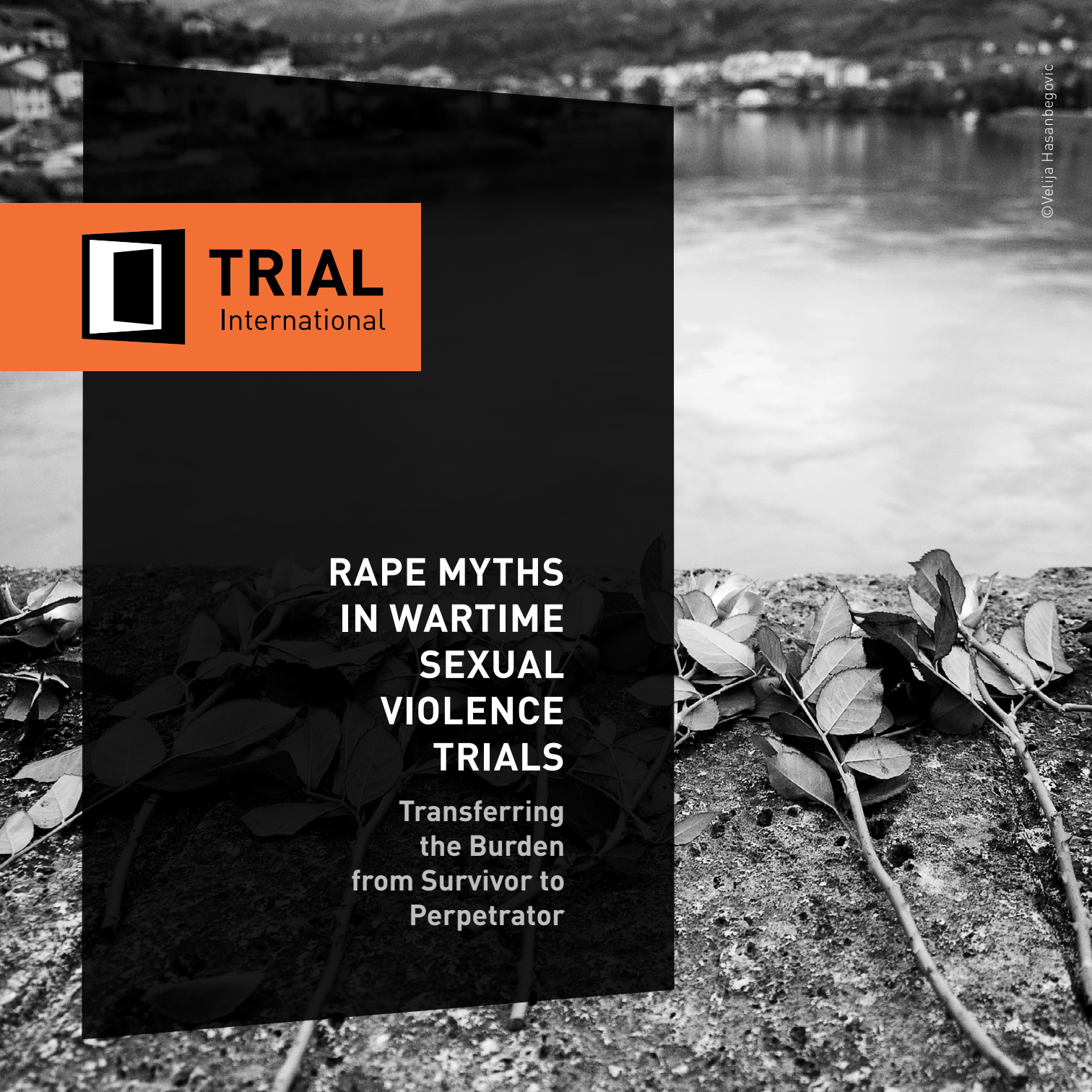

TRIAL International

RAPE MYTHS IN WARTIME SEXUAL VIOLENCE TRIALS

Transferring the Burden from Survivor to Perpetrator

The photographs used in this report depict survivors of/settings related to the Bosnian war as well as scenes from other temporal and geographic contexts. The inclusion of this latter category of photographs reflects the reality of stigmatisation; that the shaming and blaming of sexual violence survivors is a problem both past and present and one that affects populations across the globe.

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NOTE FROM THE PREVENTING SEXUAL VIOLENCE INITIATIVE (PSVI)

This TRIAL International report on the prevalence of rape myths in criminal proceedings is a vital step in the worldwide fight against the stigma suffered by survivors of sexual violence. Tackling stigma is one of the UK Preventing Sexual Violence Initiative's three main objectives, together with delivering better access to justice for survivors and improving how we prevent and respond to these horrific crimes.

The UK government has been supporting TRIAL International's work in Bosnia and Herzegovina (BiH) since 2013, and I am pleased to hear about TRIAL International's new focus on stigma. Over the past decade, TRIAL International's efforts in BiH have contributed to the overall advancement of wartime sexual violence victims' position in society. This report can be counted as yet another success amongst TRIAL International's many achievements on behalf of survivors.

In September 2017 at the UN General Assembly I launched the 'Principles for Global Action', a guide to preventing and addressing stigma associated with conflict related sexual violence. TRIAL International's report builds on this work and is the first of its kind to offer recommendations to judicial actors on how to decrease the shame and blame heaped on survivors in the courtroom. Due to the fact that the harmful behaviors displayed by judges and prosecutors are often unconscious and/or subtle, the report plays a vital role in first identifying the insidious rape

myths that dominate criminal trials and then providing concrete instructions going forward. This includes the language that should be used, legal standards that should be followed, protection measures that should be employed, crimes that should be charged, and so on.

The recommendations laid out in the report apply to wartime sexual violence prosecutions across the globe. I have every hope that judicial actors from the DRC to Burma to South Sudan will use the document as a roadmap in fulfilling the objectives set forth in the Global Principles.

Lord Ahmad of Wimbledon,
Minister of State at the Foreign and Commonwealth Office
and Prime Minister's Special Representative
on Preventing Sexual Violence in Conflict

EXECUTIVE SUMMARY

The following report traces the gender-based stereotypes that pervade wartime sexual violence prosecutions in BiH. Notwithstanding immense progress over the past decade, judicial actors continue to draw upon these rape myths, transferring shame and blame for sexual violence from the perpetrator to victim.

With the goal of making it easier for victims to participate in criminal trials, the report identifies examples of how four rape myths manifest themselves during such proceedings, providing concrete recommendations for all relevant parties.

Primary Myths

Promiscuity: Victims provoke sexual violence through promiscuous behaviour.

Consent: Victims consent to the sexual violence offence by failing to resist.

Credibility: Victims lie about sexual violence.

Shame: Victims, not perpetrators, should feel ashamed of the sexual violence they have suffered.

Key Problems

Promiscuity

- **The Admission of Impermissible Evidence:** Although BiH legislation prohibits parties from presenting evidence about victims' prior sexual experiences, judges do not consistently intervene to stop the introduction of such evidence.
- **Subsequent Sexual Conduct:** There is no prohibition on the introduction of evidence concerning victims' subsequent sexual conduct. Parties are thereby free to introduce this evidence in court, even though it relies on the same archaic notions of female sexuality as evidence of prior sexual conduct.

Consent

- **Ignoring the Ban on Consent-Based Evidence:** In wartime sexual violence cases, BiH legislation precludes use of the victim's consent in favor of the defence. In any event, courts must hold a closed hearing before permitting the introduction of consent-based evidence. Notwithstanding these restrictions, courts regularly permit the defence to call witnesses to testify about the consensual relationship between victim and perpetrator.
- **Misinterpretation of Coercive Circumstances:** The coercive circumstances engendered by war render meaningful consent impossible and resistance irrelevant. As evidenced by questions asked in court and analysis employed in verdicts, however, judicial actors are still wedded to traditional notions that victims should resist their perpetrators and that intercourse can be voluntary despite wartime duress.
- **Language Implying Consent:** Judicial actors consistently use language implying that wartime rape was consensual and/or motivated primarily by sexual gratification.
- **Stunted Characterisation of Sexual Violence:** Although sexual violence regularly fulfills the criteria for crimes such as torture, persecution, genocide, and sexual slavery, judicial actors too often limit the charge/conviction to rape. Broader characterisations of sexual violence, however, make it all the more evident that rape is integral to conflict; a crime fueled by aggression, not sexuality.

Credibility

- **Practical Obstacles to Proving Sexual Violence:** Given that there are often neither eyewitnesses nor supporting medical records in wartime sexual violence cases, international tribunals have established that a conviction can

be based on the victim's testimony alone. In contravention of such standards, certain BiH courts have responded to cases lacking corroborating evidence by subjecting victims to abnormally high standards of credibility and/or acquitting perpetrators.

- **Misunderstanding of the Psychology of Trauma:** Wartime sexual violence victims frequently tell no one about the crime, appear to have stable professional/personal lives, and experience gaps in their recollection of the incident. Judicial actors, associating these behaviours with untrustworthiness, have placed pressure on survivors to act like so-called "real" victims. Meanwhile, courts have acquitted perpetrators on the basis of victims' disjointed memories.
- **Failure to Call Expert Psychologists:** Courts and prosecutors only occasionally call expert psychologists/psychiatrists as witnesses in wartime sexual violence cases. Such witnesses, however, can explain how behaviour that may appear abnormal or inconsistent is in fact typical of trauma.
- **Inconsistent Intervention:** While evidence regarding victims' untrustworthiness is legally permissible, courts and prosecutors are too passive in responding to inappropriate defence tactics, such as repetitive, aggressive, and misleading lines of inquiry. As a result of these questions, victims sometimes become distressed and/or confused, hindering an accurate assessment of their credibility.
- **Irregular Access to Prosecutorial and Psychological Support:** Victims often meet just once with prosecutors before trial, despite the fact that multiple meetings are necessary to ensure the credibility of victims' evidence; the prosecutor establishes trust, gathers all relevant information about the incident, and eliminates holes in the victim's testimony. Similarly, victims' sporadic access to both witness support and long-term psychological assistance harms their credibility in court.

Shame

- **Identity Protection Measures:** Judicial actors occasionally impose severe identity protection measures on victims who may feel comfortable sharing their stories in public. Conversely, judicial actors too often inadvertently expose the identities of victims who wish to remain anonymous.
- **Language Implying Shame:** Judicial actors frequently use language indicating that the victim should feel shame or dishonour as the result of the sexual violence offence.
- **Unnecessary Details about the Rape:** Although the prosecution need not delve

into the minutiae of the crime to prove wartime sexual violence, prosecutors continue to ask victims unnecessarily detailed questions about how the rape occurred.

- **Characterisation of Sexual Violence against Men:** Prosecutors and judges regularly fail to characterise sexual violence against men as rape, contributing to the shroud of silence and shame that surrounds such crimes.

Recommendations

Prosecutors

- Object to the introduction of evidence on prior sexual conduct.
- Stop presenting evidence on the victim's lack of sexual experience; this tactic, geared towards illustrating the severity of damage to the victim, is the flip side of defence strategies that highlight the victim's promiscuity.
- Stop presenting arguments as to whether the victim could have fought back.
- When coercive circumstances exist, object to the introduction of evidence on the victim's consent, particularly when this evidence is introduced without a closed hearing.
- Provide detailed evidence regarding the coercive circumstances engendered by war, emphasising the link between such circumstances and the impossibility of meaningful consent.
- Avoid language in courtroom questioning/arguments that portrays rape as consensual or an expression of sexuality, not aggression.

- When applicable, charge rape to the fullest extent possible: i.e. as torture, sexual slavery, genocide, persecution, and so on.
- Meet with victims multiple times during the investigation.
- Review all prior statements given by the victim so as to clarify any inconsistencies.
- Call expert psychologists as witnesses in wartime sexual violence cases.
- Object when questions on the victim's credibility are too repetitive, aggressive, or misleading.
- Avoid language in courtroom questioning/arguments that implies the victim should feel shame.
- Fully explain all available identity prosecution options to victims and refrain from proposing measures that contravene victims' wishes.
- Stop asking victims questions about the details of the sexual violence act and instead focus on the overarching coercive circumstances.
- Charge acts of sexual violence against males as rape.
- Prepare victims for the possibility of questions on prior sexual conduct, consent, and credibility, notifying them that it is always possible to request a break and/or to stop responding to these questions.

Judges

- Intervene to prevent the introduction of inadmissible evidence on the victim's prior sexual conduct and consent.
- Always hold closed hearings in the event that there are questions about the admissibility of consent-based evidence.
- Stop analyzing whether the victim could have fought back in verdicts.
- Provide detailed explanations of the coercive circumstances engendered by war, emphasising the link between such circumstances and consent.
- Avoid language in questioning/verdicts that portrays rape as consensual or an expression of sexuality, not aggression.
- When applicable, characterise rape to the fullest extent possible: i.e. as torture, sexual slavery, genocide, persecution, and so on.
- Comply with international standards regarding the lack of corroborating evidence and minor inconsistencies in victims' recollection.

- Call expert psychologists in wartime sexual violence cases in which the prosecution has failed to do so.
- Intervene and/or take over questioning when cross-examination about the victim's credibility is repetitive, aggressive, or misleading.
- Avoid using language in questioning/verdicts that implies the victim should feel shame.
- Ensure that victims are aware of all available identity prosecution options.
- Requalify acts of sexual violence against men as rape when prosecutors have failed to charge such crimes as rape.

Witness Support Officers

- Meet with victims several times during both the investigation and trial stage.
- Prepare victims for the possibility of questions about prior sexual conduct, consent, and credibility, informing victims that it is always possible to request a break and/or stop responding.
- Ask victims what would be most beneficial in facilitating their testimony and take all necessary steps to fulfill these requests.

BiH Authorities

- Organise additional trainings for judges and prosecutors on the psychological effects of trauma; the correct application of measures of identity protection; and the international evidentiary standards applicable to wartime sexual violence prosecutions.
- Establish trainings for defence lawyers to prevent the introduction of impermissible evidence and the use of inappropriate lines of inquiry, highlighting the impact of these tactics on victims' mental health.
- Work towards establishing fully functional systems of witness support, long-term psychological assistance, and free legal aid.

State and Entity Level Legislatures

- Amend the relevant criminal procedure codes to prohibit the admission of evidence on both victims' subsequent sexual conduct, and victims' requests

for compensation/social welfare (when this evidence is used to dispute victims' credibility).

International Community

- Coordinate with the BiH authorities in helping to organise additional trainings for judges and prosecutors on the psychological effects of trauma; the correct application of measures of identity protection; and the international evidentiary standards applicable to wartime sexual violence prosecutions.
- Coordinate with the BiH authorities to help establish trainings for defence lawyers to prevent the introduction of impermissible evidence and the use of inappropriate lines of inquiry, highlighting the impact of these tactics on victims' mental health.
- Coordinate with the BiH authorities in helping to establish a functioning system of long-term psychological support for wartime victims.
- Coordinate with the BiH authorities to ensure that witness support departments at both prosecutors' offices and courts are fully funded.

FOREWORDS

From the International Perspective

This important report recognises the shame and blame – stigma - that wartime sexual violence survivors too often experience in the post-conflict environment and that can be perpetuated over many years, even generations. It offers a guide to reducing that stigma in the particular context of criminal processes and in so doing makes a valuable contribution towards the practical application of the *Principles for Global Action on Tackling the Stigma of Sexual Violence in Conflic*t, launched by the United Kingdom Foreign and Commonwealth Office in September 2017.

Importantly it makes recommendations for remedying the institutional-level discrimination and stigmatisation experienced by victims and survivors during the very processes that are intended to secure justice for the crimes committed against them.

The report closely analyses the jurisprudence from trials of wartime sexual violence across Bosnia and Herzegovina. It exposes how throughout the criminal process, lawyers, judges and other officials have perpetuated gender-based and discriminatory stereotypes or myths about rape victims, contrary to their internationally guaranteed human rights, including the right to a fair trial.

Such unlawful behaviour not only obstructs victims' access to justice, but through secondary victimization can cause further trauma and adversely impact upon emotional and physical recovery.

The key stereotypes that the report identifies have been used both consciously and unconsciously by legal professionals, in violation of international and domestic criminal law and their professional obligations. The myths are based on insidious, preconceived notions of what defines a 'real' victim of rape or other forms of sexual violence and are rooted in discriminatory, gendered, religious and cultural norms. They include the view that victims (especially women) lie about sex, are to blame for the rape due to their 'promiscuous' behaviour and provocative dress, and should physically resist the perpetrator.

Rape is committed against men as well as women and the deeply dangerous belief that men cannot be raped has contributed towards the vast majority of survivors of this crime in Bosnia-Herzegovina and elsewhere suffering in silence, without access to medical or broader holistic care.

Such instrumentalisation by legal officials of discriminatory stereotypes undermines victims' dignity and credibility and constitutes an egregious interference with their brave decision to report the crime, in the expectation that justice will be done.

The report specifically draws upon the situation of war crimes trials in Bosnia-Herzegovina but the concerns addressed are not limited temporally or geographically. This is evidenced by Article 5 of the Convention on the Elimination of Discrimination against Women, which requires States to take appropriate measures to modify social and cultural patterns of conduct of men and women, with a view to eliminating prejudices based on stereotyped roles for both.

The Committee that monitors the Convention has recognised the particular application of Article 5 in the context of access to justice and in its 2015 General Recommendation 33 on women's access to justice noted that 'Stereotyping and gender bias in the justice system ... impede women's access to justice in all areas of law, and may have a particularly negative impact on women victims and survivors of violence.'

Through this General Recommendation and its response to complaints from individuals the Committee has provided guidance to States on their specific obligations to end discrimination during the court process and to ensure equality of access to justice.

While it is useful to draw linkages between

gender-based discrimination and harmful stereotypes which pervade everyday societal discourse and behaviours, it is also important to understand that legal and judicial professionals are bound by professional codes of conduct and must uphold the law at all times. Thus when they fail to follow the law and draw conclusions based on myths and stereotypes that further stigmatise victims they destroy trust in the law and betray their profession. The very people who should reject the social construction of stigma instead reinforce it.

Of course gender-based discrimination in criminal trials is not the only barrier to access to justice, ending impunity, and securing accountability for survivors. In order to facilitate both access to justice and address the holistic needs of victims and survivors, other obstacles must be attended to, including those relating to the safety and security of victims and witnesses and measures for their greater well-being.

The report underlines that unlawful, stigmatising behaviour is everywhere unacceptable but especially within legal processes. Its practical recommendations can serve as a template for raising standards in criminal trials of alleged perpetrators of gender-based and sexual violence, wherever they are held.

Christine Chinkin
Centre for Women Peace and Security
London School of Economics
December 2017

From the Domestic Perspective

For some time, there have been talks within the professional community about how current practices and legislation are not sufficiently sensitive to the position of victims of crime. This problem is particularly evident in wartime sexual violence cases, as injured parties in such proceedings are the most vulnerable subcategory of criminal offence victims.

It is important to note that sexual violence is the most underreported crime. According to research, for one reported rape there are 15 to 20 unreported cases.[1] The reasons behind this statistic include the length of court proceedings and short sentences for perpetrators, both of which lead victims to distrust the judicial system.

Additionally, however, sexual violence victims face a number of unique challenges in coming forward to speak about the crime; societally imposed and internalised feelings

1 Data reported by the organisation "Women's Room - Center for Sexual Rights"

of shame and guilt, concern that the public will judge them, and, most painfully, anxiety about the reactions of their families and loved ones, which can range from blame to complete rejection.

These difficulties make sexual violence victims unwilling to testify about their traumatic experiences, further exacerbating extant obstacles to securing convictions, as there are typically no other eyewitnesses.

Due to the prevailing mindset of the society we live in, wartime sexual violence victims are stigmatised from the moment the act occurs. Yet it is sad that this pattern continues in the courtroom; that by taking part in the criminal proceedings, victims are re-traumatised and further stigmatised through the perpetuation of certain rape myths in legal proceedings.

