had competence.⁷⁹⁸ The

⁷⁸⁹ Consolidated version of the Treaty on the Functioning of the European Union. Official Journal of the European Union C 202/1, Article 216(1).

⁷⁹⁰ De Vido, S. (2017). The Ratification of the Council of Europe Istanbul Convention by the EU, cit., p. 83.

⁷⁹¹ Ibidem.

⁷⁹² De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 194.

⁷⁹³ De Vido, S. (2017). The Ratification of the Council of Europe Istanbul Convention by the EU, cit., pp. 79-80. In particular, the values of the EU are enshrined in Article 2 TEU, while its objectives are included in Article 3 TEU which states that the EU ‘shall promote [...] equality between women and men’ (para. 3). Moreover, equality between men and women is envisioned in Article 8 and Article 19 TFEU, which regulates the possibility to ‘take appropriate action to combat discrimination based on sex.’ Consolidated version of the Treaty on European Union. Official Journal C 326, Articles 2, 3. And, Consolidated version of the Treaty on the Functioning of the European Union. Official Journal C 202/1, Articles 8, 19.

⁷⁹⁴ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 194.

⁷⁹⁵ De Vido, S. (2017). La Violenza di Genere Contro le Donne nel Contesto della Famiglia: Sviluppi nell’Unione Europea alla Luce della Convenzione di Istanbul. *Federalismi.it*, 3, p. 7.

⁷⁹⁶ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 19(1).

⁷⁹⁷ De Vido, S. (2017). La Violenza di Genere Contro le Donne nel Contesto della Famiglia, cit., p. 8.

⁷⁹⁸ Ibidem.

Commission identified only two legal bases for signing the Convention: Article 82(2) and Article 84 TFEU.⁷⁹⁹ It is important to note that this proposal was preceded by the issuing of a ‘roadmap’ for the EU accession process by the Commission in 2015.⁸⁰⁰ The aim was to create a coherent legal framework on violence against women and, to this end, to strengthen the legal systems of the Member States in tackling this issue before the signature.⁸⁰¹

In 2017, the Convention was eventually signed by the Council with two separate Decisions.⁸⁰² The Council Decision 2017/865 regarded matters that were related to ‘judicial cooperation in criminal matters;’⁸⁰³ whereas the Council Decision 2017/866 concerned asylum and *non-refoulement*.⁸⁰⁴ Regarding the first, the Council of the European Union identified Articles 82(2) and 83(1), in conjunction with Article 218(5) TFEU, as the legal basis for authorising the signing of the Convention.⁸⁰⁵ Indeed, Article 82(2) establishes the competences of the European Union to determine minimum rules to ‘facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension,’ by means of directives adopted in accordance with the ordinary legislative procedure.⁸⁰⁶ Whereas, Article 83(1) determines the European competences to establish minimum rules concerning the definition of criminal offences and sanctions—in this case, in the area of combating violence against women—regarding crimes having a cross-border dimension.⁸⁰⁷ As for Article 82(2), Article 83(1) provides for the adoption of directives in accordance with the ordinary legislative procedure.⁸⁰⁸

With regard to the second Council Decision, the legal basis was identified in Article 78(2), as well as, Article 218(5) TFEU. Article 78(2) sets out the adoption of measures for a

⁷⁹⁹ De Vido, S. (2017). *La Violenza di Genere Contro le Donne nel Contesto della Famiglia*, cit., p. 8.

⁸⁰⁰ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2020). *1st general report on GREVIO's activities*, p. 59.

⁸⁰¹ *Ibidem*.

⁸⁰² De Vido, S. (2017). *La Violenza di Genere Contro le Donne nel Contesto della Famiglia*, cit., pp. 2-3, 10.

⁸⁰³ Council Decision (EU) 2017/865. (2017). *Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters*. Official Journal of the European Union L 131/11, Retrieved May 19, 2023, from <http://data.europa.eu/eli/dec/2017/865/oj>.

⁸⁰⁴ Council Decision (EU) 2017/866. *Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement*. Official Journal of the European Union L 131/13. Retrieved May 19, 2023, from <http://data.europa.eu/eli/dec/2017/866/oj>.

⁸⁰⁵ Council Decision (EU) 2017/865. OJ L 131/11.

⁸⁰⁶ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 82(2).

⁸⁰⁷ *Ivi*, Article 83(1).

⁸⁰⁸ *Ibidem*.

common European asylum system that includes procedures for the granting and withdrawing, as well as determining the requirements for a uniform status of asylum, subsidiary protection, and temporary protection for third-country nationals that apply for international protection.⁸⁰⁹ Whereas, Article 218(5), which is present as a legal basis in both Council Decisions, states that the ‘Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.’⁸¹⁰

Hence, contrary to the proposal of the Commission, the Council Decisions did not take into account Article 84 TFEU as a legal basis for the signing of the Convention as well as other potential articles that were acknowledged in the proposal, such as Article 79 TFEU regarding immigration or Article 157 TFEU on the equal treatment for male and female workers.⁸¹¹ Particularly significant is the non-inclusion in the Council Decisions of Article 19 TFEU on non-discrimination.⁸¹² This can be indeed considered as a failure to recognise violence against women as a form of discrimination based on gender by the EU.⁸¹³

Another article that has not been included in either the Commission’s proposal or the Council Decisions is Article 168 TFEU.⁸¹⁴ Under this article, the EU has competence, albeit flexible, in the public health field.⁸¹⁵ Indeed, one author argues that it is possible to consider violence against women a public health issue.⁸¹⁶ In this sense, the protection of women against violence not only concerns the fundamental rights of the individual, but also the pursuit of the public health objective that contributes to eradicating violence itself from society.⁸¹⁷ This particular aspect may be relevant in addressing the crime of forced sterilisation. As discussed (see Chapter 4, Section 3), in certain European countries, the autonomy of women—particularly, women with disabilities—is still violated in this regard, i.e. their prior, free and full informed consent is not expressed, respected, or asked when they

⁸⁰⁹ Wilderspin, M. (2019). Article 78 TFEU. In Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, online edn, Oxford Academic, pp. 828-835. Available at <https://doi.org/10.1093/oso/9780198759393.003.166>.

⁸¹⁰ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 83(1).

⁸¹¹ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 89.

⁸¹² De Vido, S. (2017). The Ratification of the Council of Europe Istanbul Convention by the EU, cit., pp. 69-102.

⁸¹³ Ibidem.

⁸¹⁴ De Vido, S. (2017). La Violenza di Genere Contro le Donne nel Contesto della Famiglia, cit., p. 13.

⁸¹⁵ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 195.

⁸¹⁶ Ibidem.

⁸¹⁷ Ibidem.

undergo a surgical procedure that aims to terminate a woman's reproductive capacity.⁸¹⁸ For this reason, the European Union may contribute to the promotion of best practices on sexual and reproductive health and rights among Member States.⁸¹⁹ Indeed, although the Member States enjoy a sovereign prerogative compared to the European Union in the field of health protection even in relation to gender-based violence, the latter may still have a certain margin for action in this area.⁸²⁰ The EU instruments will be non-binding in nature,⁸²¹ but they may push the agenda of the Member States towards higher protection for women's health and women's reproductive health rights.

It is necessary to mention that the European Union and the Member States must establish coordination agreements concerning the implementation and monitoring of the Convention, as the latter is a mixed agreement.⁸²² To clarify, the Istanbul Convention falls both under the European Union's and the Member States' competence.⁸²³ The EU competence in relation to the Convention was indeed recognised in the preambles of the Council Decisions, stating that both the European Union and the Member States 'have competence in the fields covered by the Istanbul Convention,'⁸²⁴ namely, they can intervene in these areas.⁸²⁵ More precisely, on one side, the Convention 'covers matters falling under EU supporting and shared competences.'⁸²⁶ The fields concerning supporting competences are regulated under Article 6 TFEU⁸²⁷ and they are limited to certain articles and chapters of the Convention.⁸²⁸ Whereas, on the other side, Article 4(2) TFEU, regulating shared competences, applies to most of the areas covered by the Convention, thus establishing that both the Member States and the EU may intervene in these fields.⁸²⁹

Following the signature of the Convention, the next step in the accession process would have been the ratification through the adoption of decisions by the Council, for which the European Parliament must give the consent. However, in 2019 the European Parliament

⁸¹⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *GREVIO's (Baseline) Evaluation Report, Bosnia and Herzegovina*, p. 68.

