

RAPE WITHOUT COERCION
Implementation of Art. 36 of the Istanbul Convention

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Summary: One could conclude that the existence of the crime of rape is largely dependent on the behavior and the attitude of the victim. While in some cases, this behavior can be a circumstance that is relevant to sentencing for the crime of rape, the consent of the person against whom a sexual act is undertaken excludes element of coercion. While the consent excludes coercion, resistance confirms. If the internal resistance of the victim was in any way expressed, the existence of force is confirmed. Without requiring the victim of such behavior from which one may conclude that she or he rejects sexual acts, not only that we would be faced with insoluble problems connected to error (error facti), but in general it would be difficult to talk about rape in a situation where from the behavior of the victim nobody could conclude that he or she opposed the sexual act. But it is not justified to require always the existence of firm physical resistance, especially not utmost resistance. In that sense, it is important to give the internal resistance and expected resistance the greater importance. If the notion of resistance is broadly understood in the form of internal resistance, and also as giving the greater importance to expected resistance, the use of force would be confirmed in the cases where the firm physical resistance did not take place as well. This view is more consistent with the object of protection of this offence (sexual liberty), and therefore with the meaning and the reason for the existence of these offence. Although in this case the boundary with a criminal offense under Article 179 CC becomes more difficult, it is not an insurmountable problem because the passive subject of that crime is the person who is incapable of any physical or mental resistance. Analysis of problems related to the implementation of rape (Article 178 of the Criminal Code of Serbia) opens *de lege ferenda* question whether it is justified to extend criminal law protection to cases of sexual acts without use of force or threat but where there is no consent of the victim. Such widening arises from the provisions of Article 36, paragraph 1 of the Istanbul Convention. The argument in favor of this expansion would be the great importance of the freedom of the individual in the sexual sphere, which deserves wider protection of criminal law. On the other hand, account must be taken of the fact that this crime of rape, ranging from its traditional name, involves the use of force (or threats) and that forced sexual act is core of this crime. It would minimize the severity of the act if it were equal to all situations where, for whatever reason, consent of the other person is absent. Although the consent of the victim (or its absence) is of great importance for the crime of rape, it would not be justified to make dependent the existence of the crime of rape only on the consent of the victim establishing primarily on that fact the legal definition. The solution how to implement the provision of Article 36 of the Istanbul Convention author sees in the prescribing of the new criminal offense or a new form of criminal offense under Article 178 of the Criminal Code (or 179), with retention of the existing offence of rape. This new, lesser offense of rape, should comprise certain sexual acts that constitute a violation of sexual freedom although no coercion occur because there is no consent of the person against whom the act is done.

Keywords: Rape, Coercion, Consent, Istanbul Convention.