This publication deals with the latter issue, attempting to bring about change in how sexual violence victims are treated during criminal trials, with a focus on survivors' voices and opinions.

The four rape myths highlighted in the publication contribute to the overarching stigmatisation of survivors and deepen survivors' reluctance to cooperate in legal proceedings. Prosecutors' offices and courts in Bosnia and Herzegovina should adopt all measures necessary to combat these myths, thereby increasing the effectiveness of the justice system in prosecuting sexual violence.

Given all of the above, this report is incredibly significant. It sets forth two main goals. The first goal is to offer courts and all parties involved in legal proceedings specific recommendations about best practices with regard to stigmatisation. Secondly, by providing concrete, practical examples of how rape myths operate in the courtroom, the report aims to raise public awareness and sensitise interested actors to these issues.

The problem of stigmatisation does not end with the final verdict. Even if victims obtain the satisfaction of seeing their perpetrators convicted, they must live and deal with the stigma that follows. It is thus vital that all sectors of society work to improve the position of sexual violence survivors. Based on this publication, judicial actors will try to do our part. What is clear, however, is that every individual and institution needs to get involved in fighting stigmatisation.

Milanko Kajganić
Prosecutor of the Prosecutor's Office
of Bosnia and Herzegovina

I. INTRODUCTION

This report aims to reduce the shame and blame that wartime sexual violence survivors[1] undergo during criminal trials, making it easier for victims to come forward and participate in proceedings.

More than 20,000 women were raped over the course of the Bosnian war. The number of men raped, though estimated to be in the thousands, is unknown.[2]

In the years since the conflict ended, sexual violence survivors have dealt with a range of physical, societal, economic, political, and psychological issues.

The absence of a statewide reparations scheme means that most victims have yet to receive redress for wartime harms, whether in the form of monetary compensation or social services.

Meanwhile, due to backlogs before courts, disjointed legislation, evidentiary hurdles, and stunted judicial will, the prosecution of perpetrators is often delayed or non-existent. The "stigmatisation" of sexual violence survivors exacerbates the above problems.

1 This document alternates between the term "victim" and "survivor" when referring to individuals subjected to sexual violence, in recognition of the fact that interviewees used both terms.

2 As the vast majority of sexual violence cases cited in the document involve female victims, the report most frequently uses the female pronoun "she" when referencing victims.

What is Stigmatisation?

"Stigmatisation" is difficult to define precisely, but entails negative, gender-based stereotypes that result in survivors' marginalisation: notions that women "ask for it", that victims of sexual violence are lying, that rape brings dishonour on survivors, and, in the case of male sexual violence victims, that homosexual acts are emasculating.

"Attention is directed toward the victim's behaviour and to what she could have or should have done, which prompts the victim to feel guilty."

-L, witness support officer at an entity level court in FBiH

Drawing upon these "rape myths", individuals and institutions shift blame and shame from the perpetrator to victim.[3]

Stigmatisation operates on several levels: personal, interpersonal, community, and structural. Sexual violence survivors, for example, frequently internalise rape myths, questioning whether they could have prevented what happened, keeping silent about the crime, and isolating themselves from loved ones. On an interpersonal level, survivors may contend with negative reactions from their families and friends, in some cases prompting the dissolution of these relationships.

Within their larger communities, particularly in rural locations, survivors regularly encounter social exclusion because of prejudices about sexual violence. Lastly, from a structural standpoint, biases against sexual violence survivors lead to discriminatory legislation and practices, preventing survivors from qualifying for social welfare, obtaining healthcare, and accessing the justice system.

Stigmatisation is a cycle, feeding on itself time and again. Some perpetrators inflict sexual violence specifically because it has the power to "mark" individuals, "emphasising and embedding social 'difference' and subordination."[4] Consequently, the failure to address stigmatisation and strip misogynistic myths of their power makes it more likely that sexual violence will occur again in the future.

3 See Organisation for Security and Co-operation in Europe (OSCE), *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers*, (2014), pgs. 129-131.

4 Preventing Sexual Violence Initiative (PSVI), *Principles for Global Action: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence*, (September 2017), pg. 7. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645636/PSVI_Principles_for_Global_Action.pdf

Combating Stigmatisation in the Courtroom

While several organisations in BiH, such as Amnesty International and the United Nations Population Fund (UNFPA), have conducted research on stigmatisation, there has been little analysis of how this phenomenon affects wartime sexual violence prosecutions; the purpose of the present report.

Over the last several years, wartime sexual violence prosecutions have increased, witness support and protection has vastly improved, and outmoded legislation has been amended. The judiciary has failed, however to fully shed the patriarchal norms that underpin stigmatisation.

"Stigmatisation is widespread, in every part of society, but the judiciary can help by standing behind survivors and affirming what has happened."

–H, a lawyer who represents wartime sexual violence victims before BiH courts

Rape myths have proved insidious yet powerful, surfacing in the language of judgments, the questions asked in court, and the imposition of certain protection measures. In such cases, as in other contexts, judicial actors place the blame and shame arising from sexual violence on the shoulders of the victim, not the perpetrator.

With the goal of combating stigmatisation in wartime sexual violence prosecutions, the report examines four myths that have prevailed in proceedings thus far, tracing the obvious as well as less noticeable ways in which assumptions and biases enter the courtroom and providing concrete recommendations for judges, prosecutors, witness support officers, the BiH authorities, and the international community going forward.

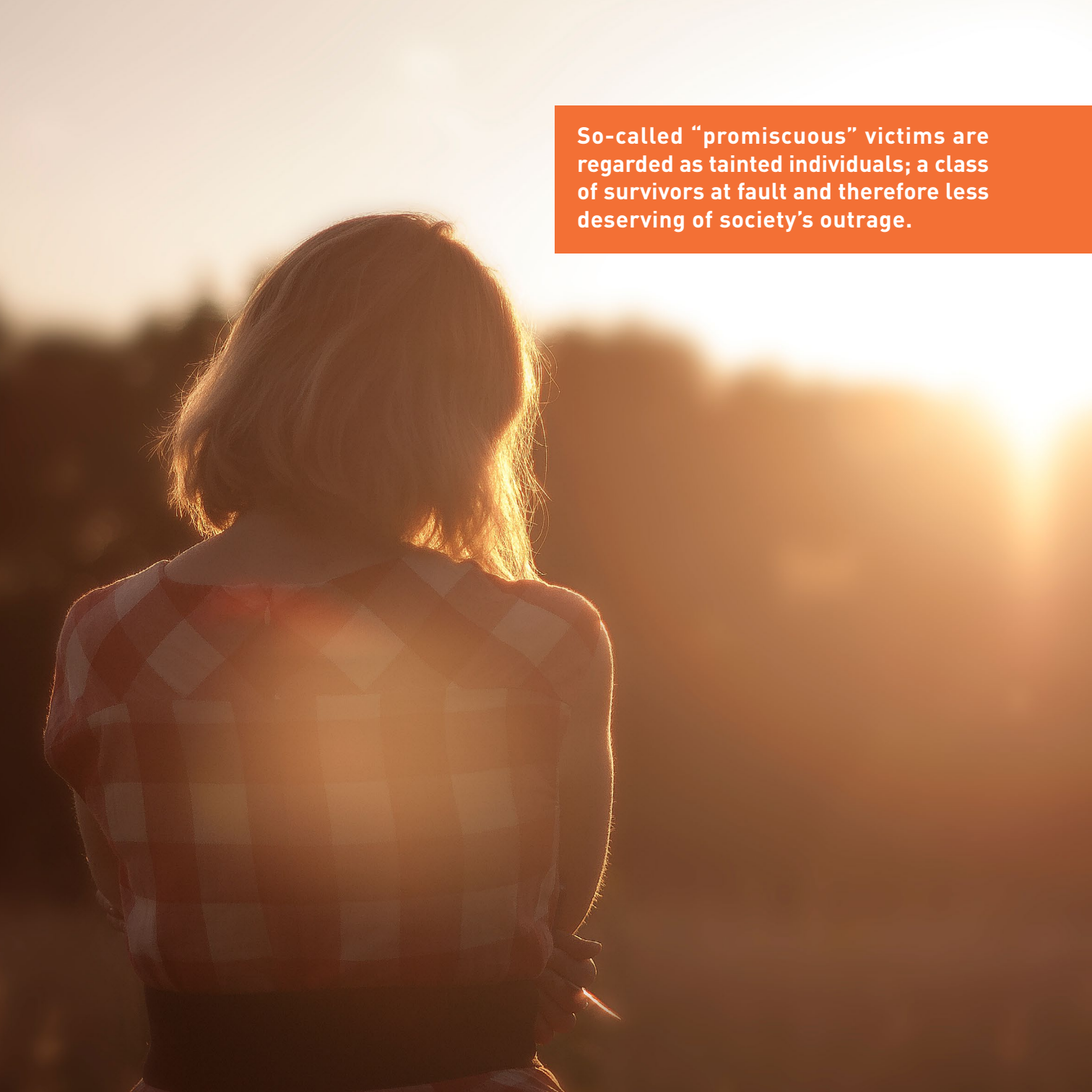
II. METHODOLOGY

This document was prepared on the basis of interviews with 31 individuals who have participated in wartime sexual violence prosecutions, including wartime sexual violence survivors, judges, prosecutors, defence lawyers, witness support officers, psychologists/psychiatrists, and survivors' lawyers. Interviewees hail from Republika Srpska (RS) and the Federation of BiH (FBiH), and comprise all ethnic backgrounds.

In particular, survivors' experiences and opinions have informed the problems highlighted herein as well as related recommendations. In order to obtain the most honest responses possible, the identities of all interviewees have been kept anonymous and interviewees have been assigned pseudonyms; full names for victims and initials for all other actors.

In addition to interviews, the report draws upon state and entity level judgments in wartime sexual violence cases. The judgments span the period 2008-2017.

Lastly, the report utilises research conducted by domestic and international stakeholders. As noted above, there has yet to be a document focused solely on stigmatisation during legal proceedings. Previous analyses have instead examined stigmatisation on a broader basis or, correspondingly, have detailed the manifold issues with wartime sexual violence prosecutions. The report thereby consolidates the valuable information provided by these secondary sources.



So-called "promiscuous" victims are regarded as tainted individuals; a class of survivors at fault and therefore less deserving of society's outrage.

III. "SHE GOT WHAT SHE ASKED FOR":[5] THE PROMISCUITY MYTH

One of the most prevalent rape myths is that victims provoke sexual violence through promiscuous behaviour; through their dress, words, sexual relations with other partners, and so on.[6]

> "Female victims of wartime rape tell me that one of the things their partners most commonly say is, 'how come you were raped and not someone else? You must have provoked him somehow.'"
>
> -D, a neuropsychiatrist who works with wartime rape victims

The promiscuity myth attributes rape to the victim's supposedly immoral lifestyle, not to the perpetrator's depravity. If the victim did not express her sexuality so openly, the perpetrator would not have been compelled to act as he did.

Correspondingly, so-called "promiscuous" victims are regarded as tainted individuals: a class of survivors at fault and therefore less deserving of society's outrage.

Although judicial practices in BiH have improved immensely of late, these biases continue to seep into wartime sexual violence proceedings.

A. Questions about Prior Sexual Conduct: "You Must Have Provoked Him Somehow"[7]

The promiscuity myth is most commonly perpetuated through defence questions about survivors' prior sexual experiences.

5 Excerpt from interview with B, a court expert and neuropsychiatrist who works with wartime sexual violence victims. B is describing common reactions to wartime rape.

6 Gillian Greensite, *Rape Myths*, California Coalition Against Sexual Assault, (1999), pgs. 3-4, 7. Available at https://www.nvcc.edu/support/_files/Rape-Myths.pdf

7 Excerpt from interview with D, a neuropsychiatrist who works with wartime rape victims.

In accordance with international standards,[8] Article 264(1) of the BiH CPC prohibits parties from asking the victim about prior sexual conduct or offering any evidence in this regard. Article 279(1) of the FBiH CPC and RS CPC contain the same restriction.

"The defence is presenting evidence that the victim was, for example, a waitress before the act, that she was like that with everybody, that she could not even feel the violence of the rape."

-H, a lawyer who represents wartime sexual violence victims

Nonetheless, defence lawyers still bring up survivors' prior relationships and/or sexual encounters, hoping judges subscribe to the myth that "promiscuous" survivors provoked the offence.

As noted by H, a lawyer who represents wartime sexual violence victims: "I've had a couple of cases where there were questions or discussion during the testimony of survivors about how she was a promiscuous person, how she changed partners, and how even her current life reflects that."

Examples from the Courtroom: "All Sorts of Activities"

In *Slavko Savic*, the defence called a witness who testified that the victim had intimate relations with a number of men during the war and worked in a catering/entertainment facility where "all sorts of activities" were performed.[9]

Such tactics are used even in cases involving minor victims. In *Dusko Solesa*, the defence attempted to present evidence that the survivor, who was underage at the time of the crime, was a "sexually mature girl with the experience required to protect herself from unwanted actions of persons of the opposite sex."[10] During cross-examination, the defence showed the victim pictures of a male acquaintance, asking whether he

8 *See* International Criminal Court (ICC) Rules of Procedure and Evidence, (2000), rule 71; International Criminal Tribunal for the Former Yugoslavia (ICTY) Rules of Procedure and Evidence, (1994), rule 96(iv).

9 *Slavko Savic*, Court of BiH, First Instance Verdict, 29 June 2015, paras. 10, 182, 319. *See also Cerim Novalic*, Court of BiH, Second Instance Verdict, 14 June 2011, para. 74-the defence questioned witnesses about the survivor's prior sexual relationship with another man.

10 *Dusko Solesa*, FBiH Supreme Court, Second Instance Verdict, 22 May 2015, pg. 10.

was her former boyfriend.[11]

Similarly, in an ongoing trial in which the victim was 16 when raped, the defence commented, "you (the victim) dated this guy at the time, you went out a lot, you were hanging out in those places."[12] In the words of O, the lawyer representing the survivor,[13] "I was shocked that the defence did this when the victim was so young."

Inconsistent Intervention

Although judges and prosecutors regularly intervene to stop defence cross-examination about prior sexual conduct, such intervention is inconsistent. As observed by M, an entity level prosecutor in FBiH, "the law is clear about forbidding certain questions but courts don't always follow prohibitions." Other interviewees mentioned that judges and prosecutors fail to take action rapidly enough, letting several questions go by before interrupting.

"In my experience, judges are too passive."

-M, an entity level prosecutor in FBiH

Meanwhile, as illustrated by the *Savic* verdict, courts are less vigilant about the prohibition against offering "any evidence" on prior sexual conduct. The *Savic* court permitted the defence to call its own witnesses to testify about the survivor's previous partners, implicitly validating this tactic by assessing the credibility of the witnesses' statements in the verdict.

Evidence regarding supposed promiscuity can deeply affect victims. Alma,[14] a survivor who testified before the Court of BiH, noted that the part of the hearing that most upset her was a defence inquiry about "other individuals not relevant to the crime." Even when the panel intervenes, the survivor still hears the question or argument, which in itself can have a stigmatising effect.

11 OSCE, *Towards Justice for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress before Courts in BiH 2014-2016* (hereinafter *Towards Justice*), (June 2017), pg. 54. Available at http://www.osce.org/mission-to-bosnia-and-herzegovina/324131?download=true

12 Interview with O, a lawyer who represents wartime sexual violence victims.

13 Victims are only permitted legal representation for the purposes of filing a compensation claim.

14 As discussed in the methodology section, all victims interviewed for the report have been given pseudonyms.

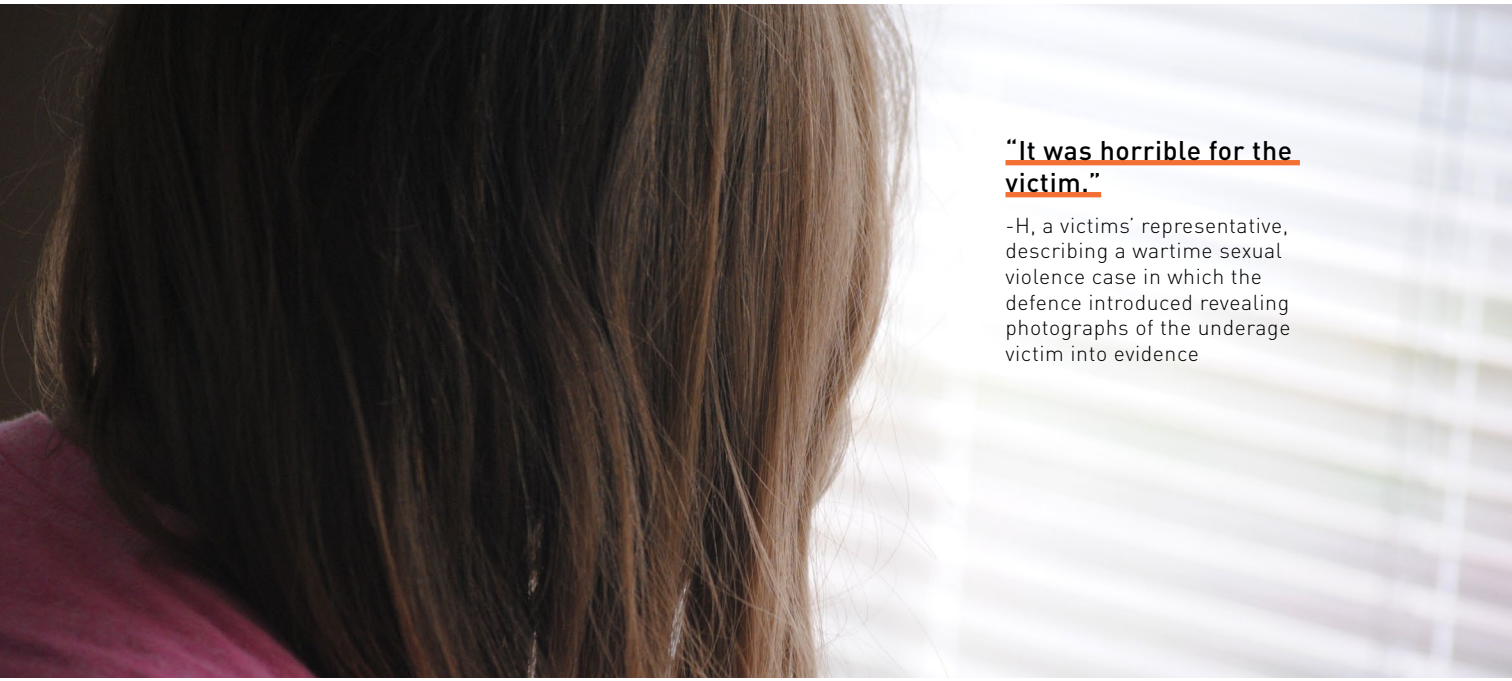
B. Questions about Subsequent Sexual Conduct: "The Gap in the Law"[15]

In contravention of international standards,[16] there is no prohibition in the relevant CPCs on the introduction of evidence regarding subsequent sexual conduct. As is true of prior sexual conduct, this evidence, unrelated to the crime itself, constitutes an attempt to portray the survivor as promiscuous and at fault.

H, the aforesaid victims' lawyer, recounted a case involving an underage victim who had moved to Germany following the rape and posted revealing photographs online. The defence

15 Excerpt of interview with V, an entity level judge in FBiH.

16 *See* ICC Rules of Procedure and Evidence, (2000), rule 71.



"It was horrible for the victim."

-H, a victims' representative, describing a wartime sexual violence case in which the defence introduced revealing photographs of the underage victim into evidence

then introduced these photographs as proof of the survivor "provoking" the defendant. As H commented, "it was horrible for the victim."