⁸¹⁹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 199.

⁸²⁰ Ivi, p. 198.

⁸²¹ Ivi, p. 199.

⁸²² Christofi, A., et al. (2017). *Violence against women and the EU*, cit., pp. 85-86.

⁸²³ *Ibidem*.

⁸²⁴ Council Decision (EU) 2017/865. OJ L 131/11, para 5.

⁸²⁵ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 4(2).

⁸²⁶ Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 85.

⁸²⁷ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 4(2).

⁸²⁸ Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 85.

⁸²⁹ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 6.

adopted Resolution 2019/2678(RSP) ‘seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union’ to the Istanbul Convention and ‘on the procedure for that accession.’⁸³⁰ The European Parliament expressed its concern regarding the compatibility of the Treaties with the legal bases identified by the Council Decisions for the accession of the EU to the Convention.⁸³¹ More precisely, the Court of Justice of the European Union (CJEU, hereafter the Court) was requested to assess whether Articles 82(2) and 84 TFEU constituted the appropriate legal bases for the Council Decisions that concluded the accession to the Istanbul Convention by the Council on behalf of the European Union, or whether these act should be based on Articles 78(2), 82(2) and 83(1) TFEU.⁸³² The European Parliament also requested the Court if, according to the legal bases identified, the act of conclusion could be divided in two separate decisions, i.e. Council Decision 2017/865 and 2017/866.⁸³³ Finally, the Court was asked whether the conclusion of the Convention under Article 218(6) TFEU was ‘compatible with the Treaties in the absence of a common accord of all the Member States giving their consent to being bound by the convention.’⁸³⁴

On 6 October 2021, the Court issued Opinion 1/19, in which it clarified that the Council does not require unanimity to adopt decisions for the conclusion of the accession to the Istanbul Convention.⁸³⁵ In addition, although the Council may wait for the ‘common accord’ of the Member States, the Court reiterated that the Treaties prohibit the European Institution from adding a further step to the conclusion of an international convention.⁸³⁶ The Court also stated that the appropriate substantive legal basis for the adoption of the Council acts concluding the accession process to the Istanbul Convention are Articles 78(2), 82(2), 84 and

⁸³⁰ European Parliament Resolution 2019/2678(RSP). (2019). *European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession*. OJ C 116/7. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52019IP0357>.

⁸³¹ European Parliament. (2023). Adesione dell'UE alla convenzione di Istanbul. *Think Tank | European Parliament*, Plenaria – Maggio I 2023, p. 1. Retrieved Oct 20, 2023, from [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747114/EPRS_ATA\(2023\)747114_IT.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747114/EPRS_ATA(2023)747114_IT.pdf).

⁸³² Opinion of the Court (Grand Chamber) of 6 October 2021. Case Avis 1/19, ECLI:EU:C:2021:832, para. 1(1) (a).

⁸³³ *Ivi*, para. 1(1)(b).

⁸³⁴ *Ivi*, para. 1(2).

⁸³⁵ *Ivi*, para. 274.

⁸³⁶ *Ivi*, para. 338.

336 TFEU.⁸³⁷ The Court, therefore, excluded Article 83(1) as a relevant legal basis for the conclusion of the Convention.⁸³⁸

On 21 February 2023, the Council requested approval of the European Parliament to proceed with the accession to the Istanbul Convention.⁸³⁹ On 25 April, the European Parliament's FEMM and LIBE Committees jointly voted to recommend Parliament's approval.⁸⁴⁰ The European accession has been long-awaited in order to fill the legal gaps in the European legal framework regarding the protection of women from violence.⁸⁴¹ To this end, the European Parliament has repeatedly called for EU accession to the Istanbul Convention and its ratification by individual Member States.⁸⁴² On 10 May 2023, the European Parliament adopted two separate legislative resolutions regarding the two draft Council decisions—draft Council decisions on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union, and on judicial cooperation in criminal matters, asylum and *non-refoulement*—concluding the accession to the Convention.⁸⁴³ Following the consent of the European Parliament to the conclusion of the Convention, the Council adopted Decision 2023/1075 and Decision 2023/1076 on 1 June 2023 and they entered into force on 22 June.⁸⁴⁴

However, consequently to the 2021 opinion of the European Court of Justice, there have been two major changes. Firstly, the initial decisions on the signature of the Convention (2017) were combined in Decision 2023/1076 on judicial cooperation in criminal matters, asylum and *non-refoulement*. Secondly, Article 83(1) was removed from the legal basis for the conclusion of the Convention.⁸⁴⁵ Indeed, Decision 2023/1076 adopts as legal bases 'Article 82(2), Article 84 and Article 78(2), in conjunction with Article 218(6), second

⁸³⁷ Opinion of the Court (Grand Chamber) of 6 October 2021. Case Avis 1/19, ECLI:EU:C:2021:832, para. 338.

⁸³⁸ De Vido, S. (2023). EU Accession to the Istanbul Convention: new legal paths for the protection of women from violence in Europe. *EU Law Live*, para. 3. Retrieved Jul 6, 2023, from <https://eulawlive.com/op-ed-eu-accession-to-the-istanbul-convention-new-legal-paths-for-the-protection-of-women-from-violence-in-europe-by-sara-de-vido/>.

⁸³⁹ European Parliament. (2023). Adesione dell'UE alla convenzione di Istanbul, cit., p. 1.

⁸⁴⁰ Ibidem.

⁸⁴¹ De Vido, S. (2022). A first insight into the EU proposal for a Directive on countering violence against women and domestic violence. *EJIL:Talk!*, European Journal of International Law Blog, pp. 1, 3. Retrieved Dec 11, 2023, from <https://www.ejiltalk.org/a-first-insight-into-the-eu-proposal-for-a-directive-on-countering-violence-against-women-and-domestic-violence/>.

⁸⁴² European Parliament. (2023). Adesione dell'UE alla convenzione di Istanbul, cit., p. 1.

⁸⁴³ De Vido, S. (2023). EU Accession to the Istanbul Convention, cit., para. 2.

⁸⁴⁴ Ibidem.

⁸⁴⁵ Ibidem.

subparagraph, point (a)(v), thereof.⁸⁴⁶ In other words, the European Union is now bound by the Istanbul Convention but to the extent of the competences included in the Council Decisions.⁸⁴⁷ Hence, as it will be analysed later, the exclusion of Article 83(1) has repercussions on the EU capability to establish minimum rules concerning the definition of crimes and sanctions on violence against women,⁸⁴⁸ in particular rape offences based on lack of consent.

The Convention entered into force on 1 October 2023,⁸⁴⁹ after a period of three months from ‘the date of the deposit of its instrument of ratification, acceptance or approval’ as regulated under Article 75(4) of the Convention.⁸⁵⁰ Once entered into force, the Convention became an integral part of the legal framework of the European Union pursuant to Article 216(1) TFEU.⁸⁵¹ In other words, the ratification of the Convention will have an impact on EU policies and law.⁸⁵² Indeed, the provisions derived from the Istanbul Convention in the European law have to comply with the obligations arising from the regional legal instrument.⁸⁵³

For the purpose of the analysis, it is deemed necessary to examine the 2022 Commission’s proposal on combating violence against women and domestic violence before proceeding. As a matter of fact, the draft Directive can be regarded as innovative because it includes several crimes against women as enshrined in the Istanbul Convention, but it also considers ICT-facilitated violence.⁸⁵⁴ The proposal aims to fill a gap in EU law in relation to violence against women and, following the 2023 accession to the Istanbul Convention, it may be possible for it to ‘become the EU’s main legal instrument for implementing [the Convention’s] provisions.’⁸⁵⁵ The proposal for a Directive of the European Parliament and the Council was

⁸⁴⁶ Council Decision (EU) 2023/1076. *Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement*. Official Journal of the European Union L1 143/4. Retrieved Aug 21, 2023, from <http://data.europa.eu/eli/dec/2023/1076/oj>.

