**Call for submissions to the UN SRVAW thematic report on rape as a grave and systematic human rights violation and gender-based violence against women**

All submissions should be sent to vaw@ohchr.org by **20 May 2020**. Kindly, indicate if you DO NOT wish your submission to be made public.

**Questionnaire on criminalization and prosecution of rape**

**Definition and scope of criminal law provisions**

1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.

Article 204 of the Criminal Code of Montenegro[[1]](#footnote-1) recognizes rape as a criminal offense against sexual freedom, as follows:

(1) Whoever forces another into sexual intercourse or another act of equivalent nature without the person’s consent shall be punished by a prison sentence for a term from one to eight years.

(2) Whoever forces another into sexual intercourse or another act of equivalent nature by means of force or threats to directly attack the life or limb of that or of another person shall be punished by a prison sentence for a term from two to ten years.

(3) Where the offence set forth in paragraphs 1 or 2 of this Article was committed under a threat of revealing information about that or another person that would harm their honor or tarnish their reputation or by a threat of committing another grave wrong, the perpetrator shall be punished by a prison sentence for a term from one to eight years.

(4) Where an offence set forth in paragraphs 1, 2 or 3 of this Article results in a serious bodily injury of a person against whom the offence was committed, or where the offence was committed by several persons or in an especially cruel or especially degrading manner, or against a juvenile, or where the offence resulted in pregnancy, the perpetrator shall be punished by a prison sentence for a term from five to fifteen years.

(5) Where an offence set forth in paragraphs 1, 2 or 3 of this Article results in the death of the person against whom the offence was committed or where the offence was committed against a child, the perpetrator shall be punished by a prison sentence for a minimum term of ten years.

1. Based on the wording of those provisions, is the provided definition of rape:
	1. Gender specific, covering women only. YES/**NO**
	2. Gender neutral, covering all persons. **YES**/NO
	3. Based on the lack of consent of victim. **YES**/ NO
	4. Based on the use of force or threat. **YES**/ NO
	5. Some combination of the above. YES / **NO.** Please specify.
	6. Does it cover only vaginal rape? YES /**NO**
	7. Does it cover all forms of penetration? **YES**/NO Please specify.
	8. Is marital rape in this provision explicitly included? YES / **NO**
	9. Is the law silent on marital rape? YES/**NO**
	10. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? **YES**/NO
	11. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES/**NO**
2. To what extent legislation in your country excludes criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit relevant articles with corresponding translations.

Legislation in Montenegro not excludes criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship.

1. What is the legal age for sexual consent?

The law does not recognize age for sexual consent, because sexual intercourse or another act of equivalent nature without the person’s consent makes the act of rape.

1. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.

There are no provisions that differentiate sexual activity among peers.

1. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.

For criminalized forms of rape is prescribe imprisonment from one to 15 years. In addition to the above Article 204, the following articles are relevant in terms of sanctions:

Article 205 of Criminal Code of Montenegro:

(1) Whoever has a forced sexual intercourse with another or an equal act taking advantage of that person's mental illness, arrested mental development, other mental alienation, physical helplessness or some other state of that person due to which he is not capable to put up resistance, shall be punished by a prison sentence for a term from two to ten years.

(2) Where the offence set forth in paragraph 1 of this Article resulted in infliction of a serious bodily injury upon the physically helpless person, or where the offence was 54 committed by several persons or in an especially cruel or especially degrading manner, or against a juvenile, or where the act resulted in pregnancy, the perpetrator shall be punished by a prison sentence for a term from five to fifteen years.

(3) Where an offence set forth in paragraphs 1 and 2 of this Article results in the death of the person against whom the offence was committed or where the offence was committed against a child, the perpetrator shall be punished by a prison sentence for a minimum term of ten years.

Article 206:

(1) Whoever commits assault of a child by penetration or other act of equivalent nature against a child shall be punished by a prison sentence for a term from three to twelve years. (2) Where the offence set forth in paragraph 1 of this Article results in a serious bodily injury of the child against whom the offence was committed, or where the offence was committed by several persons or where it results in pregnancy, the perpetrator shall be punished by a prison sentence for a term from five to fifteen years.