Entity level judge V likewise recalled a trial in which the defence presented evidence of the survivor's "promiscuity since the act", including topless photographs and information about the victim's romantic relationships.

While these situations arise less frequently than those involving prior sexual conduct, they are equally damaging and rely on the same archaic myths about women expressing their sexuality.

C. Innocent Woman vs. Promiscuous Woman

In some cases, judicial actors have drawn distinctions between the rape of so-called "promiscuous" women and the rape of "innocent" individuals.

As documented by the Organisation for Security and Co-operation in Europe (OSCE), two recent trials saw the prosecutor ask the survivor about her lack of sexual experience, an effort to illustrate the severity of damage resulting from the rape.[17] This tactic, analogous to that adopted by defence lawyers, suggests that women who have not engaged in sexual behaviour suffer more and, correspondingly, are a superior class of victims.

While practices have improved in this regard, with increasingly fewer inquiries about whether the victim was a virgin before the act,[18] such questions should never be allowed.

17 OSCE, *Towards Justice*, (June 2017), pg. 54.

18 Association Alumni of the Centre for Interdisciplinary Postgraduate Studies (ACIPS), *Prosecution of Wartime Sexualized Violence at the Court of Bosnia and Herzegovina: What Happened to Justice?* (hereinafter *Prosecution of Wartime Sexualized Violence*), (2012), pg. 27. Available at http://www.deso.mk/GetFile.ashx?f=3&pd=529&pdf=3

IV. PROMISCUITY MYTH RECOMMENDATIONS

A. Intervention and Discipline

prosecutors and judges

Prosecutors and judges should be hyper-vigilant in intervening whenever discussion of prior sexual conduct arises; not only during the questioning of survivors, but also during the examination of other witnesses and the introduction of documentary evidence.

> **"A judge is the chief of the courtroom and must take care of all witnesses, not allowing questions that are offensive to the victim or somehow undermining her."**
>
> -Z, a witness support officer at the Court of BiH

As noted by J, entity level prosecutor in FBiH, it is important to "react immediately." In *Dusko Solesa*, for example, the panel interrupted the first defence queries about the survivor's prior sexual relationships.[19] Judges, however, should go one step further, making it clear that further such questions will result in the relevant party being fined/removed from the courtroom.[20]

Additionally, judges should pay attention to prosecutorial lines of inquiry about victims' lack of sexual experience. This strategy represents the flip side of defence tactics regarding promiscuity and should be met with the same level of reprobation.

B. Reiterate Prohibition at the Beginning of the Hearing

judges

By reminding all parties from the outset that evidence concerning prior sexual conduct is prohibited, judges can set the tone for the trial. This pronouncement serves as a preemptive warning to the defence and also provides reassurance to the survivor that the panel will protect his or her best interests.

19 OSCE, *Towards Justice*, (June 2017), pg. 54.

20 *See* Article 242(3) of the BiH CPC.

C. Transparency with the Survivor

prosecutors and witness support officers

Wartime sexual violence survivors interviewed for the report found it helpful when prosecutors and/or witness support officers warned them about potential defence questions on their sexual experiences.

Other victims commented that they wished prosecutors/and or witness support officers had alerted them to this possibility. Alma, a survivor who testified before the Court of BiH, stated: the prosecutors "should prepare victims better for the trial, in order that victims know what can they expect and from which party."

> **"I tell them that questions relating to past sexual life are forbidden, and that at any moment it is possible to address the trial chamber about whether the question is approved or prohibited. In this way the witness gains some control over the process."**
>
> -L, entity level witness support officer

In this vein, several prosecutors and witness support officers mentioned that they thoroughly explain the *legal* prohibitions regarding prior sexual conduct to survivors. If the defence then attempts to interrogate the victim about this subject matter, the victim is aware that the defence is overstepping legal bounds—and can either ignore the question or even ask the judge whether the question must be answered.

On a broader basis, prosecutors and witness support officers shared that it is best practice to notify witnesses that they are always free to request a recess, including during distressing defence questions. As Azra, a survivor whose case was heard by the Court of BiH, remarked, "it meant a lot when then they told us we could ask for a break anytime we were upset by the proceedings."

D. Trainings for Defence Lawyers

HJPC, CEST, and relevant international organisations

As noted by various interviewees, even when judges and prosecutors intervene and evidence concerning prior sexual conduct is struck from the record, damage is still inflicted; the question has been asked, the survivor has heard it, and all parties have absorbed its implications.

"The harm is done when the defence lawyer is not sensitised to and educated about the particular ways to interrogate the victim. This is when the hurtful questions come out."

- V, an entity level judge

Consequently, to preempt these types of inquiries, the High Judicial and Prosecutorial Council (HJPC), the entity level Centres for the Education of Judges and Prosecutors (CEST), and relevant international bodies such as the OSCE should establish trainings for defence lawyers that address the prohibition of evidence on prior sexual conduct; the rape myths underpinning the use of such evidence; and the impact that said evidence might have on victims.

As illustrated by improved practices within prosecutors' offices and the judiciary, trainings have the power to effect real change; there is no reason that defence lawyers would not benefit from similar workshops.

E. Amend the Criminal Procedure Codes

BiH legislature

In accordance with international standards,[21] the state and entity level CPCs should be amended to prohibit the introduction of evidence regarding subsequent sexual conduct. As discussed above, this evidence, far from probative of the defendant's guilt, relies on outmoded conceptions of female sexual behaviour. It is just as irrelevant and just as harmful to survivors as evidence about prior sexual conduct.

While defence questions about victims' subsequent sexual experiences are rare, it is essential to amend the CPCs so as to guarantee that panels never give credence to this destructive line of argument.

21 *See* footnote 16.


Wartime rape “needs to be understood as a violent crime, not resulting from ‘natural’ or ‘inevitable’ ‘sexual urges.’”
©Velija Hasanbegovic

V. "SHE WANTED IT":[22] THE CONSENT MYTH

A second myth that arises in wartime sexual violence prosecutions is that survivors consent to the sexual violence offence, either by not fighting back hard enough or by engaging in "voluntary" relations with the perpetrator.[23]

Within this myth, notwithstanding the coercive circumstances engendered by war, the victim is expected to resist with force to demonstrate non-consent; if the victim does not resist, then the sexual acts that follow were not rape, but mutually desired. Judicial actors play into the consent myth in both obvious and less noticeable ways.

A. Resistance vs. Meaningful Assent

Prosecutors and judges periodically assess whether wartime sexual violence survivors could have resisted the offence in question, affirming the notion that victims should fight back.

International Standards: Coercive Circumstances

Until 2015, the BiH CC defined rape as "coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape)."

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), however, have held that rape covers situations beyond those in which force or the threat of force is wielded.

22 Excerpt of interview with D, a neuropsychiatrist who works with wartime sexual violence victims. D is describing common reactions to wartime rape.

23 *See* Rape Victims Advocates, *Sexual Violence Myths and Facts*. Available at https://www.rapevictimadvocates.org/what-you-need-to-know/myths-and-facts/; OSCE, *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers*, (2014), pgs. 129-131.

In the ICTR Trial Chamber's judgment in *Akayesu*, for example, the court emphasised the role played by coercive circumstances, which "need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict."[24]

As such, while violence and, correspondingly, resistance, can serve as evidence of non-consent, coercive circumstances are also sufficient; given the duress "inherent" in most wartime situations, it is unnecessary for the prosecution to prove that the defendant employed force/the threat of force or that the victim fought back.[25] Instead, judicial actors should focus on whether the victim had the opportunity to meaningfully assent.

In 2015, in keeping with international jurisprudence, the BiH legislature amended the CC's definition of rape to eliminate the requirement of force altogether.[26]

Examples from the Courtroom: The "Lack of a Realistic Possibility of Choice"[27]

BiH courts regularly apply the concept of coercion. In *Sasa Baricanin*, for example, the Court of BiH Appellate Panel dismissed defence claims that equated the absence of force with consent,[28] describing the coercive circumstances in which the victim found herself and stating, "the presented view of the defence that each time a rape victim offers no physical resistance to a sexual act would qualify as voluntary sexual intercourse, is fully unacceptable."[29]

24 *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4, Trial Judgment, (2 September 1998), para. 688.

25 *Prosecutor v. Dragoljub Kunarac*, Case No. IT-96-23 & IT-96-23/1A, Appeal Judgment, (12 June 2002), paras. 128-130. *See also* ICC Rules of Procedure and Evidence, (2000), rule 70-"Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence." It is also worth noting that in many cases of sexual violence, whether perpetrated in wartime or peacetime, survivors experience tonic immobility, meaning that they enter a catatonic/paralysis-like state. This phenomenon is another reason that traditional notions of resistance should not be applied to sexual violence victims.

26 Articles 172(1)(g) and 173(1)(e) of the BiH CC.

27 *Sasa Baricanin*, Court of BiH, Second Instance Verdict, 28 March 2012, para. 43.

28 Even prior to the 2015 amendments, the State Court generally complied with international standards.

29 *Sasa Baricanin*, Second Instance Verdict, paras. 43-49.

Similarly, in *Zaim Lalicic,* the Court of BiH, citing the "conditions of war" and the victim's detention in a prison facility, concluded that meaningful consent was impossible and the victim's lack of resistance irrelevant.[30] Although the SFRY CC does not define rape, entity level courts have adopted a comparable approach, issuing wartime sexual violence convictions on the basis of coercive circumstances.

Still Room for Improvement

Improvements in jurisprudence aside, some courts and prosecutors continue to place importance on whether the victim *could* have resisted.

"During rape the injured party was in no way capable of offering any kind of resistance to successfully thwart the defendant's intention."

-*Predrag Durovic*, Sarajevo Cantonal Court, First Instance Verdict, 30 October 2015, pg. 22

In *Dragoljub Kojic*, for example, the Doboj District Court took promising steps, asserting, "resistance is not a prerequisite for this charge considering the coercive atmosphere of the act."[31] The court went on, however, to find that the armed conflict and restrictions on the non-Serb population, in conjunction with threats levied by the defendant, "broke the injured party's resistance," enabling the commission of the rape.[32] .

Meanwhile, in *Radosav Milovanovic*, a particularly problematic case, the Bijeljina District Court acquitted the defendant partially on the basis that the victim voluntarily went to the Accused's apartment and "could have resisted in those circumstances."[33]

30 *Zaim Lalicic*, Court of BiH, First Instance Verdict, 25 May 2015, para. 145.

31 *Dragoljub Kojic,* Doboj District Court, First Instance Verdict, 30 April 2013, pg. 7.

32 *Dragoljub Kojic,* First Instance Verdict, pg. 3. *See also Dusko Solesa*, Bihac Cantonal Court, First Instance Verdict, 19 September 2014, pg. 13, in which the Bihac Cantonal Court noted that due to the fact that the injured party was a "juvenile, alone, without her parents," and facing a defendant who was a "soldier, (carrying) arms … and far more physically strong," she could not have resisted.

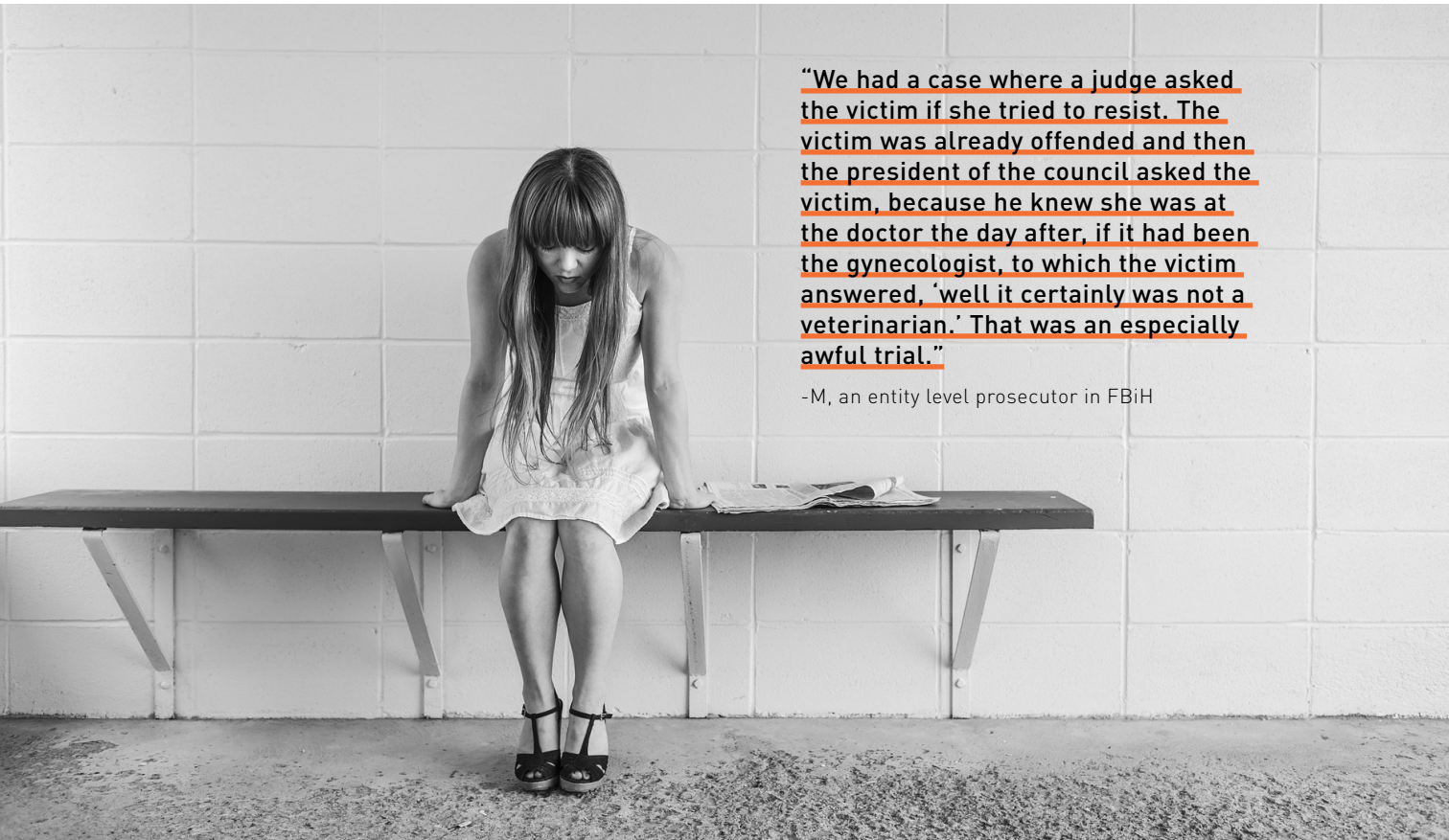
33 *Radosav Milovanovic,* Bijeljina District Court, First Instance Verdict, 22 January 2016, pg. 4. After the victim arrived at the defendant's house, the defendant used a knife to force her into sexual intercourse. The court, however, appeared to interpret the victim's so-called voluntary decision to visit the defendant's apartment as the dispositive issue with respect to consent.

"The record shows that the victim was raped and that she did not put up any resistance because she was threatened."

-*Asim Kadic*, Zenica Cantonal Court, First Instance Verdict, 6 February 2014, pg. 8

The "circumstances" in question fit the definition of coercion outlined in *Akayesu*; the non-Serb population in the area was under pressure; the perpetrator, a member of the opposing forces, told the victim to leave her family behind and visit him in his flat; and the victim's husband had disappeared just three days prior, exacerbating extant terror.[34] Expecting the victim in *Milovanovic* to resist her perpetrator disregards the duress clearly inherent in her environs.

34 *See Radosav Milovanovic*, First Instance Verdict, pg. 4.



"We had a case where a judge asked the victim if she tried to resist. The victim was already offended and then the president of the council asked the victim, because he knew she was at the doctor the day after, if it had been the gynecologist, to which the victim answered, 'well it certainly was not a veterinarian.' That was an especially awful trial."

-M, an entity level prosecutor in FBiH

In line with the above judgments, some interviewees from prosecutors' offices and the judiciary deemed it acceptable to question survivors about whether resistance was possible.

While explaining how he proves the existence of coercive circumstances, F, an entity level prosecutor in FBiH, mentioned a recent trial in which he asked the victim to explain why she couldn't resist; namely, because she was in a prison camp and "scared" and "paralysed."[35] N, another FBiH prosecutor, stated that "the possibility for the victim to fight back has to be taken into consideration", especially in cases in which victims seemed to be "free."

These viewpoints demonstrate that while judicial actors have generally absorbed and applied the concept of coercive circumstances, traditional notions of resistance have yet to be fully eliminated.

B. Consensual Sexual Relations in War

"According to my clients, the defence attorneys break them down the most. They usually provoke them with questions like: 'did you two know each other before?' and, 'what was your relationship with the perpetrator?'"

-D, a neuropsychiatrist who works with wartime rape victims

Under Article 264(3) of the BiH CPC, the victim's consent may not be used in favor of the defence in wartime sexual violence cases.[36] Article 264(4) stipulates that before admitting evidence regarding consent, courts must conduct a closed hearing.[37]

These provisions, in accordance with procedures at international tribunals,[38] derive from the aforesaid concept that conflict negates the possibility of true consent; that a civilian who has intercourse with a guard in a prison camp, for example, or with a soldier who visits her home is subject to coercive circumstan-

35 Similarly, in the *Zoran Dragicevic* trial, the prosecution asked the victim whether she offered any resistance. *See* OSCE, *Towards Justice*, (June 2017), pg. 50.

36 As noted by the OSCE, this total prohibition on evidence regarding the victim's consent likely violates defendants' right to a fair trial. If coercive circumstances (such as those in a detention camp) exist, however, there was no opportunity for the victim to meaningfully consent and any testimony in this regard is irrelevant/impermissible. *See* OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*, (June 2015), pg. 20. Available at http://www.osce.org/bih/171906?download=true.

37 Article 279(3) and (4) of the FBiH CPC and RS CPC contain the same restrictions on the victim's consent.

38 *See* ICTY Rules of Procedure and Evidence, (1994), rule 96(iii)-"before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible."

ces and does not enjoy the sexual autonomy usually present in peacetime.[39]

Despite the prohibitions laid out in the relevant CPCs, courts continue to allow the defence to introduce consent-based evidence.[40]

Examples from the Courtroom: We Slept Together Out of Love

In *Veselin Vlahovic*, the defence called witnesses to testify about the supposedly consensual relationship between the perpetrator and victim.[41] Similarly, in *Jozic and Mahalbasic*, the Accused testified that he and the victim had fallen in love,[42] while in *Josip Tolic* the Accused claimed that he was "planning a future together" with the victim.[43]

In contravention of Article 264(3) and the premise that the coercive circumstances of war render consent impossible, the courts in question did not dismiss this evidence immediately. Meanwhile, violating Article 264(4), the courts failed to hold closed hearings for the purposes of a more comprehensive relevance and credibility assessment.

Had such hearings been held, the courts should have determined that consent was out of the question and any testimony in this regard irrelevant: in *Veselin Vlahovic*, the victim was under siege in Grbavica and the Accused was a prominent member of the opposing army; in *Jozic and Mahalbasic*, the victim was a detainee and the Accused a prisoner favored by the guards; and in *Josip Tolic*, the victim a detainee and the Accused a prison guard.

39 *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, (March 2017), pg. 59. Available at http://www.president-ksgov.net/repository/docs/PSVI_protocol_web__3_.pdf

40 *See* OSCE, *Towards Justice*, (June 2017), pgs. 51-52.

41 *Veselin Vlahovic*, Court of BiH, First Instance Verdict, 29 March 2013, para. 885.

42 *Anto Jozic and Demahudin Mahalbasic*, Novi Travnik Cantonal Court, First Instance Verdict, 22 May 2017, pg. 22. *See also Zrinko Pincic*, Court of BiH, First Instance Verdict, 28 November 2008, pg. 41-the defence called several witnesses to testify that the Accused and victim were in a romantic relationship and the Accused entered into evidence a statement to that effect; *Asim Kadic*, Zenica Cantonal Court, First Instance Verdict, 6 February 2014, pg. 10-the defence claimed the Accused and the victim were in a consensual relationship.