⁸⁴⁷ De Vido, S. (2023). EU Accession to the Istanbul Convention, cit., para. 3.

⁸⁴⁸ Ivi, para. 3.

⁸⁴⁹ Ivi, para. 1.

⁸⁵⁰ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011). Article 75(4).

⁸⁵¹ De Vido, S. (2017). *La Violenza di Genere Contro le Donne nel Contesto della Famiglia*, cit., p. 3.

⁸⁵² Ibidem.

⁸⁵³ Ibidem.

⁸⁵⁴ De Vido, S. (2022). A first insight into the EU proposal for a Directive on countering violence against women and domestic violence, cit., p. 2.

⁸⁵⁵ European Parliament. (2023). *Combating Violence Against Women and Domestic Violence*. *Think Tank | European Parliament*, p. 5. Available at [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)739392](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)739392).

indeed presented by the Commission on 8 March 2022.⁸⁵⁶ In the Explanatory Memorandum, the draft Directive overtly states that it aims to combat violence against women and domestic violence in the European Union and recognises it as a form of violation of human rights and discrimination.⁸⁵⁷ Moreover, it acknowledges the pervasiveness of gender-based violence in the European Union, as 1 in 3 women has experienced some kind of violence, according to current data.⁸⁵⁸

It is worth noting that the proposal takes the Istanbul Convention as a point of reference, thus emphasising two relevant aspects. Firstly, the draft Directive recognises that the Convention is ‘the most extensive international framework to comprehensively address violence against women and domestic violence.’⁸⁵⁹ Indeed, the proposal aims to achieve the same objectives set out in the international legal instrument within the European system.⁸⁶⁰ Secondly, the proposal underlines that the protection of women is ‘fragmented across several [European] legal instruments,’ which results in ineffective responses to the issue.⁸⁶¹ Indeed, although certain aspects of violence against women are included in certain European acts, like the protection of victims of violence,⁸⁶² the European framework still lacks a legal instrument that specifically addresses violence against women.⁸⁶³ Furthermore, the proposal acknowledges the commitment at the national level to combat violence against women, partly due to the monitoring activity of the GREVIO, but it also points out that such monitoring is insufficient to fill legal gaps for which a concrete European action is desirable.⁸⁶⁴ Indeed, as analysed (see Chapter 4), the GREVIO’s considerations are not binding, thus States Parties are not bound to follow the body’s conclusions if shortcomings are identified.⁸⁶⁵

Another point that is interesting to note is the legal basis that the Commission used for the proposal. Contrary to the 2023 Council Directives that concluded accession to the Istanbul

⁸⁵⁶ European Commission. (2022). Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on combating violence against women and domestic violence. COM/2022/105 final. Retrieved Aug 21, 2023, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0105>.

⁸⁵⁷ COM/2022/105 final, p. 1.

⁸⁵⁸ Ibidem.

⁸⁵⁹ Ivi, p. 3.

⁸⁶⁰ Ibidem.

⁸⁶¹ Ibidem.

⁸⁶² See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

⁸⁶³ De Vido, S. (2022). A first insight into the EU proposal for a Directive on countering violence against women and domestic violence, cit., p. 1.

⁸⁶⁴ COM/2022/105 final, p. 3.

⁸⁶⁵ De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence, cit.,p. 85.

Convention—as will be seen in the following paragraphs—the proposal adopted Articles 82(2) and 83(1) TFEU as a legal basis.⁸⁶⁶ These articles allow the adoption of minimum rules on the definition of certain crimes and sanctions in relation to violence against women, especially rape offences and cyber violence.⁸⁶⁷ For example, Article 5 of the draft Directive criminalises rape based on lack of consent,⁸⁶⁸ which is the fundamental key element of the crime in the Istanbul Convention. Hence, the Article aims at surmounting force-based national legal systems⁸⁶⁹ that still characterise many Member States. In doing so, the proposal aimed to partly implement the provisions of the Istanbul Convention and to bypass the long process of accession as well as the resistance of some Member States to certain aspects of the Convention.⁸⁷⁰ The next step should be the adoption of the proposal by the European Parliament and the Council through the ordinary legislative procedure, but readings are still ongoing.⁸⁷¹

This notwithstanding, the draft Directive assumes even greater relevance in light of the recent accession of the European Union to the Istanbul Convention. Indeed, as aforementioned, the aim of the proposal is to achieve the objectives enshrined in the Convention, thus the draft Directive can become the main European ‘legal instrument for implementing its provisions.’⁸⁷² In addition, this proposal may even modify the scope of the competences of the European Union under the Convention.⁸⁷³ Indeed, the Convention was acceded by the Council on narrow legal basis,⁸⁷⁴ i.e. to the extent of its exclusive competences under Article 3 TEU.⁸⁷⁵ However, if the proposal will be adopted by the co-legislators of the European Union, it ‘could give rise to such exclusive competences for the EU.’⁸⁷⁶

Having explained the legal path of the accession of the European Union to the Istanbul Convention, the research will now examine possible consequences for the EU as a result of

⁸⁶⁶ COM/2022/105 final, p. 8.

⁸⁶⁷ Ibidem.

⁸⁶⁸ Ivi, pp. 22, 35.

⁸⁶⁹ COM/2022/105 final, pp. 22, 35.

⁸⁷⁰ De Vido, S. (2022). A first insight into the EU proposal for a Directive on countering violence against women and domestic violence, cit., p. 3.

⁸⁷¹ Ibidem.

⁸⁷² European Parliament. (2023). Combating Violence Against Women and Domestic Violence, cit., p. 5.

⁸⁷³ Ibidem.

⁸⁷⁴ Ibidem.

⁸⁷⁵ Council Decision (EU) 2023/1075. (2023). *Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union*. Official Journal of the European Union L1 143/1, para. 4. Retrieved Aug 21, 2023, from <http://data.europa.eu/eli/dec/2023/1075/oj>.

⁸⁷⁶ European Parliament. (2023). Combating Violence Against Women and Domestic Violence, cit., p. 5.

the legal bases adopted in the Decisions by the Council. Indeed, the exclusion of Article 83(1) limited the EU's competences, thus possibly rendering future measures to protect women from violence ineffective or less effective, but as already mentioned, the Commission's proposal for a Directive could solve these limitations.

2. Legal Consequences for Certain Consent-Based Crimes of the Istanbul Convention

In the preceding paragraphs, this dissertation examined the long legal path of the European Union to complete the accession to the Istanbul Convention. The legal basis identified by the Commission in the initial proposal for a Council decision on the signature of the Convention was mainly Article 82(2) and Article 84 TFEU, although it also suggested that other articles could be considered for the European act. Contrary to the proposal, in 2017 the Council adopted two separate decisions for the signature process, i.e. Decision 2017/865 and Decision 2017/866; and, with concern to the first, the Council adopted articles 82(2) and 83(1) TFEU as a legal basis, thus excluding Article 84 thereof. However, following the 2021 Court's opinion, the Council removed Article 83(1) TFEU from the final Decision 2023/1076 for the accession to Istanbul Convention and restored Article 84 TFEU as a legal basis.