(3) Where an offence set forth in paragraphs 1 and 2 of this Article results in the child’s death, the perpetrator shall be punished by a prison sentence for a minimum term of ten years.

(4) The perpetrator of the offence set forth in paragraph 1 of this Article shall not be punished provided that there is no major difference between him and the child in terms of their mental and physical development.

Article 207:

(1) Whoever abuses his position to incite another person to engage in a forced sexual intercourse or other act of equivalent nature, where that party is in a subordinate or dependent position in relation to the perpetrator shall be punished by a prison sentence for a term from three months to three years.

(2) A teacher, preschool teacher, guardian, adoptive parent, parent, stepfather, stepmother, or another person who abuses his position of powers to commit a forced sexual intercourse or other act of equivalent nature with a juvenile entrusted to him for study, education or care shall be punished by a prison sentence for a term from one to ten years.

(3) Where the offence set forth in paragraph 2 of this Article is committed against a child, the perpetrator shall be punished by a prison sentence for a term from three to twelve years. (4) Where the offence set forth in paragraphs 1 to 3 of this Article results in pregnancy, the perpetrator shall be punished for the offence set forth in paragraph 1 of this Article by a prison sentence for a term from six months to five years; for the offence set forth in paragraph 2 by a prison sentence for a term from two to twelve years, and for the offence set forth in paragraph 3 by a prison sentence for a term from three to fifteen years

(5) Where the offence set forth in paragraph 3 of this Article resulted in the child’s death, the perpetrator shall be punished by a prison sentence for a minimum term of ten years.

1. What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

The Law on compensation of victims of violent crimes[[2]](#footnote-2) governs the requirements, manner and procedure for realisation of the right to compensation to victims of crimes of violence. For the purpose of timely elimination of harmful consequences of serious physical and mental state of the victim, the victim is entitled to compensation, including:

* compensation for lost earnings;
* compensation for healthcare costs (costs of treatment and hospitalization);
* compensation for funeral costs. (article 4)

Funds for payment of compensation and costs of proceedings for the realization of the right to compensation shall be provided in the Budget of Montenegro in a separate section of the state administration authority responsible for judicial affairs.

**Aggravating and mitigating circumstances**

1. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?
	1. Is rape by more than one perpetrator an aggravating circumstance? **YES**/NO
	2. Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) **YES**/NO
	3. Is rape by spouse or intimate partner an aggravating circumstance? YES/**NO**
2. Does the law foresee mitigating circumstances for the purposes of punishment? YES/**NO** If yes, please specify.
3. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES/**NO**. If so, at what stage and what are the consequences?
	1. Regardless of the law, is reconciliation permitted in practice? YES/**NO** and what is the practice in this regard?
4. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/**NO** If yes, please specify.
	1. if the perpetrator marries the victim of rape? YES/NO
	2. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? YES/NO

**Prosecution**

1. Is rape reported to the police prosecuted ex officio (public prosecution)? **YES**/NO
2. Is rape reported to the police prosecuted ex parte (private prosecution)? **YES**/NO
3. Is a plea bargain or “friendly settlement” of a case allowed in cases of rape of women? YES/**NO**
4. Is plea bargain or “friendly settlement” of a case allowed in cases of rape of children? YES/**NO**
5. Please provide information on the statute of limitations for prosecuting rape.

Article 124 of the Criminal Code od Montenegro prescribes Time-Barred Prosecution, as follows:

Unless otherwise provided for by this Code, prosecution may not take place after expiration of:

1) twenty-five years from the commission of a criminal offence punishable under law by a long-term prison sentence; 2) twenty years from the commission of a criminal offence punishable under law by a prison sentence for a term exceeding fifteen years; 3) fifteen years from the commission of a criminal offence punishable under law by a prison sentence for a term exceeding ten years; 4) ten years from the commission of a criminal offence punishable under law by a prison sentence for a term exceeding five years; 5) five years from the commission of a criminal offence punishable under law by a prison sentence for a term exceeding three years; 6) three years from the commission of a criminal offence punishable under law by a prison sentence for a term exceeding one year; 7) two years from the commission of a criminal offence punishable under law by a prison sentence for a term not exceeding one year or a fine. (2) Where several penalties are laid down for a criminal offence, the statute of limitations shall be determined in accordance with the most severe of the penalties provided.