43 *Josip Tolic*, Court of BiH, First Instance Verdict, 20 March 2015, para. 182.

Confusion over the Prohibition on Consent

Amongst interviewees, there was confusion about whether or not courts could prohibit testimony regarding consent.

Several prosecutors and judges deemed this testimony admissible as long as the victim himself or herself was not subjected to questions. The CPCs contain no such differentiation, however, between the examination of victims and other forms of evidence, such as defence testimony. Per Article 264 and corresponding provisions in the entity CPCs, evidence on consent cannot be used in favor of the defence and, in any event, should never be permitted absent an *in camera* hearing.[44]

Interviewees' responses and cases such as *Vlahovic* and *Tolic* show that some judicial actors do not fully understand the substance of Article 264, or, more importantly, the relationship between consent and coercive circumstances.

In allowing the presentation of evidence on consent notwithstanding manifest coercion, courts stigmatise/retraumatise victims, bolstering the myth that sexual relations *can* be voluntary despite the duress engendered by war.

C. Detailing the Link between Coercion and Consent

At present, some verdicts do not sufficiently link coercive circumstances to issues of consent, instead focusing on the interaction between perpetrator and victim.

In *Jasko Gazdic*, for example, the Court of BiH based its consent analysis primarily on this interaction; the victim had been abducted from her family home, threatened with a gun, and made to fear for the life of her underage daughter in the next room.[45] The court's focus on the interpersonal dynamic between victim and perpetrator precipitated an assessment of whether the victim could have resisted.[46]

44 As mentioned above, a complete ban on evidence regarding the victim's consent is problematic. Nonetheless, if coercive circumstances are manifest, meaningful consent is impossible and any testimony in this respect irrelevant.

45 *Jasko Gazdic*, Court of BiH, First Instance Verdict, 9 November 2012, paras. 248-250. The court only briefly mentioned the overarching situation in Foca at the time.

46 *Jasko Gazdic*, First Instance Verdict, para. 248.

Although the facts surrounding the exchange between Gazdic and the victim are important, the wartime context in Foca would also have been sufficient to prove non-consent, shifting attention away from the force/threat of force employed by Gazdic and making it all the more evident that the victim was not in a position to assent to sexual relations.

Examples from the Courtroom: Spotlighting the Broader Circumstances

When the broader circumstances are spotlighted, the victim's capacity to fight back is clearly irrelevant.

In *Zoran Dragicevic*, for example, the Court of BiH dismissed all lines of argument regarding consent, emphasising the terror of the situation in which the victim found herself; "what needs to be taken into consideration is that, at that period of time, Grbavica was in isolation from the greater geographical context. On the one side, citizens, including the victim, lived together with the hostile army, or rather surrounded by it, and they had to keep their doors and building entrances open for unannounced and random interruptions from various military formations ...The victim was a Bosniak, which was a circumstance that added to her fear, as she stated in her testimony, which is understandable and expected."[47]

Compared to *Gazdic*, this explanation is less concerned with the victim's specific dealings with the defendant, thereby forestalling potential stereotypes regarding consent and resistance.

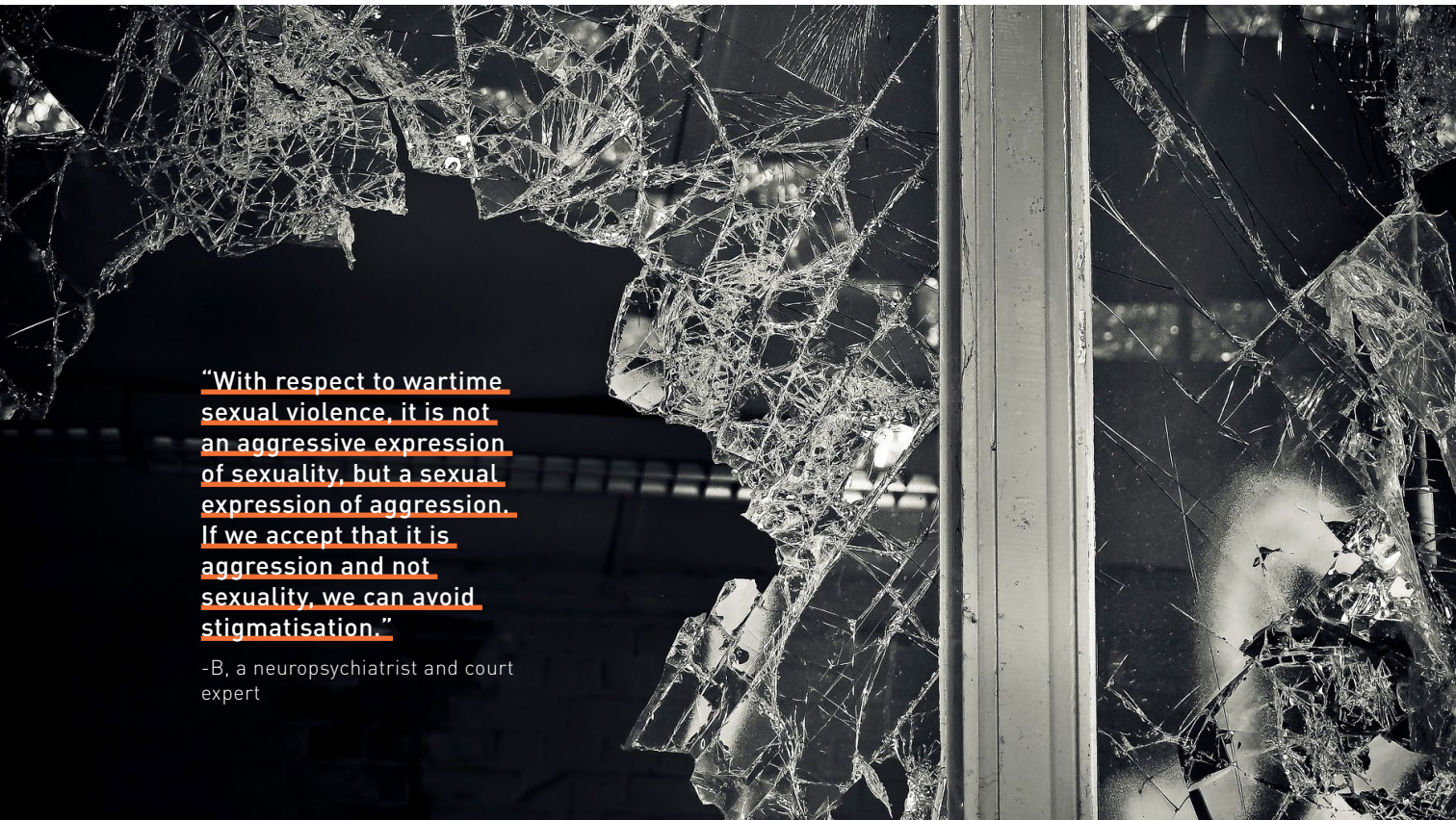
47 *Zoran Dragicevic*, Court of BiH, First Instance Verdict, 22 November 2013, para. 165.

D. Language Implying Consent: "Intercourse, i.e. Rape"[48]

Judicial actors regularly utilise language that implies wartime rape was consensual and/or that portrays the crime as sexual instead of aggressive. As stated at the 2016 Wilton Park Conference, a meeting of experts convened to develop the "2017 Principles for Global Action on Preventing and Addressing Stigma Associated with Conflict Related Sexual Violence", wartime rape "needs to be understood as a violent crime, not resulting from 'natural' or 'inevitable' 'sexual urges.'"[49]

48 *Mladen Markovic*, Istocno Sarajevo District Court, First Instance Verdict, 27 May 2013, pg. 6-"the actions stated in the indictment … can be characterised as intercourse, i.e. rape."

49 Wilton Park Conference, *Preventing Sexual Violence Initiative: Shaping Principles for Global Action to Prevent and Tackle Stigma*, (November 2016), pg. 10. Available at https://www.wiltonpark.org.uk/wp-content/uploads/WP1508-Report.pdf



First, certain descriptions of wartime rape indicate that both parties assented to the relations.

Examples from the Courtroom: They "Had Sexual Intercourse"

In *Asim Kadic*, the FBiH Supreme Court stated that the Accused "took the injured party away and had sexual intercourse with her there".[50] The term "had sexual intercourse", with no mention of coercion, belies the brutality of the incident, in which Kadic, bearing a rifle, ordered the victim to undress, after which he raped her multiple times.

"I recall one example when the prosecutor in the direct examination asked if the defendant made love to her. That was inappropriate, and insulting to the victim because rape is not love making."

-V, an entity level judge in FBiH

Likewise, in *Zoran Dragicevic*, the first instance panel at the Court of BiH noted of the rape, "he then had sexual intercourse with her on the bed, after which he told her to take a shower … After the shower, he had sexual intercourse with her again."[51] The panel's account of what happened seems almost ordinary, a non-event; without prior knowledge, an outsider could mistake the description for that of a couple having mutual sexual relations.

As documented by trial monitors from the Association Alumni of the Centre for Interdisciplinary Postgraduate Studies (ACIPS) in a 2012 report, some prosecutors likewise rely on phrases that evoke consensual intercourse. In *Veselin Vlahovic*, for example, the prosecutor asked

50 *Asim Kadic*, FBiH Supreme Court, Second Instance Verdict, 20 November 2014, pg. 7.

51 *Zoran Dragicevic*, First Instance Verdict, para. 158. *See also Redzep Beganovic*, Bihac Cantonal Court, First Instance Verdict, 18 March 2016, pg. 4-"the defendant Coralic Amir had sexual intercourse with the juvenile victim"; *Dusko Dabetic*, Sarajevo Cantonal Court, First Instance Verdict, 17 June 2016, pg. 13-"the defendant Dusko Dabetic, while committing the criminal offence, as well as later sexual relations, did so in especially unfavorable conditions for the injured party"; *Asim Kadic*, First Instance Verdict, pg. 2-"the said person had sexual intercourse with the victim … after which he ordered her not to put her clothes back on, that he was going to do it one more time, and he had sexual intercourse with her for the second time."; *Jasko Gazdic*, First Instance Verdict, para. 173-"she did not respond, so he lay on top of her and then there was full sexual intercourse of the vaginal kind between him and her."

the survivor, "How did the sexual intercourse look like?"[52] The witness herself had already labeled the act as "rape."

In addition to using terms such as "sexual intercourse", judicial actors tend to depict rape as motivated primarily by sexual desire.

Examples from the Courtroom: Sexual Pleasure, Not Aggression

In *Danilo Spasojevic*, the Bijeljina District Court, detailing the abduction and rape of several females, stated, "while driving (the Accused) were pleasuring themselves sexually by putting their sex organs into the mouths of the said female persons ... (the Accused), alternating, sexually pleasured themselves by putting their sex organs into (the victims') mouths, and then into their sex organs and anuses".[53] This recitation of events focuses on sexual fulfillment, disregarding the fact that rape is above all an expression of aggression.

Correspondingly, in *Mladen Markovic*, the Istocno Sarajevo District Court noted of the rape, "(the Accused) forced her to perform fellatio on him and please him that way as well."[54]

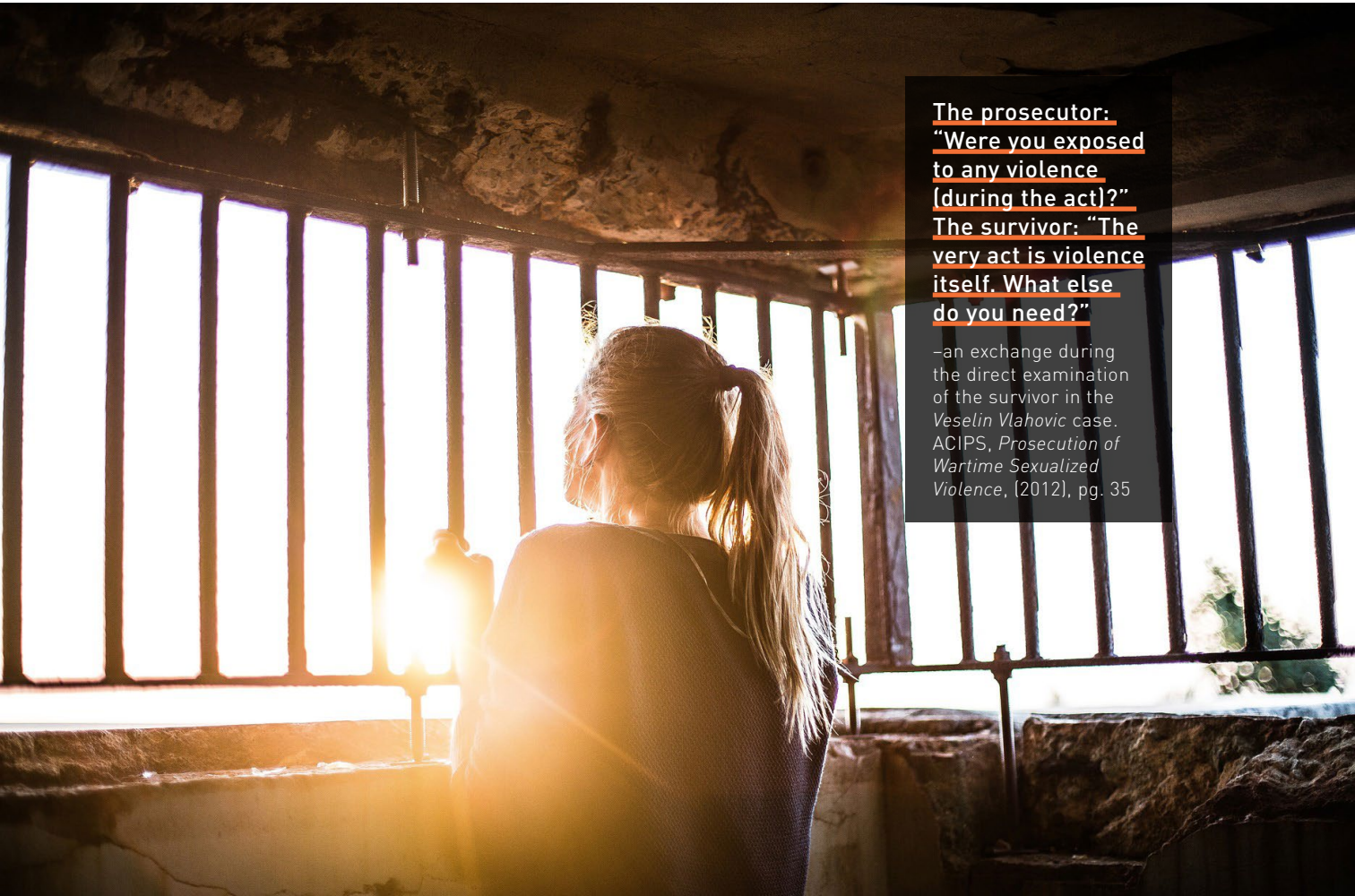
52 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 37.

53 *Danilo Spasojevic*, Bijeljina District Court, First Instance Verdict, 25 January 2012, pg. 2.

54 *Mladen Markovic*, First Instance Verdict, pg. 7. *See also Ibro Macic,* Court of BiH, First Instance Verdict, 17 April 2015, para. 274-"they were forced to pleasure each other orally"; *Veselin Vlahovic*, First Instance Verdict, para. 27-"he got up and demanded the injured party to pleasure him orally"; *Bosiljko Markovic and Ostoja Markovic*, Court of BiH, Second Instance Verdict, 29 February 2016, para. 51-"two men ... forced her to pleasure them orally as well"; *Bosiljko Markovic and Ostoja Markovic*, Court of BiH, First Instance Verdict, 24 June 2015, para. 185-"they forced her to pleasure them orally after the rape"; *Jasko Gazdic*, First Instance Verdict, para. 4-"the injured party had to orally pleasure a third person, unknown to her, after which both of them left the room."

In neglecting the violent power dynamics that define rape, courts depict the act as more akin to "a variant of sexual intercourse",[55] echoing the consent myth discussed throughout this section. As stated by B, neuropsychiatrist and court expert, stigmatisation will decrease when society begins to view sexual violence not as an "aggressive expression of sexuality", the result of "natural urges", but as a "sexual expression of aggression."

55 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 37.



The prosecutor: "Were you exposed to any violence (during the act)?" The survivor: "The very act is violence itself. What else do you need?"

–an exchange during the direct examination of the survivor in the *Veselin Vlahovic* case. ACIPS, *Prosecution of Wartime Sexualized Violence*, (2012), pg. 35

E. Stunted Characterisation of Sexual Violence Crimes

Prosecutors and courts sometimes fail to appropriately qualify sexual violence crimes, missing valuable opportunities to combat the consent myth.

Sexual violence regularly fulfills the legal criteria for a range of offences, including torture, sexual slavery, and genocide.[56] By characterising sexual violence as a crime other than rape, judicial actors can highlight the ways in which sexual violence is connected to the broader wartime context; an act fueled by aggression, not sexual gratification.

In certain cases, however, prosecutors have declined to charge sexual violence to the "fullest extent possible",[57] limiting the indictment to rape. Courts have correspondingly neglected to re-qualify these crimes.[58]

Examples from the Courtroom: Limiting the Indictment

As documented by the OSCE, the *Veselin Vlahovic* case encapsulates the aforesaid problem. The Accused—among his many crimes—held a woman in captivity, during which he raped her several times. Although this conduct could have been characterised as sexual slavery, the prosecution charged the Accused with, respectively, rape and enslavement as crimes against humanity, unnecessarily isolating the sexual violence offence from the Accused's other criminal activities.[59]

The more that rape is recognised as analogous to/connected with other war crimes, part and parcel of violent conflict, the more the consent myth will recede from public consciousness.

56 Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), pgs. 186-216.

57 OSCE, *Towards Justice*, (June 2017), pg. 18

58 As discussed below, cases of sexual violence against males often result in the reverse problem, with judicial actors refusing to characterise such crimes as rape. It is also worth noting that the SFRY CC, applicable in entity level cases, does not contain provisions on crimes against humanity, such as persecution and sexual slavery. Accordingly, entity level judicial actors are more restricted than their state level counterparts with respect to the characterisation of sexual violence crimes.

59 OSCE, *Towards Justice*, (June 2017), pgs. 19-20.

VI. CONSENT MYTH RECOMMENDATIONS

A. Eliminate Resistance Analysis

prosecutors and judges

While judicial actors in BiH have, as documented in this section, taken great strides to align their analysis of wartime rape with international standards, it is imperative that all parties stop the practice of assessing whether the victim could have resisted.

Neither prosecutors conducting direct examination nor judges evaluating consent in verdicts should, once having determined that coercive circumstances existed, have any reason to delve into the victim's capacity to fight back. Such calculations are irrelevant and encourage outmoded notions that victims must resist to signal non-consent.

Instead of relying on resistance paradigms, judicial actors should focus on whether it was possible for the victim to meaningfully assent to the act.

B. Stop Allowing Testimony on Consent

prosecutors and judges

"Defence lawyers are always trying to find justification for their clients, saying 'why did the victim find herself in that situation in the first place?' What matters is that courts intervene when questions cross the line."

-O, a lawyer who represents wartime victims

As discussed above, courts occasionally permit the defence to present evidence on consent by calling witnesses or introducing documentary evidence. Not only does this practice contravene international standards on the inherently coercive nature of war, it also violates prohibitions in the state and entity level CPCs.

Going forward, judges should take care to conduct closed hearings to determine the admissibility of consent-based evidence. Prosecutors should be vigilant about objecting if closed hearings are not held.