More specifically, the Council Decision 2023/1076 adopted Article 82(2), Article 84 and Article 78(2) TFEU as a legal basis,⁸⁷⁷ thus reconfirming the articles identified by the Commission in its 2016 proposal. For the purpose of this research, it is necessary to analyse the articles in question in order to understand the possible effects that this Decision will have on the EU law, in particular on consent-based crimes such as sexual violence and forced sterilisation. Article 82(2) TFEU enables judicial cooperation in criminal matters, particularly the approximation of criminal procedure:

‘2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

⁸⁷⁷ Council Decision (EU) 2023/1076. OJ L1 143/4.

- (a) *mutual admissibility of evidence between Member States;*
 - (b) *the rights of individuals in criminal procedure;*
 - (c) *the rights of victims of crime;*
 - (d) *any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.*
- Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.*⁸⁷⁸

Thus, Article 82(2) TFEU ‘empowers the Union to adopt Directives [to] establish’ minimum rules’ in some pre-defined areas’ of criminal proceedings as enlisted in lit. a to lit. d.⁸⁷⁹ Yet, such directives must take into account differences between the legal traditions and frameworks of Member States.⁸⁸⁰ Moreover, the EU has competence to the extent that the acts facilitate mutual recognition of judicial decisions in criminal matters that have a cross-border dimension.⁸⁸¹ With particular reference to lit. c, i.e. ‘the rights of victims of crime,’ the EU may decide to adopt directives ensuring a minimum level of victims’ rights among the Member States, as national laws and policies often and largely differ from one Member State to the other.⁸⁸² Protection of women victims of violence is already envisioned in the Victims’ Rights Directive 2012/29,⁸⁸³ according to which Member States are required to support and offer justice services to victims.⁸⁸⁴ Furthermore, it also requires Member States to instruct competent authorities to ensure the ‘respectful, sensitive, tailored, professional, and non-discriminatory’ treatment of victims.

Hence, Article 82(2) TFEU is a key legal basis for the implementation of Chapter IV and Chapter VI of the Istanbul Convention, concerning the rights of victims and criminal procedures.⁸⁸⁵ However, this Article will not be of use in criminalising sexual violence based on the of lack of consent, nor in strengthening the legal definition of forced sterilisation based

⁸⁷⁸ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 82(2).

⁸⁷⁹ Bogensberger, W. (2019). Article 82 TFEU. In Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, p. 892. Retrieved Dec 28, 2023, from <https://doi.org/10.1093/oso/9780198759393.003.172>.

⁸⁸⁰ Ibidem.

⁸⁸¹ Ibidem.

⁸⁸² Ivi, p. 894.

⁸⁸³ De Vido, S. (2023). EU Accession to the Istanbul Convention, cit., para. 3.

⁸⁸⁴ Bogensberger, W. (2019). Article 82 TFEU, cit., p. 894.

⁸⁸⁵ Christofi, A., et al. (2017). Violence against women and the EU, cit., p. 88.

on women's prior and informed consent. In other words, Article 82(2) cannot be adopted as a legal basis for the implementation of Chapter Von substantive law of the Convention, in particular Articles 36 and 39, resulting in a lack of harmonisation at the EU legal level of the Member States. Yet, it may be possible to include definitions of such crimes in a general EU act. One author argues indeed that Article 82(2) TFEU may still be adopted as a legal basis for a general directive on violence against women.⁸⁸⁶ Such a directive may include definitions of the different types of violence, for example, the sexual violence offence as enshrined in the Istanbul Convention.⁸⁸⁷ But the act may be limited because it might be too general; moreover, it will not apply to cases of 'internal violence' since it must be characterised by the element of trans-nationality.⁸⁸⁸

As of Article 84 TFEU, it regulates the European Parliament and Council capability to act in accordance with the ordinary legislative procedure in order to:

*'[...] establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.'*⁸⁸⁹

Article 84 TFEU primarily operates in the field of crime prevention and, since this notion is not defined, the purpose of the article is not limited to any specific crime area or means of crime prevention.⁸⁹⁰ Under Article 84, therefore, the European Union can contribute to preventing the recurrence of violence against women with measures aimed at reducing gender-based crimes against women.⁸⁹¹ However, the actions of the European Union are 'limited to measures that assist, facilitate, and stimulate the cooperation between MS' because 'crime prevention is and remains a competence of the MS.'⁸⁹² This means that the EU has no power to adopt a legal act on crime prevention that may bound Member States, thus excluding any concrete legal action regarding the crime of sexual violence and forced sterilisation enshrined in Articles 36 and 39 of the Istanbul Convention. Furthermore, it is important to note that harmonisation of the laws and regulations of the Member States is clearly interdicted

⁸⁸⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 197.

⁸⁸⁷ Ibidem.

⁸⁸⁸ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 198.

⁸⁸⁹ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 84.

⁸⁹⁰ Bogensberger, W. (2019). Article 84 TFEU, cit., p. 909.

⁸⁹¹ Ibidem.

⁸⁹² Ibidem.

under Article 84⁸⁹³ and such condition cannot be derogated.⁸⁹⁴ In other words, the EU may only exhort Member States to improve national measures concerning gender-based violence through, for instance, strategies or policies.⁸⁹⁵

Finally, the European Union shall adopt measures on matters of asylum, subsidiary protection and temporary protection under Article 78(2) TFEU:

[...] for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;*
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;*
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;*
- (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.*⁸⁹⁶

Article 78(2) regulates the adoption of measures concerning asylum and subsidiary protection.⁸⁹⁷ In particular, under lit. a and lit. b, the Article aims at creating a common system to ensure the recognition of asylum and subsidiary protection status, in alignment with the definition of the Geneva Convention.⁸⁹⁸ Whereas, lit. f concerns the establishment of standards to determine the conditions of reception, namely the determination of necessary elements for the application.⁸⁹⁹ Therefore, Article 78(2) will enable the EU to include ‘gender-

⁸⁹³ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 197.

⁸⁹⁴ Bogensberger, W. (2019). Article 84 TFEU, cit., p. 909.

⁸⁹⁵ De Vido, S. (2017). The Ratification of the Council of Europe Istanbul Convention by the EU, cit., p. 88.

⁸⁹⁶ Consolidated version of the Treaty on the Functioning of the European Union. OJ C 202/1, Article 78(2).

⁸⁹⁷ Ibidem.

⁸⁹⁸ Wilderspin, M. (2019). Article 78 TFEU. In Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights*, cit., p. 828.

⁸⁹⁹ Ivi, pp. 833-834.

based violence against women as a form of persecution,' taking into consideration the requirements of the Convention.⁹⁰⁰

The legal basis chosen for the accession to the Istanbul Convention does not encompass the possibility for harmonisation regarding the definition of gender-based crimes against women, in particular sexual violence and forced sterilisation based on lack of consent, in all Member States legal frameworks. However, this would have been partially possible under Article 83(1) TFEU. The exclusion of the latter from the concluding Decisions is comprehensible considering the possibility for one or more Member States to bring an action of annulment in front of the Court against the Council's acts,⁹⁰¹ thus risking further prolonging the process of accession to the Convention. Nonetheless, one author argues that Article 83(1) TFEU is fundamental to establishing minimum criminal measures concerning violence against women, in particular in defining rape offences based on the lack of consent.⁹⁰² As a matter of fact, rape amount to one of the areas covered under Article 83(1) TFEU, i.e. 'sexual exploitation of women and children.'⁹⁰³ In other words, it may be possible to establish minimum standards of the definition of sexual violence, particularly rape, for judicial cooperation in case of serious crimes that have cross-border effects.⁹⁰⁴ On one side, this will allow to include lack of consent as a constitutive element of the rape crime, as envisaged by Article 36(2) of the Istanbul Convention.⁹⁰⁵ As it has been widely analysed (see Chapter 2, Section 2), in European contemporary law, sexual violence is defined based on the absence of consent of the victim.⁹⁰⁶ Indeed, consent is key element differentiating rape from permissible sexual intercourse.⁹⁰⁷ Moreover, consent can be considered the free expression of women's sexual will, thus by extension of their autonomy.⁹⁰⁸ On the other side, possible directives concerning the definition of such crime may be able to overcome the challenges that the GREVIO identified in the Baseline Evaluation Reports of States Parties.⁹⁰⁹ Thus, an EU act may contribute to reach higher levels of protection for women from violence. Indeed, despite the monitoring of the GREVIO, the body produces non-binding acts and

⁹⁰⁰ De Vido, S. (2023). EU Accession to the Istanbul Convention, cit., para. 3.