1. What are the provisions allowing a child who was the victim of rape to report it after reaching adulthood, if any?

See answer under point 16.

1. Are there mandatory requirements for proof of rape, such as medical evidence or the need for witnesses? YES/NO If yes, please specify.

Study on sexual violence against women and children in Montenegro[[3]](#footnote-3) contains a recommendation about necessity to improve the practice of gathering evidence, especially when it comes to crimes against sexual freedom, where people with experience of violence have not had physical injuries, or do not have medical documentation.

1. To what extent are there rape shield provisions aimed at preventing judges and defence lawyers from exposing a woman’s sexual history during trial?

There is no explicit legal provision that allows the use of evidence regarding the sexual history and sexual behaviour of the victim only when necessary and relevant, but the decision to do so is at the discretion of the acting judge.

1. What procedural criminal law provisions exist aimed to avoid re-victimizations during the prosecution and court hearings? Please specify.

In order to protect the minor from re-victimization, the hearing of the minor is, as a rule, performed in a special room equipped with technical devices for audio-visual recording. Exceptionally, if there are justified reasons for that, minors, as witnesses or injured parties, may be heard in their apartment or other premises or in the institution in which they reside, regardless of technical equipment.[[4]](#footnote-4) According to the information from the same Study, it follows that in some security centres men predominantly have a conversation with the victim of sexual violence and that the victim usually gives three statements. Victim gives the first statement to the duty service, the second, detailed, to the officers of blood and sexual offenses. Although the prosecutor may accept the statement, the practice says that this is not the case, due to the lack of details and information. Consequently, the victim is interrogated for the third time before the prosecutor, which is a psychological and emotional burden for the victim of violence, and can also be a form of secondary victimization. Police representatives note that the presence and support of confidants is beneficial to the victim. In this sense, the recommendation is to legally restrict the use of evidence regarding the sexual history and sexual behaviour of the victim in purpose to protect victim against re-victimization during the proceedings.[[5]](#footnote-5)

**War and/or conflict**

1. Is rape criminalized as a war crime or crime against humanity? YES/NO

Both, as a Crime against humanity from Article 427 of the Criminal Code of Montenegro and as a war Crime against the civilian population from Article 428.

1. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES/**NO**
2. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? ***YES***/NO

Explicit provision is contained in Article 129 of the Criminal Code of Montenegro, which, *inter alia*, prescribes that statutory limitations shall not be applicable to criminal prosecution and execution of penalties for criminal offences set forth in Articles 426 to 431 of this Code. In particular, the criminal offense Crime against the civilian population is contained in the Article 427 of the Criminal Code of Montenegro.

1. Has the Rome Statute of the International Criminal Court (ICC) been ratified? **YES**/NO

Yes, by the Law on Ratification of the Rome Statute of the International Criminal Court.[[6]](#footnote-6)

**Data**

1. Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

According to the information available to the Protector, in the work before the courts in 2019 was 21 cases from Article 204 of the Criminal Code of Montenegro - rape; in 2018 was 15 cases; in 2017 also 15 cases; in 2016 was six (6) cases; in 2015 was seven (7) cases; and five (5) cases in 2014. The Protector does not have data on the number of convictions or sanctions imposed.

**Other**

1. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

1. Official Gazette of the Republic Montenegro 70/2003, 13/2004, 47/2006 and Official Gazette of Montenegro 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015, 44/2017 and 49/2018 [↑](#footnote-ref-1)
2. "Official Gazette of Montenegro", no. 35/2015 [↑](#footnote-ref-2)
3. The Study on sexual violence against women and children in Montenegro, page 171, available at the link: <http://szk.org.me/wp-content/uploads/2020/03/Studija-o-seksualnom-nasilju-nad-%C5%BEenama-i-djecom-u-Crnoj-Gori-web.pdf> [↑](#footnote-ref-3)
4. *Ibid,* page 100 [↑](#footnote-ref-4)
5. *Ibid,* page 120 [↑](#footnote-ref-5)
6. "Official Gazette of the FRY - International Agreements", No. 005/01 from 27 June 2001 [↑](#footnote-ref-6)