C. Connect Coercive Circumstances to Consent

prosecutors and judges

In order to demonstrate victims' lack of free will, prosecutors should submit extensive evidence on coercive circumstances and, correspondingly, judges should provide detailed explanations of said circumstances in verdicts. As mentioned above, this approach prioritises meaningful consent over force/the threat of force.

D. No Language Implying Consent

prosecutors and judges

Judges and prosecutors should omit all language indicating that the victim consented from both verdicts and questions asked in court.

"The sexual act and sexual pleasure is not the goal."

-B, neuropsychiatrist and court expert

Asserting that the victim and defendant "had sexual intercourse", for example, or stating that the victim "slept with" the defendant contributes to the myth that the victim signaled assent: that she "wanted it" and was not actually raped.

Judicial actors should likewise avoid emphasising the sexual nature of the crime. Wartime rape is predominantly an expression of aggression, not sexuality, and this should be reflected in all language used.

E. Charge Sexual Violence as Other Crimes

prosecutors and judges

Prosecutors should, when possible, charge sexual violence as a crime other than rape, such as torture, sexual slavery, or genocide. This type of broader characterisation links sexual violence to the wartime context, highlighting the brutality of the offence and debunking the misconception that rape is motivated by sexual urges. If prosecutors fail to characterise crimes appropriately, judges should revise said characterisations in verdicts.

F. Witness Preparation

prosecutors and witness support officers

In line with recommendations regarding prior sexual conduct, prosecutors and witness support officers should prepare victims for the possibility that the defence will try to elicit testimony about consent.

"Witness support officers should inform victims about possibly negative or uncomfortable situations in court, for example, questions about whether they were in a relationship with the criminal."

-Dalila, a victim who testified in a wartime rape case before the Bijeljina District Court

As mentioned above, interviewees consistently stated that informed victims are steadier and more empowered in court. Victims' lawyer H recalled a recent case in which the defence cross-examined the victim about whether she "voluntarily engaged" in intercourse, "so as to push her out of balance." The victim, however, was "ready and very calm so the defence did not succeed."

Additionally, similar to questions concerning prior sexual conduct, prosecutors and witness support officers should notify the victim that he or she can request a break and even ask the judge if "the question must be answered."

“It is easy for the public to grasp a gunshot wound or disappeared family members, but when it comes to the psychological trauma caused by rape, it is often invisible and the public often does not truly comprehend the depth of the harms,” contributing to the myth that victims lie.

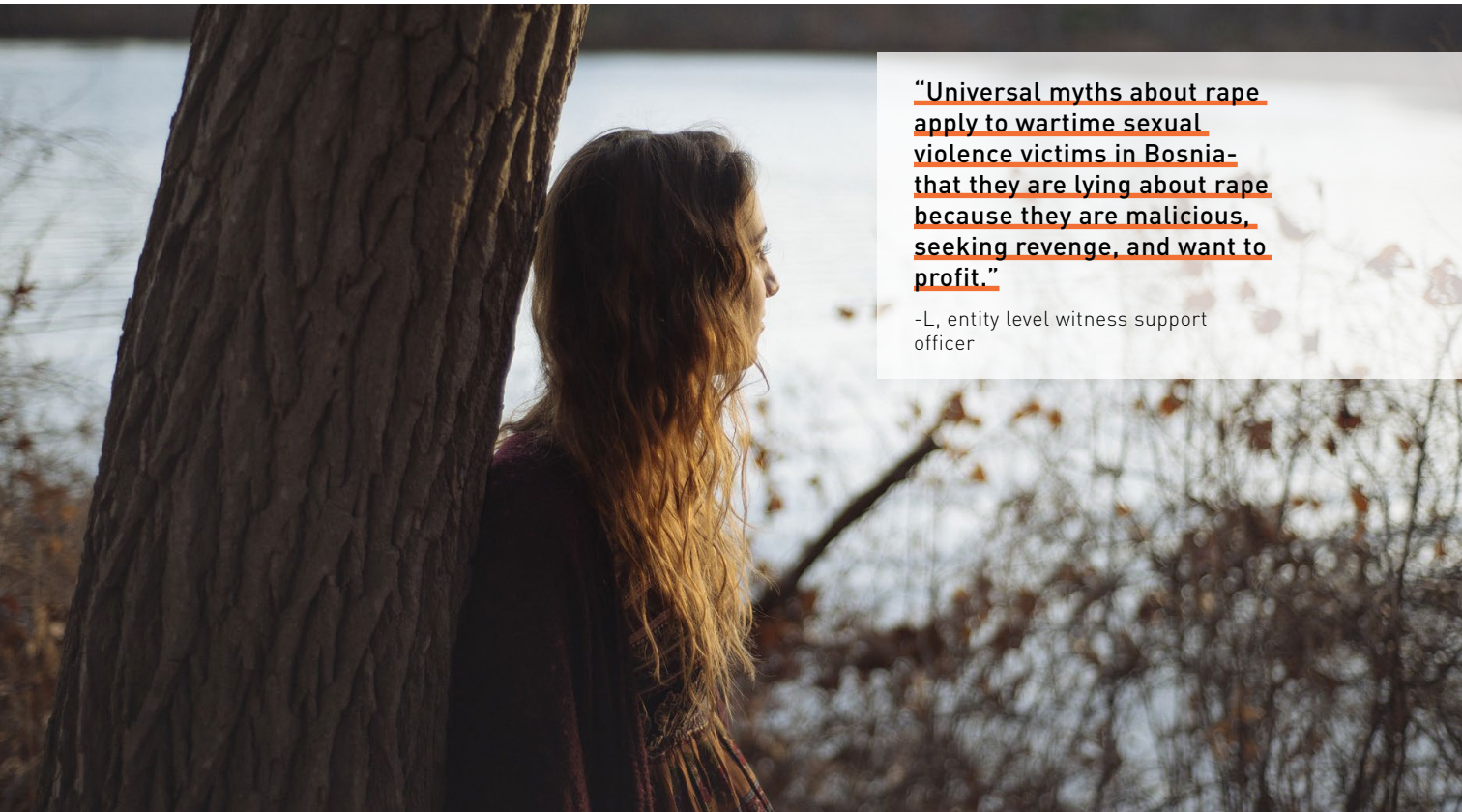
-R, a psychotherapist who works with wartime sexual violence victims

VII. VICTIMS LIE : THE CREDIBILITY MYTH

The aforementioned stereotypes concerning victims' promiscuity and consent fuel the overarching myth that wartime sexual violence victims lie about rape. Again, this myth transfers blame for the act of sexual violence from perpetrator to victim.

Allegations of deceit are prevalent during both peacetime and war,[60] partially due to the fact that the harms of rape are less apparent and/or understood than those of other crimes.

60 *See* Wilton Park Conference, *Preventing Sexual Violence Initiative: Shaping Principles for Global Action to Prevent and Tackle Stigma,* (November 2016), pg. 7; OSCE, *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers*, (2014), pgs. 129-131.



"Universal myths about rape apply to wartime sexual violence victims in Bosnia- that they are lying about rape because they are malicious, seeking revenge, and want to profit."

-L, entity level witness support officer

As R, a psychotherapist who works with victims, noted, "it is easy for the public to grasp a gunshot wound or disappeared family members, but when it comes to the psychological trauma caused by rape, it is often invisible and the public often does not truly comprehend the depth of the harms."

Wartime sexual violence victims are particularly vulnerable to accusations of dishonesty; many were unable to procure corroborative medical documentation because of wartime circumstances; did not report the crime until years later as the result of prevailing stigma; and have given multiple statements about the offence over the period between the war and the commencement of trials, creating room for inconsistencies.

In the words of F, an entity level prosecutor in FBiH, "parties take advantage of the difficulty of documenting wartime rape to argue that victims have some secret motive or reason for fabricating the story."

This backlash against wartime sexual violence victims exacerbates the problem of underreporting. As observed by P, a victims' rights activist, "the feeling that no one will believe them is directly linked to the unwillingness of victims to come forward about the acts and testify in court."

A. Interrogating Victims' Responses to Rape

Judicial actors are not sufficiently sensitive to the various behaviours victims might display in the aftermath of rape, instead attributing wholly explicable actions to victims' lack of credibility.

As documented by numerous organisations, the majority of wartime sexual violence victims do not disclose their experiences to anyone for a range of reasons; shame, fear of the perpetrator retaliating, fear of the reaction of loved ones, fear of bringing shame on the family, distrust of judicial mechanisms, religious norms surrounding sexual activity, suppression engendered by psychological trauma, and so on.[61]

61 *See* Amnesty International, *Last Chance for Justice for Bosnia's Wartime Rape Survivors*, (September 2017), pgs. 10, 50. Available at https://www.amnesty.org/en/documents/eur63/6679/2017/en/; ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 29; UNFPA, *Stigma Against Survivors of Conflict-Related Sexual Violence in BiH*, (June 2015), pgs. 6-7. Available at http://ba.unfpa.org/sites/default/files/pub-pdf/UNFPA%20Stigma%20Short%20ENG%20FIN1_0.pdf

Examples from the Courtroom: Manipulation of Victims' Silence

Despite the above explanations, defence lawyers regularly exploit victims' silence to try to prove their untrustworthiness as witnesses. In *Zaim Lalicic*, for example, the defence labeled it "questionable" that the injured party had not mentioned the rape before 2014, when the indictment was issued.[62]

62 *Zaim Lalicic*, First Instance Verdict, pg 10. *See also Gligor Begovic*, Court of BiH, Second Instance Verdict, 27 June 2016, para. 61-the defence emphasised that the three injured parties did not mention the sexual abuse before the investigation in 2014; *Dragoljub Kojic*, First Instance Verdict, pg. 3-in closing argument, the defence stated that the injured party did not tell anyone about the rape for years, and that it was therefore clear that the defendant did not use force; *Albina Terzic*, Court of BiH, First Instance Verdict, 19 October 2012, paras. 207-208-the defence questioned the veracity of the victim's testimony because she first disclosed the rape to Association "Women – Victims of War", not to the police; *Velibor Bogdanovic*, Court of BiH, Second Instance Verdict, 21 June 2012, para. 45-"The Defence placed particular emphasis on the fact that it was only 17 years after the incident that the victim came forward with the revelation that she was raped, which instills absolute doubt when it comes to the truthfulness and accuracy of the incident itself."

"Every appearance at court can make the victim feel more guilty. The victims oftentimes wonder why they have to go through all of that, they are convinced it is because they are not trusted."

-S, an entity level witness support officer in RS

"Why did you hide this?"

-question asked of an injured party in the *Veselin Vlahovic* trial. ACIPS, *Prosecution of Wartime Sexualized Violence*, (2012), pg. 35

In some cases, the defence has adopted an inappropriate tone while cross-examining victims about this subject. During the *Veselin Vlahovic* trial, the victim was asked why she did not mention the rape in the immediate wake of the war. As documented by ACIPS, the defence attorney's tone was "aggressive, addressing the witness as if she was guilty and as if she was in the police station under investigation for a criminal act."[63]

Notwithstanding the victim's answer that she only decided to tell anyone after prolonged therapy, the defence continued to harp on her silence, terminating this line of inquiry only when a member of the presiding panel intervened.[64] Given the wealth of literature on why victims might stay quiet after rape, the attorney's questions were both insulting and irrelevant.

Behaviour Fixation

Beyond the issue of silence, interviewees noted that judicial actors hold unreasonable expectations about how sexual violence *should* affect victims. As observed by L, entity level witness support officer, there is a "behaviour fixation", with judges and prosecutors finding those who display emotion more credible.

S, a witness support officer in RS, recounted similar experiences; a prosecutor instructing a victim to cry so as to best convince the panel of her story; a judge commenting of a wartime sexual violence survivor, "oh, she doesn't look like a victim at all"; and so on.

Assumptions concerning "normal victimhood" disregard psychological research on the manifold forms of trauma,[65] burdening survivors with the pressure of proving their trustworthiness through their behaviour.

63 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 35.

64 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 36.

65 *See International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, (March 2017), pgs. 231-32.

Meanwhile, defence lawyers have played upon these stereotypes, portraying victims with seemingly stable lives as liars. In *Velibor Bogdanovic*, for example, the defence insinuated that because the victim had maintained a job for 17 years and had not sought professional help, she had fabricated the rape.[66] In *Predrag Durovic*, the defence relied upon this same tactic, claiming that it was "impossible" for an individual suffering from rape trauma to give birth to two children.[67]

Again, these arguments derive from the expectation that all "real" wartime sexual violence victims will act in a certain way, fueling broader prejudices concerning victims' deceitfulness.

66 *Velibor Bogdanovic*, Court of BiH, First Instance Verdict, 29 August 2011, paras. 22-24.

67 *Predrag Durovic*, First Instance Verdict, pg. 8. *See also Muhidin Basic and Mirsad Sijak*, Court of BiH, First Instance Verdict, 18 January 2013, para. 249- the defence attempted to elicit expert testimony that it was abnormal for rape victims to "cover up" the rape and "behave as if nothing had happened."

"If the victim does not cry or show emotion, and at the same time functions normally, has a family, and a job, she will not be seen as a 'real victim.' Others will perceive her as being off or lying."

-S, entity level witness support officer in RS

B. Practical Obstacles to Proving Wartime Sexual Violence

In addition to scrutinizing victims' behaviour following the rape, defence lawyers dispute victims' credibility by exploiting the obstacles to proving wartime sexual violence, such as difficulties in obtaining supporting medical documentation[68] and the frequent lack of eyewitnesses.[69]

Cognizant of these practical complications, international tribunals have established that it is permissible to convict a wartime sexual violence perpetrator on the strength of the victim's testimony alone.[70] As stated in *Dusko Tadic*, sexual violence victims should be afforded the "same presumption of reliability" as all other witnesses, even without corroborating evidence.[71]

Examples from the Courtroom: Faulting Victims for Practical Obstacles

In certain wartime sexual violence cases, defence strategies regarding corroboration have resonated with domestic courts.

In *Oliver Krsmanovic*, for example, the Court of BiH stated that given the lack of eyewitnesses, the victim's testimony needed to be such that it "left no shadow of doubt as to its accuracy and veracity and the witness's credibility and integrity."[72]

68 *See Velibor Bogdanovic*, First Instance Verdict, para. 18-"the Defence submits that the victim has failed to furnish any medical documents to this end, although it is known that she had health insurance coverage throughout the war"; *Zaim Lalicic*, First Instance Verdict, para. 149-"the injured party answered the defence question of why she did not have any medical documents saying that it is not her fault, but the fault of those who organised the exchange on May 9, 1993, as they were responsible for providing for the medical examination of the prisoners."

69 *See Mato Baotic*, Court of BiH, First Instance Verdict, 9 December 2016, para. 163; *Petar Kovacevic*, Court of BiH, Second Instance Verdict, 15 September 2016, para. 81. The lack of eyewitnesses to rape is an issue during peacetime as well. In the context of the Bosnian conflict, there tend to be more eyewitnesses in cases of sexual violence against males, as these crimes were often committed in group situations in prison camps.

70 *See* ICTY Rules of Procedure and Evidence, (2000), rule 96(i)-in cases of sexual assault, "no corroboration of the victim's testimony shall be required."

71 *The Prosecutor v. Dusko Tadic*, Case No. ICTR-94-1-T, Trial Judgment, (7 May 1997), para. 536-explaining that Rule 96(i) affords victims of sexual violence the "same presumption of reliability as the testimony of victims of other crimes."

72 *Oliver Krsmanovic*, Court of BiH, First Instance Verdict, 31 August 2015, para. 311. *See also Muhidin Basic and Mirsad Sijak*, First Instance Verdict, para. 58; *Velibor Bogdanovic*, First Instance Verdict, para. 79.

> In contravention of international practices, this "no shadow of a doubt" threshold appears higher than that of beyond any reasonable doubt, placing an unjustified burden on the shoulders of sexual violence victims—and prosecutors trying to secure convictions.
>
> Correspondingly, in *Radosav Milovanovic*, the Bijeljina District Court went one step further, acquitting the Accused partially on the basis that there were no eyewitnesses to the crime.[73]

Cases such as *Milovanovic* and *Krsmanovic* fault wartime sexual violence victims for the practical barriers to proving wartime sexual violence, lending credence to the notion that victims lie.

C. Inconsistencies and Gaps: Victims' Recollection

Judicial actors are occasionally inattentive to various factors that might detract from victims' recollection of the sexual violence incident, thereby reinforcing the credibility myth.

Trauma has the capacity to damage victims' memories. When individuals are subjected to sexual violence, the survival function of the brain kicks in. Certain details that would normally be registered are overlooked, resulting in fragmentary, non-linear recollection.[74]

As noted by H, a lawyer who represents wartime sexual violence victims, "sometimes they are able only to remember one moment of the act each time, like a puzzle."

Meanwhile, victims frequently repress memories of the incident as a "natural defence mechanism",[75] exacerbating difficulties with recollection.

An additional obstacle in this respect is the passage of time. In many cases, the particulars of the offence have been lost in the 20 plus years since the war. This problem is heightened by the fact that some victims gave statements to multiple institutions during the same period.

73 *Radosav Milovanovic*, First Instance Verdict, pg. 4. *See also Mladen Markovic*, First Instance Verdict, pg. 10.

74 *See International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, (March 2017), pg. 240.

75 Interview with D, a neuropsychiatrist who works with wartime sexual violence victims.

Naturally, victims' various accounts over the years may differ from testimony provided in court decades onward.

Minor Discrepancies

"She was very surprised and frightened when contacted by the relevant persons from SIPA who came to her house to take her statement in relation to the rape ... The witness underlined that her mind went blank, that she could not talk because she was crying and was in pain, that she was confused, that she did not know what to say."

-the injured party in *Cerim Novalic*, when challenged about inconsistencies between different statements she gave to the authorities. *Cerim Novalic*, Court of BiH, First Instance Verdict, 21 May 2010, pgs. 35-36

Although *significant* contradictions in victims' testimony are clearly relevant, defence lawyers too often attack minor discrepancies or gaps.

Defence attorney T, for example, has noticed that some of her colleagues draw attention to "completely immaterial" facts, arguing, for example, "that the survivor in previous statements said it was nice weather at the time of the rape, and then later she said it was raining." Such variations likely derive from the combination of trauma and time and do not merit challenges to victims' credibility.

Examples from the Courtroom: What Was He Wearing?

The approach described by T is evident throughout state and entity level cases. In *Petar Kovacevic*, the defence contested the victim's testimony because she struggled to remember "facts surrounding how she took off her dress", including who unbuttoned the garment and which pieces of clothing were removed; the victim had recounted these specifics during a prior interview with the police, but could not summon

them in court.[76]

In *Krsto Dostic*, the defence deemed the victim unreliable based on, *inter alia*, her inability to recall what the defendant was wearing or describe the room in which the rape occurred.[77]

The tactics on display in *Kovacevic* and *Dostic* disregard the trauma that wartime sexual violence victims have experienced, faulting victims for their very natural responses to "combined torture."[78]

Antagonising the Victim

In some such cases, the defence has adopted a particularly antagonistic tone during cross-examination, asking the victim the same questions over and over again and/or evincing clear disrespect for the victim's credibility. ACIPS trial monitors, for example, documented numerous instances of inappropriate conduct on the part of the defence.

Examples from the Courtroom: "The Defence Crosses the Boundary"[79]

In *Jasko Gazdic*, a witness—who was herself a wartime rape victim (she was raped by several men in the same apartment in which the injured party in the case was raped)—was subjected to repeated questions about whether the defendant was "more black-haired" or "less black-haired", the appearance of the defendant's uniform, and the exact type

76 *Petar Kovacevic*, Court of BiH, First Instance Verdict, 2 November 2015, para. 240.