⁹⁰¹ Ibidem.

⁹⁰² De Vido, S. (2017). La Violenza di Genere Contro le Donne nel Contesto della Famiglia, cit., p. 9.

⁹⁰³ De Vido, S. (2017). The Ratification of the Council of Europe Istanbul Convention by the EU, cit., p. 87.

⁹⁰⁴ Ibidem.

⁹⁰⁵ COM/2022/105 final, p. 22.

⁹⁰⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 126.

⁹⁰⁷ Ferzan, K. K. (2006). Clarifying Consent, cit., p. 212.

⁹⁰⁸ De Vido, S. (2020). *Violence against women's health*, cit., p. 199.

⁹⁰⁹ European Parliament. (2023). Combating Violence Against Women and Domestic Violence, cit., p. 5.

recommendations that States Parties to the Convention are not obliged to respect and implement.⁹¹⁰ Accordingly, European legal acts, such as the draft Directive proposed by the Commission in 2022, may ensure the respect of the provisions enshrined in Article 36 of the Convention.⁹¹¹

With concern to a possible harmonisation of the definition of forced sterilisation, as encompassed in Article 39 of the Istanbul Convention, the healthcare field still falls within the sovereign prerogatives of the Member States. In other words, as aforementioned, although it may be possible to consider violence against women a public health issue,⁹¹² the European Union may contribute only to the extension of its competences in accordance with certain articles, such as Article 168 on the promotion of best practices on sexual and reproductive health and rights among Member States.⁹¹³ In other words, the EU contribution will not result in binding acts for the Member States.⁹¹⁴ With respect to the 2022 draft Directive on combating violence against women and domestic violence, instead, forced sterilisation was not included among the articles.⁹¹⁵ Moreover, although the European Disability Forum—an ‘umbrella organisation of persons with disabilities’⁹¹⁶—asked the European Parliament to consider including forced sterilisation as a form of violence against women to be criminalised in the Proposed Directive, the Member States ‘have refused the inclusion of the crime [...] during negotiations.’⁹¹⁷ Therefore, there is still no agreement among Member States to harmonize the definition of forced sterilisation at the European level—as encompassed in Article 39 of the Convention—and there also seems to be ‘lack of willingness to accept the criminalisation’ of this crime, which is one of the most widespread and practiced forms of violence against women, especially against women with disabilities.⁹¹⁸

⁹¹⁰ De Vido, S. (2016). *The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence*, cit., p. 85.

⁹¹¹ European Women’s Lobby (EWL). (2023). Open Letter on the Legal basis of the Directive on combating violence against women and domestic violence and the article on the offence of rape. *European Women’s Lobby*. Available at <https://www.womenlobby.org/Open-Letter-on-the-Legal-basis-of-the-Directive-on-combating-violence-against>.

⁹¹² Ibidem.

⁹¹³ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 199.

⁹¹⁴ Ivi, p. 199.

⁹¹⁵ COM/2022/105 final.

⁹¹⁶ European Disability Forum. (2024). Shame! EU Member States fail to criminalise forced sterilisation and rape. *European Disability Forum*, para. 2. Available at <https://www.edf-feph.org/shame-eu-member-states-fail-to-criminalise-forced-sterilisation-and-rape/#:~:text=In%202022%2C%20the%20European%20Commission,disabilities%20against%20abuse%20and%20violence>.

⁹¹⁷ Ibidem.

⁹¹⁸ Ibidem.

To resume, the accession to the Istanbul Convention by the European Union has marked an important and awaited step at the EU level, as it may constitute the answer to the European legal gaps regarding violence against women. The European actions to combat violence against women have indeed been fragmented between binding and non-binding acts.⁹¹⁹ The Convention, in this sense, may represent the answer for a unified response to the issue by the Union, but the legal basis adopted for the accession limits the EU to the extent of its competences. In other words, the exclusion of Article 83(1) TFEU is a major setback to the possibility of harmonising the EU law according to the provisions of the Istanbul Convention. In particular, the choice affects the possible inclusion of the definition of sexual violence including rape, based on the lack of consent, as enshrined under Article 36 of the Convention; and it also has repercussions on defining forced abortion and forced sterilisation as provided by Article 39 on of the Convention. Thus, by extension, the legal basis adopted by the Council Decision 2023/1076 affects the possibility for the EU to ensure higher protection for women against gender-based violence across the Member States.

A solution to this problem may be the draft Directive of the Commission on combating violence against women and domestic violence (2022), as the proposal defines the crime of rape based on the lack of freely given consent as encompassed under Article 36 of the Convention;⁹²⁰ and it may also add the definition of forced abortion and forced sterilisation based on the absence of prior and informed consent, as demanded by the civil society.⁹²¹ However, there are two main observations to make in this regard. On one side, certain Member States are opposed to the harmonisation of the definition of rape.⁹²² On the other, the procedure for the adoption of the EU Act is still ongoing, so it is not possible to determine whether it will be adopted or not and at what conditions.

At this point, the concept of consent and its connection to violence against women has been widely analysed. The next chapter will dwell on the concept of consent when applied to sexual violence and rape, as well as, forced abortion and force sterilisation. The research will make use of several case law cases in order to demonstrate the importance of the notion of

⁹¹⁹ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 99.

⁹²⁰ COM/2022/105 final.

⁹²¹ European Disability Forum. (2024). Shame! EU Member States fail to criminalise forced sterilisation and rape, cit., para. 2.

⁹²² Ibidem.

consent as founding element for the crimes of sexual violence, and forced abortion and force sterilisation.

With this last chapter, the thesis has reached its conclusion by examining the importance of the concept of consent as a key element in the definition of certain crimes against women, i.e. sexual violence, and forced abortion and forced sterilisation. It has also underlined how this concept is often missing from national criminal codes, particularly those of the States Parties to the Istanbul Convention, and it has examined possible future developments in the EU law in the light of the Union's ratification of the Convention.

Conclusion and final considerations

The dissertation has sought to analyse the concept of consent in relation to violence against women and it has underlined several characteristics and limits of the notion considering specific contexts of application, especially the legal sphere. However, before proceeding with the final observations, it is deemed necessary to underline some limits of the research.

To begin, it is relevant to mark that shortcomings identified by the GREVIO in States Parties regarding Article 39 of the Istanbul Convention, especially provisions regulating forced sterilisation, intertwined with other factors and issues. The Article criminalised forced abortion as a form of violence against women that aims to effectively terminate the natural reproductive capacity of a woman without her prior and informed consent.⁹²³ So, this practice constitutes a serious form of violation of women's right to health and, by extension, of women's sexual and reproductive health.⁹²⁴ Indeed, this practice interferes with a woman's reproductive system,⁹²⁵ thus with her right to decide about her reproductive options,⁹²⁶ as it has lasting and permanent consequences.⁹²⁷ The Baseline Reports of the GREVIO have highlighted that women belonging to different fragile categories, such as women with disabilities or part of certain ethnic groups, are more affected by this form of violence. On one side, this can be explained by the fact that States consider women belonging to these categories as incapable of making autonomous decisions and, consequently, they are reticence in criminalising this practice. On the other side, the GREVIO noted that several States Parties lack adequate documentation about forced sterilisation, which means that it is not possible to have a complete overview of the national situation and the extent of this form of violence. For this reason, future studies may find more detailed information concerning the practice and better available data for deepening a possible research on this issue.

A second limitation of this dissertation concerns the activity of the GREVIO. The first round of Baseline Evaluation Reports is currently ongoing in certain countries due to some postponements, as in the case of Ukraine.⁹²⁸ This suggests that the picture of the situation in Europe regarding the implementation and compliance of States Parties with Articles 36 and

⁹²³ Explanatory Report to the Council of Europe Convention, cit., para 205.

⁹²⁴ De Vido, S. (2020). *Violence against women's health*, cit., p. 8.

⁹²⁵ Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 69.

⁹²⁶ De Vido, S. (2016). *Donne, violenza e diritto internazionale*, cit., p. 137.

⁹²⁷ Christofi, A., et al. (2017). *Violence against women and the EU*, cit., p. 69.

⁹²⁸ Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*, pp. 81-82.

39 of the Convention is still incomplete—especially considering the recent accession of the EU. Furthermore, the first thematic evaluation round (2023-2031) of the GREVIO has just started and it is reasonable to believe that the group of experts will examine the implementation of specific provisions in the national legal systems of States Parties, including Article 36 and Article 39. Therefore, future research may compare and analyse changes, amendments, or setbacks made by States Parties in the fields of sexual violence, forced abortion, and forced sterilisation, making use of the new data and broader information. Indeed, research may observe the evolution of the definitions of the gender-based crimes at issue and examine whether or not States Parties have aligned themselves with the provisions contained in Articles 36 and 39, thus whether or not they have included the concept of consent in their national legal systems.

Lastly, the accession to the Istanbul Convention by the European Union is quite recent, albeit long-awaited. This step represents an opportunity at the European level to improve the measures aiming to fight violence against women, which has been at the heart of many European directives and policies in the last few years—take as an example the Gender Equality Strategy, renewed for the period 2020-2025. The dissertation has, however, highlighted that these measures often result in fragmented European actions against the problem or the adoption of soft laws, which are often not as effective as binding legal instruments. Violence against women, particularly rape, is a phenomenon which is known and present in all countries of the Union. The potential adoption of binding legislative acts for EU Member States would lead to two main outcomes: the European legal harmonisation on minimum rules about gender-based violence, including common definitions of certain crimes, which will result in higher protection of women's rights; and, the successful implementation and compliance with mandatory obligations of the Istanbul Convention. However, given the topicality of the matter, the research does not have the necessary information to determine what measures the Union will take and what impact they will have on Member States and women's rights. The analysis has developed on mere legal assumptions in the light of the legal bases adopted by the Union and the 2022 Commission's proposal for a directive, which is being discussed at the European level at the time of writing this research. Notably, with concern to the latter, the adoption of the proposal would constitute a first step towards the harmonisation of definitions of gender-based crimes such as rape. However, it is not possible

to know yet whether and under which conditions the proposal will be adopted by the European Council.

To conclude, this dissertation has provided a comprehensive analysis of the concept of consent, particularly in the context of violence against women, with a focus on sexual violence, forced abortion, and forced sterilisation. This concept has acquired a significant relevance at the legal level for women by ensuring the protection of their rights and their autonomy, especially sexual and reproductive autonomy. Through a multidisciplinary approach, this dissertation has demonstrated that the concept of consent plays a pivotal role in defining gender-based crimes such as, for instance, sexual violence. In particular, the research has illustrated that certain States, especially those party to the Istanbul Convention, still lack in comprehensive definitions of sexual violence, forced abortion and forced sterilisation based on the lack of consent. Furthermore, it has highlighted the relevance of including this concept at national level in order to effectively criminalise these forms of violence against women.

As a matter of fact, the analysis has discussed the multifaceted nature of the concept of consent, considering also the complex nature of women's autonomy. It has underlined several characteristics, limits and requirements that this notion must encompass in order to be considered legally and ethically valid. Among the fundamental requirements, consent must be given in absence of external factors, like coercion, to be considered 'free.' The examination has also drawn connections between gender-based stereotypes and women's rights, identifying in the former the cause of a potential lack of respect for women's autonomy.

Focusing on specific gender-based crimes, this dissertation has explored the relevance of the concept of consent when applied to crimes of sexual violence, forced abortion, and forced sterilisation. It has determined the requirements that must be respected for consent to be considered legally valid, adopting different cases as reference and example. In particular, the research has demonstrated the relevance played by the *M.C. v. Bulgaria* case, which contributed to the shift from a forced-based to a consent-based definition of sexual violence. Furthermore, it has explained the gradual inclusion of 'informed consent' in the definition of forced abortion and forced sterilisation as means to ensure the protection of women's right to health and reproductive health.

Shifting to the Istanbul Convention, this dissertation has recognised the regional legal instrument as one of the most comprehensive in addressing gender-based violence. In

particular, it has analysed the definitions contained in Article 36 (sexual violence) and Article 39 (forced abortion and sterilisation) of the Convention, placing the focus on the concept of consent which is included in both provisions. The analysis has subsequently introduced the monitoring mechanism of the Istanbul Convention, i.e. the GREVIO, to examine the level of implementation and compliance of States Parties with the provisions enshrined in Articles 36 and 39 through Baseline Evaluation Reports. In doing so, it has highlighted several shortcomings regarding the inclusion of the concept of consent in national legal systems.

Finally, this dissertation has analysed the European Union's recent accession to the Istanbul Convention, providing a legal overview of the process and analysing its consequences on European law. The discussion has delved into the examination of the legal basis adopted by the EU to conclude the accession and it has drawn possible consequences regarding the potential criminalisation of consent-based crimes against women in EU law, especially sexual violence and forced sterilisation.

In the end, this dissertation has provided an in-depth examination of the concept of consent from its theoretical foundations to its practical applications at both national and international levels. It has highlighted that several national legal frameworks of States Parties to the Istanbul Convention have not included the concept of consent in the definition of sexual violence, forced abortion and forced sterilisation. Yet, the full integration of this notion into national legal systems is considered essential because it contributes to higher protection of women's rights and the combat of gender-based violence as a whole.

REFERENCES

Bibliography

1. Alaattinoğlu, D. (2023). Article 39: Forced abortion and forced sterilisation. In *Preventing and Combating Violence Against Women and Domestic Violence*. Cheltenham, UK: Edward Elgar Publishing, 471–481.
2. Brockbank, M. (2019). “The Myth of the “Gray Area” in Rape: Fabricating Ambiguity and Deniability.” *Dignity: A Journal of Analysis of Exploitation and Violence*, 4(4), Article 2, 1–17.
3. Caneva, E., et al. (2021). La cultura della violenza. Curare le radici della violenza maschile contro le donne. *WeWorld*, in collaboration with IPSOS, 1–17.
4. Casonato, C. (2009). Il consenso informato. Profili di diritto comparato. *Diritto Pubblico Comparato Ed Europeo*, 3, 1–23.
5. Chiesa, L. E. (2017). Solving the Riddle of Rape-by-Deception. *Yale Law & Policy Review*, 35(2), 407–460.
6. 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. *Think Tank | European Parliament*, Policy Department C: Citizens’ Rights and Constitutional Affairs, 1–143.
7. Conaghan, J. (2005). Extending the Reach of Human Rights to Encompass Victims of Rape: *M.C. V. Bulgaria*. *Feminist Legal Studies*, 13, 145–157.
8. 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.
9. Conti, A., Bin, P., Casella, C., Capasso, E., Fedeli, P., Salzano, F. A., Terracciano, L., & Piras, M. (2018). Piercing and Tattoos in Adolescents: Legal and Medico-legal Implications. *Open medicine (Warsaw, Poland)*, 13, 148–150.
10. Cook, R. J., and Cusack, S. (2010). *Gender Stereotyping: Transnational Legal Perspectives*. Philadelphia: University of Pennsylvania Press.
11. Corrêa Camargo, B., & Renzikowski, J. (2021). The Concept of an “Act of a Sexual Nature” in Criminal Law. *German Law Journal*, 22(5), 753–768.