77 *Krsto Dostic*, Court of BiH, Second Instance Verdict, 27 January 2017, para. 46. *See also Slavko Savic*, First Instance Verdict, para. 17-"In addition, the Defence Attorney pointed to the statements that the injured party gave to both the Women Victims of War Association (the Association) and the Prosecutor's Office, and their inconsistencies in relation to her testimony at the hearing"; *Bosiljko Markovic and Ostoja Markovic*, First Instance Verdict, paras. 46-47-the defence questioned the victim about inconsistencies in her prior statements and the fact that she described the van ride leading up to the crime as lengthy, in contrast with other witnesses' testimony.

78 Interview with B, neuropsychiatrist and court expert.

79 Excerpt from an interview with O, a lawyer who represents victims in wartime rape cases.

of weapon he carried.[80]

The defence attorney ultimately asked the victim, "did Women Victims of War try to tell you how Gazdic looked like?"[81] This form of hostile interrogation both ignores stressors that might engender minor inaccuracies and constitutes an affront to the suffering inflicted on wartime rape victims.

The Impact of Defence Aggression

Victims interviewed for the report recounted the harm caused by aggressive defence tactics.

Dalila, a wartime rape victim who testified in Bijeljina, was questioned by the defence about whether the Accused's attempt to rape her lasted several minutes or one minute; in her statement to the prosecutor's office, she said that the incident took "more than one minute", but when testifying in court, said that it was "around one minute." For Dalila, the repeated questions about this subject were upsetting.

"One of the defence lawyers kept interrupting me during my testimony, trying to confuse me, and the judges never intervened."

-Senija, the sister of a wartime rape victim who testified before the Banja Luka District Court

Correspondingly, Emina, a victim who testified before the Court of BiH, recalled that the defence lawyer "laughed cynically" when showing her photos during the identification process, making her feel that he thought she was lying.

In the experience of witness support officer Z, victims who are subjected to such lines of inquiry are psychologically affected; "usually they say that they feel bad after, that they couldn't remember the t shirt or the smell, they say that it is their fault and they feel ashamed and stupid for not remembering and testifying."

80 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 39.

81 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 38. *See also Albina Terzic*, in which defence lawyers "aggressively insisted, for the second time, that the witness should precisely tell them the time of the traumatic event." ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 28.

Examples from the Courtroom: Fueling the Credibility Myth

Although courts generally reject defence arguments based on minor inconsistencies,[82] there are troubling anomalies.

In *Mladen Markovic*, for example, the Istocno Sarajevo District Court acquitted the defendant of raping two women. The court found one of the Accused's rape victims "unreliable" because she could not recall the precise time and date of the rape; just that it occurred before dark and sometime in the beginning of June 1992.[83] The court also faulted the witness for forgetting whether the perpetrator had insignia on his uniform or was equipped with cartridge belts.[84] These specifics are precisely the type of minutia that trauma and the passage of time might erase from a wartime rape victim's memory.

Rape is a "life long trauma ... events like that with all their detail permanently stay in the victim's memory."

-the Istocno Sarajevo District Court, acquitting *Mladen Markovic* of rape

Meanwhile, with respect to the second victim, the Istocno Sarajevo District Court displayed a similar level of illiteracy about the psychology of sexual violence. This victim had given statements regarding the rape both during the war and decades onward; her initial statement, provided in the midst of wartime chaos, was less comprehensive than her later statements. Finding the victim unreliable, the panel proclaimed that rape is a "life long trauma ... events like that with all their detail permanently stay in the victim's memory."[85] In the court's words: "in time, S1's testimony had evolved, developed and changed in the opposite way of what would be expected ... because testimonies given 10 or more years after-the-fact

82 *See Bosiljko Markovic and Ostoja Markovic*, First Instance Verdict, para. 179-"the Panel finds that those persons who were subjected to such a traumatic experiences as rape 'cannot reasonably be expected to remember small details of the incident such as the date or time. Also, it is unreasonable to expect them to remember each element individually of the complex and traumatic sequence of events. In fact, under certain circumstances, inconsistencies can point to truthfulness and the fact that no influence was imposed on the witnesses.'"

83 *Mladen Markovic*, First Instance Verdict, pgs. 12-13.

84 *Mladen Markovic*, First Instance Verdict, pg. 12.

85 *Mladen Markovic*, First Instance Verdict, pg. 13.

would have less details due to forgetting."[86]

Again, this assessment overlooks a number of potential explanations for the evolution of the victim's testimony; the victim may have been traumatised or uncomfortable speaking at length at the time of the event; suppressed memories may have risen to the surface; she may have obtained familial or psychological support in the intervening years; and so on.[87]

Acquittals such as *Mladen Markovic* encourage the myth that victims lie, and foster further misunderstanding about how victims process acts of sexual violence.

D. Ulterior Motives : The Conniving Victim

"I remember in one case the defence attacked the victim's motives, saying she did it for welfare, and also her protected status-saying that she went public with her name when she was applying for welfare. The defence was trying to make the victim look both greedy and like she was hiding behind the court for no reason."

-L, an entity level witness support officer in FBiH

Citing the lack of corroborating evidence, victims' supposedly abnormal behaviour, and inconsistencies in victims' recollection, defence lawyers regularly argue that victims are lying in order to obtain compensation and/or a pension based on civilian victim of war status.

Wartime sexual violence victims already face great challenges in acquiring compensation/social welfare.[88] Namely, despite victims' right to court-ordered compensation in criminal proceedings, various legal and financial obstacles have prevented the issuance of a single award.

Meanwhile, RS does not afford rape victims civilian victim of war status and in FBiH, those who apply

86 *Mladen Markovic*, First Instance Verdict, pg. 9.

87 *See also Radosav Milovanovic,* First Instance Verdict, pgs. 4-5-in which the Bijeljina District Court, acquitting the defendant of rape, pointed to minor inconsistencies in the victim's statements.

88 *See* Amnesty International, *Last Chance for Justice for Bosnia's Wartime Rape Survivors*, (September 2017), pgs. 33-42.

must undergo a complicated and potentially re-traumatising procedure to obtain several hundred euros per month; an amount that barely covers housing, medical expenses, family obligations, and so on.

Defence lawyers, however, continue to challenge even these pittances, ascribing greed to rape victims who have been cast aside by society.

In *Dusko Solesa*, for example, the defence asked in closing argument, "why did the injured party report the act and the perpetrator only after almost 20 years, and just when she was entitled to compensation as a woman victim of war?"[89] Correspondingly, in *Muhidin Basic and Mirsad Sijak*, the defence accused the victim of seeing a psychiatrist and joining a victims' association only to acquire a pension.[90]

The allegation that survivors have somehow "invented" stories of rape plays into stereotypes regarding vengeful and manipulative victims.

Examples from the Courtroom: Conflating Compensation Claims with Credibility

In *Sasa Baricanin*, a troubling example of judges legitimising the aforesaid defence tactics, the Court of BiH deemed the victim *more* credible because she had not pursued compensation.

In the court's words: "in support of the truthfulness of her evidence and intent to testify speaks the fact that during the proceedings she filed no property claim, nor did she request any pecuniary compensation for the tragedy survived."[91]

This reasoning suggests that victims who *do* choose to pursue compensation are untrustworthy.

89 *Dusko Solesa*, First Instance Verdict, pg. 14.

90 *Muhidin Basic and Mirsad Sijak*, First Instance Verdict, paras. 259-260.

91 *Sasa Baricanin*, Court of BiH, First Instance Verdict, 9 November 2011, para. 230.

Although most courts have rejected motive-based arguments, the suggestion is damaging in itself. As noted by ACIPS, in "questioning the motives of women in such a way, the defence actually questions the legal provisions concerning the recognition of wartime rape survivors' status."[92] Similarly, defence inquiries about compensation, like the analysis employed in *Baricanin*, challenge the right to property claims set forth in the CPC.

In light of the tenuousness of victims' credibility, J, an entity level prosecutor in FBiH, tells victims "not to mention the compensation claim until the very end of the trial."

Given that proper restorative mechanisms are far from secure, it is dangerous for judicial actors to undermine victims' access to redress in this manner, particularly through argumentation that fosters the credibility myth.[93]

E. Insufficient Number of Meetings between Prosecutors and Victims

It is essential that the prosecutor in a given case meet with the victim multiple times during the investigation, so as to boost the victim's credibility in court.

Troublingly, however, several victims interviewed for the report met with prosecutors just *once* prior to trial.

"I met with the prosecutor only once when I was giving my first statement."

-Emina, a victim who testified before the Court of BiH

92 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 28.

93 *See also Zaim Lalicic*, First Instance Verdict, para. 167-the defence claimed that the injured party testified so as to exercise her rights as a rape victim; *Slavko Savic*, First Instance Verdict, para. 310-the defence claimed that the injured party had "fabricated" the whole incident in order to exercise her right to a pension; *Ante Kovac*, Court of BiH, First Instance Verdict, 10 July 2009, pg. 7-the defence argued that the victim had invented the story of her rape so as to obtain a pension.

"The Victim Must Feel Comfortable Opening Up"[94]

First, it may take multiple meetings for prosecutors to establish trust. As mentioned above, some victims have never discussed their experiences with anyone, let alone a complete stranger. The taboos surrounding wartime rape—and sexual matters more generally—often make it difficult for victims to talk openly about the crime, particularly those who are older and/or from rural areas.

> **"Good preparation makes you a good witness, one who will provide all information, not be scared, not be surprised, and be confident in your testimony."**
>
> -F, an entity level prosecutor in FBiH

Entity level prosecutor F thereby noted: "you need to proceed very slowly with victims, it takes several meetings before you can even obtain a proper statement. I go step by step, not even talking about the rape in the first encounter, but just getting to know them."

If a victim does not trust the prosecutor on her case, it is unlikely that she will share the details necessary for her story to be conveyed effectively at trial.

The prosecution might not be able to explain certain inconsistencies or gaps in the victim's account of the incident, for example, because of difficulties obtaining the relevant information from the victim. Similarly, the defence might surprise the prosecution with evidence that the victim felt uncomfortable disclosing during the investigation.

Meanwhile, with respect to direct examination, a lack of trust between the victim and prosecutor can make the victim appear uneasy and duplicitous, like she is "hiding something".[95]

"Let the Victim Tell the Story How She Wants and in Her Time"[96]

Regular meetings throughout the investigative stage are also important because of the oft-fragmented nature of victims' memories.

As discussed above, due to the trauma sustained during sexual violence, a victim's recolle-

94 Interview with L, an entity level witness support officer in FBiH.

95 Interview with F, an entity level prosecutor in FBiH.

96 Interview with R, a psychotherapist who works with wartime sexual violence victims.

ction of the crime may be non-linear and disjointed.[97] With the details taking time to piece together, like a "puzzle",[98] it is almost impossible for a prosecutor to gather all crucial information in one meeting.

"Good Preparation Is Key to Good Testimony"[99]

"When there is one meeting or the meetings are rushed, there are gaps in the story and inconsistencies, through no fault of the victims but because of the impact of trauma on their memories."

-N, entity level prosecutor in FBiH

Lastly, meetings before trial are vital to preparing the victim for court. Prosecutors emphasised that they use such conversations to go over upcoming testimony, "eliminate holes",[100] and explain the questions that will be asked. In this way, prosecutors can ensure that direct examination will proceed smoothly and, correspondingly, that the victim's evidence will be credible.

F. Irregular Access to Witness Support

Several victims interviewed for the analysis reported that, similar to their experiences with prosecutors, they either met with witness support officers just once before trial or, in some cases, at the trial itself.

It is important, however, that victims receive continuous access to witness support throughout the investigation and trial process; witness support enables victims to tell their stories credibly in court, with the requisite "confidence and self-esteem."[101]

Witness support officers are trained psychologists and social workers. Within prosecutor's offices, witness

"It's all about preparation- they prepare themselves to be strong and concentrated and answer the questions in court and we are there to support them."

-Z, witness support officer at the Court of BiH

97 See OSCE, *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers,* (2014), pgs. 112-116.

98 Interview with H, a lawyer who represents wartime sexual violence victims.

99 Interview with F, an entity level prosecutor from FBiH.

100 Interview with A, an entity level prosecutor from RS.

101 Interview with R, a psychotherapist who works with wartime victims.

support officers make first contact with the victim; inform the victim about the process of giving a statement; discuss any related fears the victim might have; and provide psychological assistance when the victim gives his or her statement.

Prosecutors interviewed for the report stressed the key role played by witness support in obtaining quality statements from survivors. FBiH prosecutor F, for example, noted that he makes sure witness support personnel are present during all interviews to "attend to the victim's emotional needs if the situation arises." In F's words, "I'm not sure how I would even proceed with witness interviews if I didn't have the help of witness support."

"The role of witness support is to prepare the survivor psychologically, so they relax the survivor and sometimes make their decision to testify even stronger."

-O, a lawyer who represents wartime sexual violence victims

Witness support personnel at courts take over responsibility from their counterparts within prosecutors' offices in the lead-up to trial. According to interviewees, these officers provide victims with many different forms of assistance; explaining the setup of the courtroom, including where victims sit to testify and where the prosecution and defence are located; informing victims of potential questions from different parties; attending public trials with victims to reduce their anxiety about testifying; accompanying victims to the waiting room prior to their testimony; sitting next to victims throughout their testimony; and notifying the court if victims need a break.

Z, witness support officer at the Court of BiH, recalled a wartime sexual violence case in which she asked the victim what would help her most in the courtroom, to which the victim responded, "just hold my hand." Z sat holding the victim's hand as she testified for two and a half hours without interruption, after which the defence did not have any questions.

As illustrated by this example, effective witness support officers do whatever is necessary to assist the victim during his or her testimony.

Examples from the Courtroom: "I Felt Safe"

Victims interviewed for the report confirmed the value of witness support. Aida, whose perpetrator was tried by the Court of BiH, remarked, "I felt safe at the trial because the witness support officer was with

me." Emina likewise stated that she "could not describe enough" the importance of the officer's presence during her testimony before the Court of BiH.

Those who did not receive witness support or had only brief conversations with witness support officers expressed disappointment and/or indicated that the lack of said support affected their testimony.

Alma, for example, noted: "I met with the witness support officer from the court only at the trial itself and they had called me on the phone once before. It was much more difficult for me to testify. I had a fear of the unknown environment because it was my first time in the courtroom. I was ashamed."

Correspondingly, Mirela, a victim who testified before the Doboj District Court, wished she had witness support at the investigative stage; for Mirela, "it was more difficult to give the first statement to the prosecutor/investigator because it was the first time I told my story to an official representative."

"Witness support officers should hold more meetings with victims before the hearing in order to prepare them. It is not enough to meet only once before the hearing."

-Emina, who testified before the Court of BiH

The irregularity of witness support can be traced to funding difficulties. According to the OSCE, five courts and five prosecutors' offices across the country currently lack witness support staff.[102]

Several prosecutors interviewed for the report mentioned that their offices had recently lost funding for these departments, with detrimental effects.[103] RS prosecutor A, for example, stated: "I am very sorry that now we don't have a witness support office because we do not have the psychological skills to be dealing with this aspect of the witness's preparation."

102 OSCE, *Towards Justice*, (June 2017), pg. 80.

103 In addition, I, a judge in RS, noted that his court now lacks funds for witness support.

Meanwhile, even institutions with witness support personnel are under-resourced, making it difficult for these departments to provide comprehensive assistance to victims.

G. The Paucity of Long-Term Psychological Services

Though witness support officers provide victims with important assistance, long-term psychological treatment best enables victims to process and recount incidents of sexual violence.

At present, psychological services in BiH are sparse, particularly in rural areas. As documented by Amnesty International, there are just 190 doctors per 100,000 persons in BiH, and one Centre for Mental Health for every 30,000 to 50,000 individuals. Meanwhile, the state has yet to establish a comprehensive reparations scheme for wartime victims. As a result, sexual violence survivors struggle to obtain the psychological care they need.[104]

The paucity of such assistance detracts from, among other things, survivors' relationships, ability to sustain jobs, physical wellbeing, and, with respect to the subject of this report, ability to testify in court.

"When victims have not worked through trauma and emotional issues this can ruin their testimony at courts. Professional help will help witnesses have more fluent and coherent testimony."

-R, a psychotherapist who works with wartime sexual violence victims

As stated by wartime sexual violence survivor Dalila, who served as a witness before the Bijeljina District Court, "psychological support means a lot. It empowers and prepares you for testimony so you do not feel like a victim." Azra, the president of a victims' association, similarly commented, the "issue of mental health needs to be systematically approached and that cannot happen in a short period of time."

There is a stark difference between the testimony of witnesses who have undergone extensive counseling and those who have not, with the former group developing the ability to piece together disparate memory

104 Amnesty International, *Last Chance for Justice for Bosnia's Wartime Rape Survivors*, (September 2017), pgs. 43-46.

fragments and translate them into words.[105]

Victims' rights activist P, for example, monitored several recent wartime sexual violence trials. In one such proceeding, the victim had not received long-term psychological support and struggled with her recollection of the rape. P attributed the perpetrator's subsequent acquittal to the effect of untreated trauma on the victim's memory. In P's words, "this is why it failed."

H. Inconsistent Use of Expert Psychologists as Witnesses

According to judicial actors interviewed for the report, prosecutors generally limit their use of expert psychologists/psychiatrists[106] to cases in which medical documentation is lacking or the victim has filed a compensation claim.[107] Expert psychologists can play a key role, however, in boosting victims' credibility.

> **"If I now had a case of sexual violence, I would try to be more creative and engage a psychological expert when needed to overcome inconsistencies, to explain why victims don't speak up for 15, 20 years."**
>
> -A, entity level prosecutor in RS

First, such witnesses can explain the effect of trauma on victims' recollection of events, combating the stereotype that victims are untrustworthy.[108]

In *Jozic and Mahalbasic*, for example, the defence highlighted inconsistencies in the victim's testimony, stressing that the victim was unable to remember the month in which she was raped, or whether she fell ill after Jozic raped her or after Mahalbasic raped her.[109] The court subsequently relied on the testimony of the expert psychiatrist called by the prosecution to conclude that gaps in the victim's memory were

105 See OSCE, *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers*, (2014), pg. 123.

106 For the purposes of brevity, the report will herein refer to the general category of expert psychiatrists and psychologists as "expert psychologists."

107 In order to quantify the harms caused by the sexual violence incident for the purposes of a compensation claim, prosecutors frequently call expert psychologists.

108 *See* OSCE, *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers*, (2014), pgs. 140-141.

109 *Anto Jozic and Demahudin Mahalbasic*, First Instance Verdict, pg.11.

typical given the trauma provoked by rape.[110] In the words of a judicial actor who followed the case, "the testimony of the psychiatrist was key to the judges' confidence in the victim's testimony as honest."

Expert psychologists are also well-positioned to challenge defence claims regarding victims' supposedly abnormal behaviour after the crime.

Examples from the Courtroom: The "Silence Conspiracy"

In *Zrinko Pincic*, the defence pointed to the fact that the victim did not report the rape for over a decade, asserting that she had fabricated the story.[111]

The neuropsychiatrist called by the prosecution, however, rebutted this line of argument, detailing the feelings of "shame" and "disgrace" that lead victims to remain silent; the so-called "silence conspiracy" phenomenon.[112]

Finally, expert witnesses can comprehensively describe the harms suffered by victims, enhancing public knowledge and combating any distrust that stems from the "invisible" damage wrought by sexual violence.

Examples from the Courtroom: Shedding Light on "Invisible" Harms

In *Jasko Gazdic*, the expert psychiatrist testified that the victim's "emotional responses were reduced, there were changes in the cognitive aspects of her personality, and that her sexuality as well as her ability to

110 *Anto Jozic and Demahudin Mahalbasic*, First Instance Verdict, pgs. 12, 14-15.

111 *Zrinko Pincic*, First Instance Verdict, pg. 41.

112 *Zrinko Pincic*, First Instance Verdict, pgs. 36, 41. *See also* ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 33-the neuropsychiatrist called by the prosecution in *Gazdic* explained the "phenomenon of the conspiracy of silence," stating that only 20 percent of survivors ultimately decide to share what happened with others.

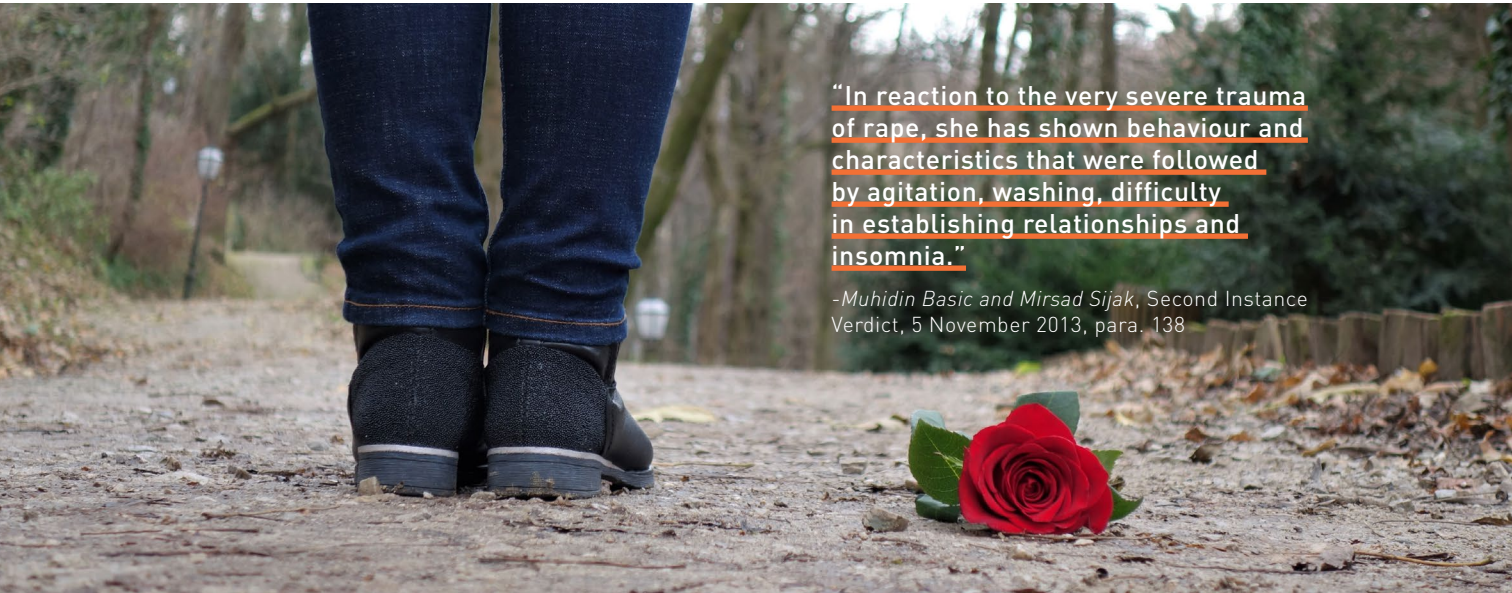
normally function in all major spheres of life were drastically damaged."[113]

In other cases, psychologists have detailed the feelings of guilt and shame that continue to haunt victims, manifesting themselves in compulsive washing, social isolation, and sexual dysfunction.[114]

Many of these harms would not be immediately apparent to those without psychological training. By testifying at length about the consequences of rape, however, expert psychologists render such injuries as clear and concrete as the pain caused by the loss of a limb or the death of a family member, making it difficult for outsiders to question sexual violence survivors' accounts of the crime.

113 *Jasko Gazdic*, First Instance Verdict, para. 144.

114 *See Ante Kovac*, Second Instance Verdict, 12 November 2010, para. 188-"Dr Sabic-Haracic also testifies that witness A manifested typical traumas common to rape victims, and talked about feelings of guilt, thinking whether she could have prevented the rape, feeling dirty, and her constant need to wash herself, and her feeling of aversion to sex, describing her first sexual contact after being reunited with her husband as extremely painful"; *Dragoljub Kojic,* First Instance Verdict, pg. 6-"The injured party is now also experiencing the emotional freeze of the physical humiliation. The injured party is socially isolated, reliving the trauma in a capsule ... According to the expert's opinion the injured party had a catastrophic experience, beyond ordinary human experience. Her macrostresses stem from war"; *Predrag Durovic*, First Instance Verdict, pg. 12-the expert psychologist testified about the "severe dysfunction in memory, attention, and cognitive, emotional, and volitional aspects" caused by the rape, with the result that the victim had experienced serious relationship problems, anxiety, irritability, and "revolt towards sex".



"In reaction to the very severe trauma of rape, she has shown behaviour and characteristics that were followed by agitation, washing, difficulty in establishing relationships and insomnia."

-*Muhidin Basic and Mirsad Sijak*, Second Instance Verdict, 5 November 2013, para. 138

VIII. CREDIBILITY MYTH RECOMMENDATIONS

→ PRIOR TO TRIAL:

A. Multiple Meetings with Victims During Investigation

prosecutors

As referenced above, in order to ensure that evidence provided by wartime sexual violence victims is as credible as possible, prosecutors should meet with victims multiple times during the investigation stage.

Through multiple meetings, a prosecutor can establish trust, gather all relevant information about the crime, and clarify any inconsistencies and/or gaps in the victim's story. Without such communication, the victim's testimony in court and, correspondingly, the prosecution's effectiveness will falter.

B. Review Multiple Statements

prosecutors

So as to further fend off defence attacks regarding victims' untrustworthiness, the prosecutor in a given case should procure and review all statements that the victim has provided with respect to the sexual violence incident. As previously discussed, one of the defence's most effective strategies is to highlight discrepancies between said statements.

In the view of state level judge K, "the prosecution could avoid the issue of inconsistencies that is brought up in court by clarifying the victim's statements before trial." Several prosecutors interviewed for the report likewise identified this "clarification" process as a vital means of bolstering victims' credibility. While locating every relevant statement may be laborious, particularly in cases in which survivors have spoken with lesser known researchers and media outlets, "the payoff in court is worth the effort."[115]

115 Interview with F, an entity level prosecutor from FBiH.

"These victims usually testified many times, both after the war and during the war, and what I try to do is collect all the statements presented to the court, showing that the victim has testified consistently about crucial facts."

-A, entity level prosecutor from RS

Additionally, although almost none of the prosecutors interviewed mentioned that they went over such statements *with* victims themselves, research conducted by Medica Mondiale concluded that victims testifying before the ICTY found reviewing their former statements to be "the most supportive in terms of preparation."[116]

According to the Medica Mondiale report, it was helpful for victims to revisit their prior comments about the crime, recall different pieces of information, and develop their own opinions as to how and why inconsistencies emerged.[117]

One witness said: "I talked about it about 100 times, and something is always forgotten, or added, and remembered. Sometimes that small piece of information does not mean anything, but sometimes it means a lot. The first statements I gave under a lot of stress, and those are brief and clear statements. Later on when we were more relaxed, the statements were longer, but the defence sticks to the first statements. For example, they say 'you said only this', and I say 'when I gave that statement I was just rescued, I was naked, without footwear, hungry, and thirsty, and I only gave the statement to get it over.'"[118]

C. Warn Victims about Credibility Questions

prosecutors and witness support officers

As with queries about prior sexual conduct and consent, it is important that prosecutors and witness support officers notify victims of potential defence questions regarding credibility, particularly given their prevalence and permissibility.

In so doing, prosecutors and witness support officers can both prevent victims from being

116 Medica Mondiale, *The Trouble With Rape Trials-Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualized Violence During the War in the Former Yugoslavia*, (2009), pg. 62.

117 Medica Mondiale, *The Trouble With Rape Trials-Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualized Violence During the War in the Former Yugoslavia*, (2009), pg. 62.

118 Medica Mondiale, *The Trouble With Rape Trials-Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualized Violence During the War in the Former Yugoslavia*, (2009), pg. 62.

surprised in court and inform victims about the defence's duty to challenge the evidence, mitigating potential discomfort caused by standard credibility arguments.

"When victims know they are not obligated to answer any question, it takes the power back if the defence is discrediting them or they don't feel respected."

-R, a psychotherapist who works with wartime sexual violence victims

Additionally, prosecutors and witness support officers should advise victims that they can request a break at any point and can also ask the panel about the relevance of inquiries posed by the defence. Considering the frequency with which defence lawyers subject victims to repeated questions regarding inconsistencies, it is important for victims to know that they can stop responding.

→ DURING TRIAL:

D. Call Expert Psychologists as Witnesses

prosecutors and judges

Prosecutors in wartime sexual violence cases should regularly call expert psychologists as witnesses for the purposes of explaining supposed inconsistencies in victims' behaviour and/or recollection of the crime, and detailing the harms generated by sexual violence. In the event that a prosecutor does not engage a psychologist, the panel presiding over the case should request expert assistance.

E. Vigilant Intervention

prosecutors and judges

Prosecutors and judges must be vigilant in responding to inappropriate defence arguments regarding wartime sexual violence victims' credibility. While questions on this topic, unlike those about consent and prior sexual conduct, are legally permissible, judicial actors should better control the courtroom so as to stop irrelevant and/or insulting lines of inquiry.

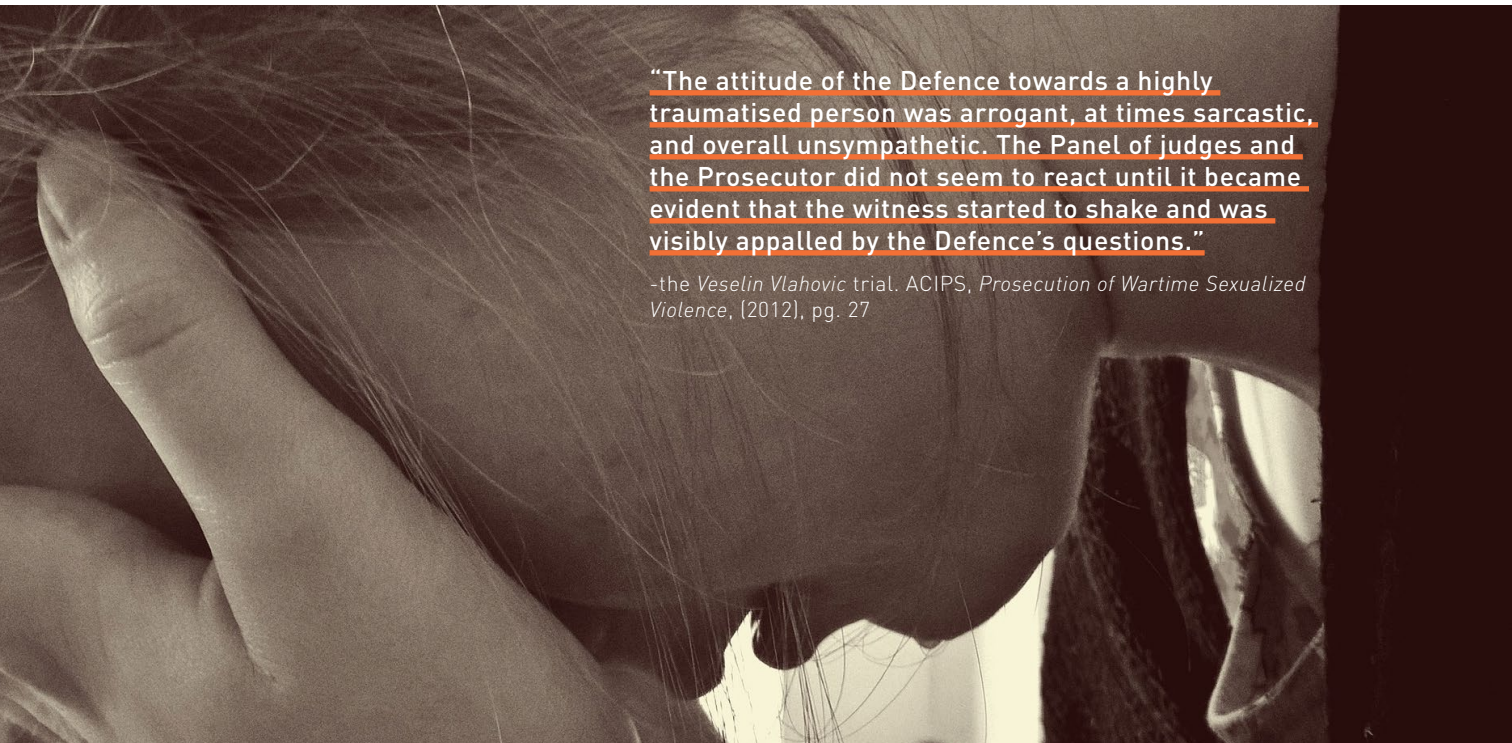
"The presiding judge has the power to stop certain questions being asked of vulnerable witnesses. Unfortunately, with harassing questions or the defence asking the same question multiple times, I'm not sure they always exercise that possibility."

-F, an entity level prosecutor in FBiH

Under Articles 262(3), 263, and 267 of the BiH CPC and Article 8(1) of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, judges can intervene during examination and cross-examination for several purposes; to protect witnesses from harassment, to prevent the loss of time due to repetitive questions, to terminate queries designed to confuse, and so on. These provisions are mimicked in Article 277(3) of the FBiH CPC and RS CPC, reflecting international standards on judicial responsibilities.[119]

Correspondingly, the prosecution can object to misleading, irrelevant, overly aggressive, and repetitive lines of cross-examination.

119 *See* ICC Rules of Procedure and Evidence, (2000), rule 88(5)-"a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence."



"The attitude of the Defence towards a highly traumatised person was arrogant, at times sarcastic, and overall unsympathetic. The Panel of judges and the Prosecutor did not seem to react until it became evident that the witness started to shake and was visibly appalled by the Defence's questions."

-the *Veselin Vlahovic* trial. ACIPS, *Prosecution of Wartime Sexualized Violence*, (2012), pg. 27

Examples from the Courtroom: When to Intervene

Given the above provisions, judges and prosecutors *can and should* intercede more frequently on victims' behalf. With regard to the defence interrogating Dalila about whether her sexual assault "lasted a minute or a little more than a minute", for example, judicial actors would be justified in interrupting; the rehashing of minutiae serves no legitimate legal purpose.

Likewise, when the defence antagonises the victim, asking questions such as "Why did you hide this?" or "Did Women Victims of War try to tell you what Gazdic looked like?", judicial actors would be permitted to intervene based on the display of aggression towards a vulnerable witness.

Intercession is similarly warranted with questions about the victim's silence following the war, and/or ostensibly stable life; these details are not probative of the victim's trustworthiness. Allowing such lines of cross-examination bolsters the credibility myth and needlessly re-traumatises witnesses who have already overcome formidable challenges to testify.

When to Stay Quiet

In certain cases, it is equally important that judges know when *not* to intervene. In particular, interviewees stressed that judges too often stop the testimony of victims who become emotional and/or appear to have veered off subject.

In the experience of psychotherapist R, for example, "when the victim comes to a point that she starts to tell how she felt, it is vital that prosecutors and judges allow it, as it will not last hours but is key to her story."

F, the aforesaid entity level prosecutor, likewise stressed the value of permitting wartime sexual violence victims to testify at their own speed, in their own vocabulary, and in keeping with their own chronology; according to F, "judges must allow victims to proceed in the order that they prefer, as that is how they are eventually able to explain what happened."

F. Take an Active Role in Questioning

judges

While prosecutors and defence attorneys generally monopolize the examination and cross-examination of witnesses, Articles 261(3) and 262(1) of the BiH CPC permit judges to assume an active role in questioning. Additionally, in cases involving vulnerable witnesses, judges—assuming the consent of all parties—may pose inquiries on parties' behalf.[120]

"Sometimes the court will ask questions in the name of the defence, because it feels different for the victims, it feels better for them."

-K, a judge at the Court of BiH

As such, if the defence is pursuing a particularly aggressive or misleading line of cross-examination, judges should take over questioning, protecting the witness from unwarranted attacks on his/her credibility and also ensuring that relevant inconsistencies are clarified.

Examples from the Courtroom: "I Understand Now and I Know What Happened"

Witness support officer Z recalled a case in which the wartime sexual violence victim testifying was "very fragile" and on medication for a range of psychological problems stemming from the war. During the victim's initial appearance in court, her testimony was disjointed and confusing, leaving the panel unclear as to what had actually happened. In Z's words, the victim "was so lost in her trauma and memories that the panel could not piece her story together."

The presiding judge subsequently called the victim back for clarification, resolving various points of misunderstanding such as "you said this happened on the 22nd, but in your written statement it was recorded as happening on the 23rd," "you said you were in the house when the rape occurred, but in your prior statement you said you were outside of the house", and so on.

120 Article 8(2) of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses.

In response to the judge's questions, the victim was able to explain discrepancies in her story; the perpetrator had returned to rape her on several occasions, as the result of which the dates and places of the incidents had blurred together. At the end of this second exchange, the judge stated, "I understand now and I know what happened."

Similarly, in *Veselin Vlahovic*, ACIPS trial monitors documented a member of the trial panel posing clarifying questions to the victim.[121] When the defence attempted lines of cross-examination geared towards misleading the victim, the judge explained the meaning of said queries.

→ LEGISLATIVE AND/OR INSTITUTIONAL MEASURES:

G. Fund Witness Support Departments

international community and BiH authorities

Given the importance of witness support in, among other things, facilitating victims' testimony and counteracting the credibility myth, BiH authorities and the international donor community must ensure that witness support departments at both prosecutors' offices and courts are fully funded going forward.[122]

H. Improve Psychological Services

international community and BiH authorities

While witness support is vital during the investigation and trial stage, long-term psychological counseling is the most effective means of helping wartime sexual violence

121 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 27.

122 *See* Amnesty International, *Last Chance for Justice for Bosnia's Wartime Rape Survivors*, (September 2017), pg. 51-recommending that the Council of Ministers "ensure that Courts and prosecutors' offices that currently lack full-time witness support officers are allocated funds to employ this staff." Additionally, court presidents and prosecutors should request funding for witness support from the relevant governmental bodies.

victims process and verbalise what happened to them. Considering the manifold benefits of institutionalised psychological support, international donors and the authorities should work towards improving the accessibility of such services for victims.[123]

I. Trainings on the Psychological Effects of Rape and Evidentiary Standards

HJPC, CEST, and relevant international organisations

It is necessary to ensure that there are no more cases like *Mladen Markovic*, in which minor inconsistencies in victims' recollection benefit the defendant.

It is likewise necessary to ensure that, even absent expert psychologists, prosecutors and courts are able to fully explain, among other things, the reasons why some victims remain silent; the manner in which trauma can affect victims' memories; and the harms generated by rape.

> **"Even I, because of my insufficient knowledge, was apprehensive about the credibility of some statements and it was only after scientific findings and trainings that we learned about how trauma affects memory."**
>
> -N, an entity level prosecutor in FBiH

Trainings on the psychological consequences of sexual violence have already proven effective, as evidenced by improvements in jurisprudence and practices. The HJPC, CEST, and relevant international organisations should arrange further such workshops to build upon this progress.

Additionally, the aforementioned institutions and organisations should incorporate international precedent on corroborating evidence into future trainings. As demonstrated by cases such as *Krsmanovic* and *Milovanovic*, some judicial actors have yet to fully absorb these standards.

123 *See* Amnesty International, *Last Chance for Justice for Bosnia's Wartime Rape Survivors*, (September 2017), pgs. 43-46

J. Trainings for Defence Lawyers

HJPC, CEST, relevant international organisations

The strategies employed by defence lawyers with regard to victims' credibility are often inappropriate. As discussed above, these tactics range from repetitive questions on the same subject; lines of inquiry intended to confuse victims; unnecessarily aggressive language and intonation; irrelevant questions about minor inconsistencies and victims' behaviour following the crime; and even laughter at victims' responses.[124]

"The key challenge is the defence's stance towards the victim, the way they question and treat them. I believe that defence lawyers did not go through enough educational seminars and training in that regard."