12. Cusack, S. (2014). *Eliminating judicial stereotyping. Equal access to justice for women in gender-based violence cases*. Commissioned by the UN Office of the High Commissioner for Human Rights.
13. De Vido, S. (2016). *Donne, violenza e diritto internazionale: la Convenzione di Istanbul del Consiglio d'Europa del 2011*. Udine: Mimesis.
14. De Vido, S. (2016). The Council of Europe Istanbul Convention on preventing and Combating Violence Against Women and Domestic Violence: an Appraisal. In Candiotta, L., & De Vido, S., (Eds.), *Home-Made Violence* (2nd Ed. Esperienze Filosofiche), Mimesis.
15. De Vido, S. (2017). La Violenza di Genere Contro le Donne nel Contesto della Famiglia: Sviluppi nell'Unione Europea alla Luce della Convenzione di Istanbul. *Federalismi.it*, 3, 1–25.
16. De Vido, S. (2017). 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. *European Journal of Legal Studies*, 9(2), 69–102.
17. De Vido, S. (2020). *Violence against women's health in international law*. Manchester: Manchester University Press.
18. De Vido, S. (2022). A first insight into the EU proposal for a Directive on countering violence against women and domestic violence. *EJIL:Talk!*, European Journal of International Law Blog.
19. De Vido, S. (2023). EU Accession to the Istanbul Convention: new legal paths for the protection of women from violence in Europe. *EU Law Live*.
20. Division for the Advancement of Women of the Department of Economic and Social Affairs of the United Nations Secretariat. (2006). *Ending violence against women: From words to action. Study of the Secretary-General*. United Nation Publication.
21. Durojaye, E. (2018). Involuntary Sterilisation as a Form of Violence against Women in Africa. *Journal of Asian and African Studies*, 53(5), 721–732.
22. Endler, M., Lavelanet, A., Cleeve, A., Ganatra, B., Gomperts, R., & Gemzell-Danielsson, K. (2019). Telemedicine for medical abortion: a systematic review. *BJOG : an international journal of obstetrics and gynaecology*, 126(9), 1094–1102.

23. European Commission, Directorate-General for Justice and Consumers, Sosa, L., De Vido, S. (2021). *Criminalisation of gender-based violence against women in European states, including ICT-facilitated violence : a special report*. Publications Office.
24. European Disability Forum. (2024). Shame! EU Member States fail to criminalise forced sterilisation and rape. *European Disability Forum*.
25. European Women’s Lobby (EWL). (2023). Open Letter on the Legal basis of the Directive on combating violence against women and domestic violence and the article on the offence of rape. *European Women’s Lobby*.
26. Fernet, M., Hébert, M., Brodeur, G., & Théorêt, V. (2021). “When You’re in a Relationship, You Say No, but Your Partner Insists”: Sexual Dating Violence and Ambiguity Among Girls and Young Women. *Journal of Interpersonal Violence*, 36(19-20), 9436–9459.
27. Ferzan, K. K. (2006). Clarifying Consent: Peter Westen’s The Logic of Consent. *Law and Philosophy*, 25(2), 193–217.
28. Ferzan, K. K. (2019). Consent and Coercion. *Arizona State Law Journal, Forthcoming, Virginia Public Law and Legal Theory Research Paper No. 2019-04*, 1–59.
29. Friedman, M. (2003). *Autonomy, Gender, Politics*. New York: Oxford UP.
30. Gher, J. M., and Shah, P. K. (2023). Human Rights and Infertility. *The Office of the High Commissioner for Human Rights*, 1–41.
31. Greasley, K. (2016). Is Sex-Selective Abortion against the Law? *Oxford Journal of Legal Studies*, 36(3), 535–564.
32. Green, D. S., & MacKenzie, C. R. (2007). Nuances of informed consent: the paradigm of regional anesthesia. *HSS journal : the musculoskeletal journal of Hospital for Special Surgery*, 3(1), 115–118.
33. Hakvag, H. (2010). Does Yes Mean Yes? Exploring sexual coercion in normative heterosexuality. *Canadian Woman Studies*, 28(1), 121–126.
34. International Commission of Jurists. (2015). *Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions in Laws and Practice*. Geneva.
35. Jurasz, O. (2015). The Istanbul Convention: a new chapter in preventing and combating violence against women. *Australian Law Journal*, 89(9), 619–627.

36. Jurviste, U., Members' Research Service, & Shreeves, R. (2018). The Istanbul Convention: A tool to tackle violence against women and girls. *Think Tank | European Parliament*, 1–2.
37. Kaukinen, C. (2014). Dating Violence Among College Students: The Risk and Protective Factors. *Trauma, Violence & Abuse*, 15(4), 283–296.
38. Kellerbauer, M., Klamert, M., & Tomkin, J. *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York.
39. Kuneva, L. (2023). *Harmful Gender Stereotypes and Misogynist Narratives in Bulgarian Online Media* [Seminar]. Gender Violence and Disinformation in the Digital Realm: Persistent Challenges and Necessary Responses, Venice, Italy.
40. Leon, C. M., & Aizpurua, E. (2023). Do Youth Dream of Gender Stereotypes? The Relationship among Gender Stereotyping, Support for Feminism, and Acceptance of Gender-Based Violence. *International Journal of Environmental Research and Public Health*, 20(3), 2439.
41. 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.
42. McQuigg, R. (2012). A Contextual Analysis of the Council of Europe's Convention on Preventing and Combating Violence Against Women. *International Human Rights Law Review*, 1(2), 367–381.
43. McQuigg, R.J.A. (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.
44. Moyano, N., Sánchez-Fuentes, M. del M., Parra-Barrera, S. M., & Granados de Haro, R. (2023). Only “yes” means “yes”: Negotiation of Sex and Its Link With Sexual Violence. *Journal of Interpersonal Violence*, 38(3–4), 2759–2777.
45. Muižnieks, N. (2014). Sex-selective abortions are discriminatory and should be banned. *The Commissioner's Human Rights Comment*, Council of Europe, Strasbourg
46. Nourse, V. (2000). “The “Normal” Successes and Failures of Feminism and the Criminal Law.” *Georgetown Law Faculty Publications and Other Works*.

47. OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (2014). *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*. World Health Organization.
48. Oosterveld, V. (2005). The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice? *Harvard Human Rights Journal*, 18, 55–84.
49. Peterson, Z. D., & Muehlenhard, C. L. (2007). Conceptualizing the “Wantedness” of Women’s Consensual and Nonconsensual Sexual Experiences: Implications for How Women Label Their Experiences with Rape. *The Journal of Sex Research*, 44(1), 72–88.
50. Pike, G. K. (2023). Coerced Abortion – The Neglected Face of Reproductive Coercion. *The New Bioethics*, 29(2), 85–107.
51. Pillay, N. (2014). Equality and Justice in the Courtroom. *United Nations*.
52. Pitea, C. (2005). Rape as a Human Rights Violation and a Criminal Offence: The European Court’s Judgment in *M.C. v. Bulgaria*. *Journal of International Criminal Justice*, 3(2), 447–462.
53. Pugh, J. (2020). *Autonomy, Rationality, and Contemporary Bioethics [Internet]*. Oxford (UK): Oxford University Press.
54. Rosenthal, I., Oosterveld, V., and SáCouto, S. (2022). What Is ‘Gender’ in International Criminal Law? In Indira Rosenthal, Valerie Oosterveld, and Susana SáCouto (eds), *Gender and International Criminal Law*, Oxford, online edn, Oxford Academic.
55. Sessa, M. G. (2023). *Cases of Gender Disinformation in the Italian Context [Seminar]*. Gender Violence and Disinformation in the Digital Realm: Persistent Challenges and Necessary Responses, Venice, Italy.
56. The Committee of Experts (CEVI). (2021). General Recommendation of the Committee of Experts of the MESECVI (No. 3): The Concept of Consent in cases of Gender-Based Sexual Violence Against Women. *MESECVI/CEVI/doc.267/21*.
57. Thommen, M. (2022). Consent (Civil Law). In *Elgar Encyclopedia of Crime and Criminal Justice*. Cheltenham, UK: Edward Elgar Publishing.
58. Venkatraman, R. (2021). Women’s Right to Know” Informed Consent Informational Materials. *Embryo Project Encyclopedia*, Center for Biology and Society, Arizona State University.

59. Weiss, G. (1995). Sex-Selective Abortion: A Relational Approach. *Hypatia*, 10(1), 202–217.
60. Wertheimer, A. (2000). What Is Consent? And Is It Important? *Buffalo Criminal Law Review*, 3(2), 557–583.
61. Westen, P. (2004). Some Common Confusions About Consent in Rape Cases. *Ohio State Journal of Criminal Law*, 2, 333–359.
62. Wilderspin, M. (2019). Article 78 TFEU. In Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, online edn, Oxford Academic.
63. Worthy, L. D., Lavigne, T., and Romero, F. (2020). *Culture and Psychology. How People Shape and are Shaped by Culture*. Phoenix: MMOER.

INTERNATIONAL LEGAL REFERENCES

International and Regional Covenant

1. Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164). (1997).
2. Convention on the Elimination of All Forms of Discrimination against Women. (1979).
3. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011).
4. International Covenant on Economic, Social and Cultural Rights. (1966).
5. Consolidated version of the Treaty on European Union
6. Consolidated version of the Treaty on the Functioning of the European Union
7. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. (2003).

Council of Europe Reports and Acts

1. *Chart of signatures and ratifications of Treaty 210*. Council of Europe - Treaty Office.
2. Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. (1997). European Treaty Series - No. 164.

3. Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence. (2011). Council of Europe Treaty Series - No. 210.

GREVIO Reports and Baseline Reports

1. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2020). *1st general report on GREVIO's activities*.
2. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *4th general report on GREVIO's activities*.
3. 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), Albania*.
4. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *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), Bosnia and Herzegovina*.
5. 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*.
6. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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), Greece*.
7. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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), Ireland.*
8. 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), Italy.*
 9. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2023). *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), Luxembourg.*
 10. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *Mid-term. Horizontal Review of GREVIO baseline evaluation reports.*
 11. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2022). *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), Norway.*
 12. Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). (2021). *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), Poland.*
 13. 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), Serbia.*

European Union Acts

1. Council Decision (EU) 2017/865. *Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters.* Official Journal of the European Union L 131/11.
2. Council Decision (EU) 2017/866. *Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement.* Official Journal of the European Union L 131/13.
3. Council Decision (EU) 2023/1075. (2023). *Council Decision (EU) 2023/1075 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union.* Official Journal of the European Union LI 143/1.
4. Council Decision (EU) 2023/1076. *Council Decision (EU) 2023/1076 of 1 June 2023 on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, asylum and non-refoulement.* Official Journal of the European Union LI 143/4.
5. European Commission. (2022). Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on combating violence against women and domestic violence. COM/2022/105 final.
6. European Parliament Resolution 2019/2678(RSP). (2019). *European Parliament resolution of 4 April 2019 seeking an opinion from the Court of Justice on the compatibility with the Treaties of the proposals for the accession by the European Union to the Council of Europe Convention on preventing and combating violence against women and domestic violence and on the procedure for that accession.* OJ C 116/7.
7. European Parliament. (2023). Adesione dell'UE alla convenzione di Istanbul. *Think Tank | European Parliament, Plenaria – Maggio I 2023.*
8. European Parliament. (2023). Combating Violence Against Women and Domestic Violence. *Think Tank | European Parliament.*

9. European Union. (2007). Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. *Official Journal of the European Union*, 2008/C 115/01.
10. Publications Office of the European Union. (2023). Legal personality of the EU.

The Court of Justice of the European Union

1. Opinion of the Court (Grand Chamber) of 6 October 2021. Case Avis 1/19, ECLI:EU:C:2021:832.

European Court of Human Rights

1. *G.M. and Others v. The Republic of Moldova*. (2022). Application no. 44394/15.
2. *I.M. and Others v. Italy*. (2022). Application no. 25426/20.
3. *J.L. v. Italy*. (2021). Application no. 5671/16.
4. *M.C. v. Bulgaria*. (2004). Application no. 39272/98.
5. *S.F.K. v. Russia*. (2022). Application no. 5578/12.
6. *V.C. v. Slovakia*. (2011). Application no. 18968/07.

UN Acts and Documents

1. Office of the UN High Commissioner for Human Rights. (2023). *Sexual and reproductive health and rights | OHCHR - UN human rights office*. UN Human Rights Office of The High Commissioner.
2. Office of the United Nations High Commissioner for Human Right. *Background paper on the role of the judiciary in addressing the harmful gender stereotypes related to sexual and reproductive health and rights. A review of case law*. Gender Stereotyping and the Judiciary: A Workshop Guide.
3. UN Women. (2019). When it comes to consent, there are no blurred lines. Originally published on *Medium*.

UN Committees established by International Human Rights Conventions

1. UN Committee on Economic, Social and Cultural Rights. (2016). *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*. E/C.12/GC/22.

2. UN Committee on the Elimination of Discrimination Against Women (CEDAW). (1992). *CEDAW General Recommendation No. 19: Violence against women*.

CEDAW Committee

1. *Vertido v. The Philippines*. (2010). CEDAW Communication No. 18/2008, UN Doc. CEDAW/C/46/D/18/2008.

TABLE OF NATIONAL LEGAL REFERENCES

National Jurisprudence

United States Courts

1. *People v. Burnham*. (1986). Nos. F001305, F002404. Court of Appeals of California, Fifth Appellate District.
2. *State v. Thompson*. (1990). 792 P.2d 1103. Montana Supreme Court.

Canadian Courts

1. *R. v. Cuerrier*. (1998). 2 S.C.R. 371.

National Criminal Codes

The Criminal Code of Finland

1. Criminal Code of Finland.

The Criminal Code of Italy

1. Codice penale.

The Criminal Code of Poland

1. The Criminal Code of Poland, Rozdział XXV, Offences against Sexual Liberty and Decency

The Criminal Code of the Republic of Albania

1. Criminal Code of the Republic of Albania. Section VI, Sexual Crimes

The Criminal Code of the Republic of Serbia

1. The Criminal Code of Republika Srpska, Special Part, Chapter XII, Crimes against Life and Limb

The Penal Code of Greece

1. The Penal Code of Greece, law 4619/2019

The Penal Code of Luxembourg

1. Code Pénal Luxembourgeois.

The Penal Code of Norway

1. The Penal Code of Norway, Section 291.

OTHER SOURCES

1. Britannica, T. Editors of Encyclopaedia. (2023). Abortion. *Encyclopedia Britannica*. Available at <https://www.britannica.com/science/abortion-pregnancy>.
2. Cambridge University Press. (n.d.). Consent. In *Cambridge Dictionary*. Retrieved Aug 14, 2023 from <https://dictionary.cambridge.org/dictionary/english/consent>.
3. Oxford Reference. (n.d.). Rape. In *World Encyclopedia : Philip's*. Retrieved May 7, 2023, from <https://www.oxfordreference.com/view/10.1093/acref/9780199546091.001.0001/acref-9780199546091-e-9682>.
4. Procter P. (2009). Consent. In *Longman Dictionary of Contemporary English* (5th ed.). Pearson Educational Limited.
5. *Sex Crimes - "Sexual or Aggressive Intent" - Defined*. North Star Criminal Defense. (n.d.). Available at <https://www.northstarcriminaldefense.com/sex-crimes-sexual-or-aggressive-intent-defined/>.
6. The Legal Information Institute of the Cornell Law School. (2022). Consent. In *Wex Legal Dictionary and Encyclopedia*. Retrieved Sep 8, 2023 from <https://www.law.cornell.edu/wex/consent>.