-S, an entity level witness support officer in RS

In said instances, defence lawyers disregard victims' suffering and capitalize on the credibility myth, hoping that judges will be swayed accordingly. Such ploys can be deeply traumatising for victims, leaving them feeling confused and ashamed.

Consequently, the HJPC, CEST, and relevant international organisations should establish trainings for defence lawyers on topics such as where to draw the line between valid and invalid challenges to victims' credibility; how the latter challenges harm victims' mental health; the societal stereotypes that said challenges play into; and the likelihood that courts will be more receptive to legitimate lines of attack.

K. Amend the Criminal Procedure Codes

BiH legislature

To both destabilise the credibility myth and protect victims' right to reparations, the state and entity level legislatures should consider amending the relevant CPCs to prohibit parties from using evidence about compensation and/or social welfare to prove wartime sexual violence victims' trustworthiness/untrustworthiness.

124 Interview with wartime sexual violence victim Emina; interview with K, a state court judge.

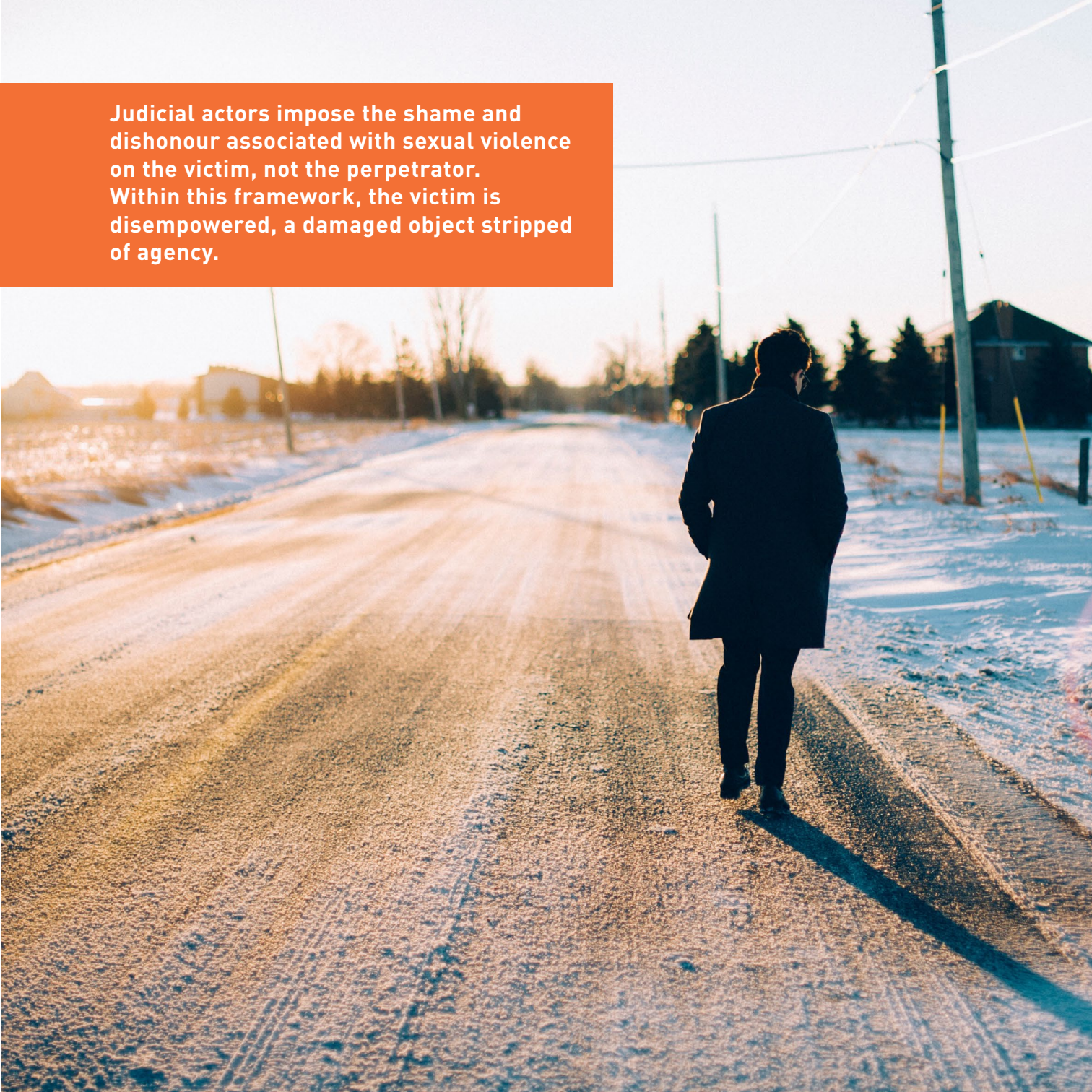
Evidentiary rules are often policy-oriented. In the United States, for example, evidence that a person has liability insurance is inadmissible for the purpose of proving fault.[125] Likewise, parties are generally barred from introducing evidence that the defendant has engaged in settlement talks or plea bargaining negotiations.[126] The above rules—recognizing the value of insurance, settlements, and plea bargains—prevent parties from undermining these schemes through legal means.

In BiH, the preclusion of evidence regarding compensation and welfare would achieve analogous policy objectives; said evidence does not bear on victims' credibility, fosters damaging stereotypes about the "manipulative" sexual violence victim, and endangers the limited rights that such victims have obtained in BiH.

125 Rule 411 of the United States Federal Rules of Evidence.

126 Rules 408 and 410 of the United States Federal Rules of Evidence.

Judicial actors impose the shame and dishonour associated with sexual violence on the victim, not the perpetrator. Within this framework, the victim is disempowered, a damaged object stripped of agency.



IX. AN ATTACK ON HONOUR : THE SHAME MYTH

The final myth prevalent in wartime sexual violence proceedings is that the victim should feel shame.

"My advice is that there is no shame or disgrace."

-Lamija, a wartime sexual violence victim whose case concluded in a plea agreement

Once again, the burden of the crime is transferred from perpetrator to victim, with the victim taking on the disgust and dishonour associated with sexual violence. Within this framework, the victim is disempowered, a damaged object stripped of agency.[127]

The shame myth fosters the aforesaid phenomenon of internal stigmatisation, with victims absorbing the humiliation imposed by societal and cultural norms.

A. The Worst Thing That Can Happen to a Woman: Evocative Language

Judicial actors periodically use language implying that rape brings shame upon the victim.

Examples from the Courtroom: "A Special Burden"

As detailed in the PSVI Principles, stigmatisation stems from patriarchal paradigms in which women are "the carriers of purity" and any violation of their bodies leaves them "contaminated".[128] Certain wartime sexual violence verdicts perpetuate these conceptions.

In *Dusko Dabetic*, for example, the Sarajevo Cantonal Court stated that

127 *See* OSCE, *Investigation Manual for War Crimes, Crimes Against Humanity, and Genocide*, (October 2013), pg. 308.

128 *See* PSVI, *Principles for Global Action: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence*, (September 2017), pgs. 17, 32-33.

the sexual violence crime "attacked the honour of the woman."[129] Per this wording, the sexual violence incident impairs the victim's "honour", not that of the individual who perpetrated the offence.

In other cases, courts have cited the moral consequences of sexual violence for victims. Referring to the "special burden" imposed by rape, the state court panel in *Jasko Gazdic* noted that the crime had impacted the "moral, customary, and other aspects of life of both the victims and their families."[130]

Correspondingly, several judicial actors interviewed for the report described rape as "the worst thing that can happen to a woman."

Rape is a woman's "body and dignity (being) insulted in the worst possible way."

-the defence in the *Vlahovic* trial. *Veselin Vlahovic*, Court of BiH, Second Instance Verdict, 5 February 2014, para. 635

This label relies on the shame myth, ascribing more value to the supposed "moral", honour-violating "burden" of rape than harms engendered by other crimes; the loss of a child for a parent, the loss of limbs for an athlete, and so on.

Encapsulating this conceit, albeit in a more brutal and explicit manner, the defence in the *Albina Terzic* trial referred to the victim as the "object of rape."[131] The defence's phrasing denies the survivor any identity besides that of rape victim, relegating her to a wholly passive role. In the face of the "special burden" wrought by rape, coming forward and testifying has no empowering effect; the victim's story is already over.

129 *Dusko Dabetic*, First Instance Verdict, pg. 1. *See also Milkan Gojkovic*, Sarajevo Cantonal Court, First Instance Verdict, 25 February 2016, pgs. 28-29-"by violating human dignity with particularly degrading and humiliating actions, and attacking the honour of a woman's person"; *Marijan Brnjic*, Second Instance Verdict, 25 May 2017, para. 42-"the body of the injured party as well as her dignity and honour was harmed."

130 *Jasko Gazdic*, First Instance Verdict, para. 356.

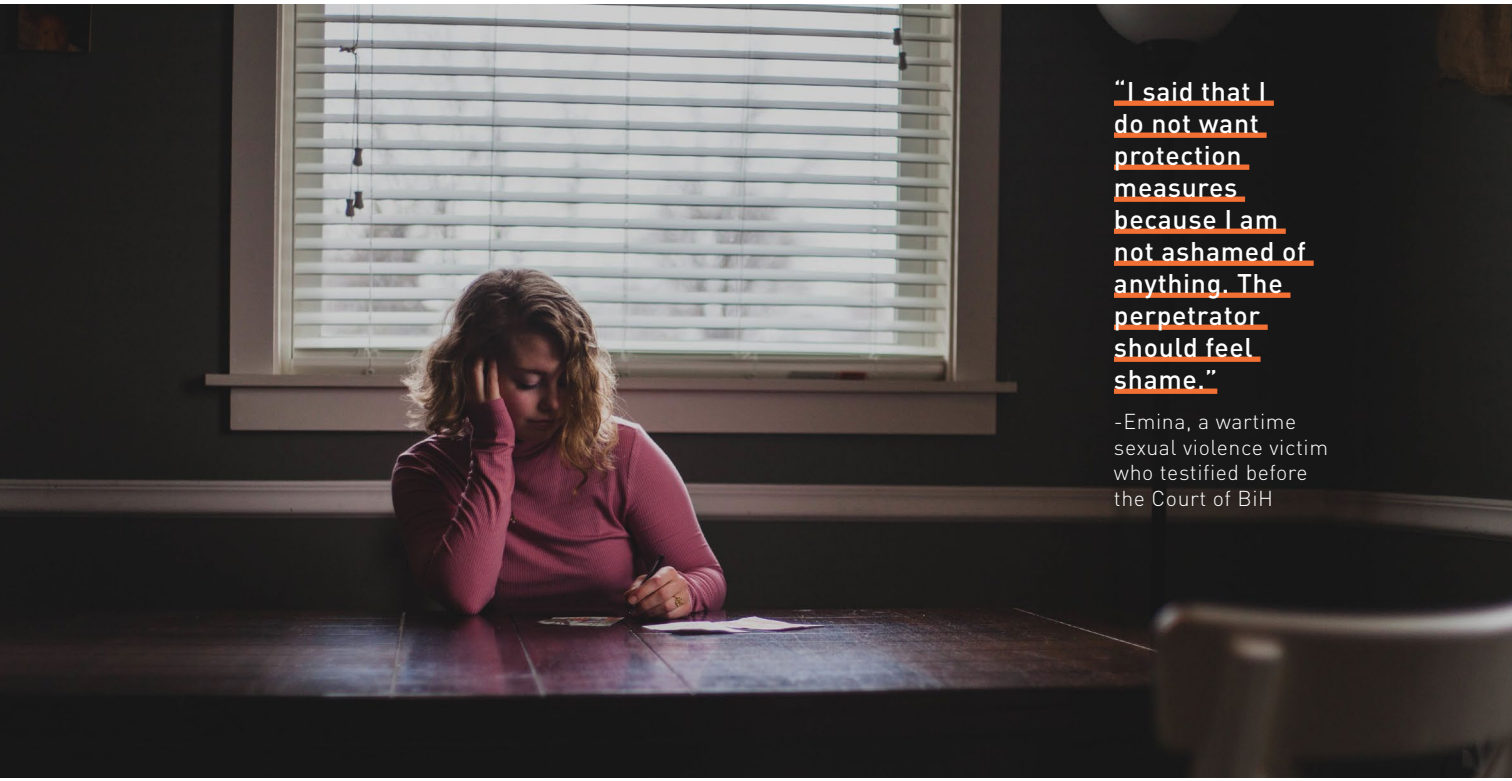
131 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg 28.

B. Identity Protection Measures: What Do Victims Want?

Identity protection measures, while vital in many wartime sexual violence cases, should only be imposed with the consent of the witness in question.[132]

In certain instances, however, it appears that courts and prosecutors automatically apply the most severe identity protection measures, failing to adequately consult the victim and presuming that he or she is embarrassed to speak about the crime in public. This action, while seemingly well-intentioned, plays into the shame myth.

132 Article 5(a) of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses.



"I said that I do not want protection measures because I am not ashamed of anything. The perpetrator should feel shame."

-Emina, a wartime sexual violence victim who testified before the Court of BiH

Options for Identity Protection

Under domestic legislation, courts can issue a range of identity protection measures, including the use of pseudonyms; testimony from a separate room; video and audio distortion; the use of written testimony in lieu of oral testimony; the removal of the accused from the courtroom; and the closing of proceedings to the public.[133]

During the investigation stage, the prosecutor consults with the victim to determine whether to employ a pseudonym in the indictment. Upon the commencement of trial, the prosecutor speaks with the victim again to assess whether additional identity protection measures are needed. In both cases, the presiding panel must approve the proposed protection measures.

Per the Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses, "the Court shall not order the application of a more severe measure if the same effect can be achieved by application of a less severe measure."[134]

Disregarding Victims' Wishes

Although entity and state level legislation requires that victims assent to the relevant protection mechanism, courts occasionally apply measures that contravene victims' expressed preferences.

"On occasion, pseudonyms are used automatically, despite the wishes of the victim."

-V, entity level judge in FBiH

Judges and prosecutors interviewed for the report, for example, stated that they have assigned pseudonyms during the investigation even when victims requested that their identities be made public.

F, entity level prosecutor in FBiH, recounted a case in which "the victim was adamant that she did not want protective measures." After speaking with his colleagues, however, the prosecutor decided to not use the victim's full name in the indictment, identifying her only by her initials in case she changed her mind. According to F,

133 *See* Articles 9-13 of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses; Article 235 of the BiH CPC.

134 Article 4 of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses

this practice is not uncommon.[135]

Uninformed Consent

In other cases, it appears that prosecutors and panels opt for protection measures without the *informed* consent of the victim.

"The court sometimes excludes the public or applies measures of protection automatically under the assumption that the victim may not be aware of measures she would need."

-K, state level judge

The language surrounding identity protection is technical; phrases such as "audio-visual distortion", "pseudonym", and "closed proceeding" are not easily intelligible to the general public. According to interviewees, judicial actors too often fail to explain these options and their consequences to victims, with the result that some victims do not understand how protection measures operate.

This problem is particularly evident with respect to the exclusion of the public, one of the most severe measures in terms of identity protection.

Examples from the Courtroom: Closing the Proceedings

Many wartime sexual violence trials are closed proceedings; in certain cases, due to the aforementioned miscommunication and preconceptions, prosecutors assume victims will want the public kept out, and victims, lacking adequate information, interpret a closed hearing to mean that the defendant will be removed from the courtroom.

U, a journalist who covers wartime sexual violence cases, stated that many victims she has contacted after trial tell her they "were not aware that the defendant would be in the court" and "only wanted their identity not to be revealed to the defendant, specifically."

135 While in some cases the victim may very well *want* her identity protected by pseudonym, it is vital that the prosecutor first consult with the victim to clarify her preference. As described in the subsequent section, prosecutors do not always ask victims what they want and/or adequately inform them about available options.

In this vein, wartime sexual violence victim Erna expressed regret during her interview that she had not received a "closed trial", so "she would not have had to look at the perpetrator." Given Erna's conflation of the exclusion of the public with the exclusion of the perpetrator, it seems she was ill-informed about protection options.

Avoiding the Last Resort: the Application of Less Severe Measures

In some wartime sexual violence trials, the "same effect" could be achieved by a "less severe measure" than the closing of proceedings.

As referenced above, victims are typically most concerned with confronting their perpetrators in court. If a victim's anxiety stems from this source, she could testify from a different room and also utilise audio-visual distortion,[136] thereby obtaining the protection she wants, forcing the perpetrator to face public scrutiny, and sharing her story with her peers.

"The prosecutor usually decides to exclude the public immediately if the case encompasses sexual violence. In my opinion, this option should be the last resort, as there are lesser measures."

-A, entity level prosecutor in RS

In other cases, victims do not want their identities disclosed to their perpetrators. This measure, however, is almost never applied and is not correlated with the closing of proceedings. In the experience of entity level prosecutor F, once victims realise that "tomorrow the accused will know their identities, even if the public doesn't, they very rapidly change their minds and say they don't actually need that type of identity protection."

As such, the assumption that victims will always want closed proceedings is misplaced, protecting perpetrators from the public eye and imposing stigma on individuals who might feel comfortable disclosing their stories.

136 With audio-visual distortion, the public does not find out the victim's identity but still hears the victim's story directly

Protecting Victims' Identities

In contrast, it is essential that victims who *do* express fears about security and stigmatisation obtain the protection requested. Interviewees stated that witnesses, prosecutors, and judges sometimes—albeit inadvertently—reveal the identities of witnesses who have received protection measures.[137]

Entity level prosecutor N, for example, recalled a wartime sexual violence case in which the public was excluded while the *victim* testified, but not while other witnesses testified and identified the victim by name. Journalist U likewise noted that in several wartime sexual violence cases she has observed, judicial actors have accidentally disclosed victims' identities.

These types of mistakes are the flip side of prosecutors imposing protective measures on victims who do not want them. Victims' voices must be heard and respected in all cases, ensuring that victims, not judicial actors, decide which identity protection measures are most empowering for them.

C. Unnecessary Questions about Sexual Violence

"Prosecutors should not ask about the details of the crime, like what kind of underwear the perpetrator was wearing. If it is in the statement it does not have to be asked again at the trial."

-Azra, a wartime sexual violence victim who testified before the Court of BiH

Prosecutors periodically ask victims about the details of the sexual violence crime. This needless line of examination can contribute to internal stigmatisation, thus furthering the "shame" myth.

Questions about the minutiae of wartime rape are unwarranted for several reasons.

First, if such particulars are already included in the victim's initial statement (the product of a more intimate and informal conversation), prosecutors can rely on this document and concentrate their inquiries on confirming that the rape occurred.

Secondly, and more importantly, prosecutors do not have to delve into sexual details to fulfill legal criteria.

137 *See* ACIPS, *Prosecution of Wartime Sexualized Violence*, (2012), pgs. 29-30.

"I recall cases in which the prosecutor inquired about whether the victim bled, whether the victim screamed, and whether there was full penetration."

-H, a lawyer who represents wartime sexual violence victims

Under the definition of rape set forth by international tribunals, prosecutors must prove that the victim's vagina, mouth, or anus was penetrated by a penis—or the vagina or anus by another body part or object.[138] Specifics such as the position of the act, how the victim's clothes were removed, and whether the perpetrator kissed the victim are legally irrelevant.

Meanwhile, as discussed above, non-consent can be demonstrated by the existence of coercive circumstances; the interaction between victim and perpetrator need not be examined.

Examples from the Courtroom: "Details of the Rape That Should Not Be Discussed"[139]

Some prosecutors, likely due to a lack of knowledge,[140] focus on "details of the rape that should not be discussed".

In *Dzevad Dulic*, for example, the prosecution asked the victim to describe the sexual act at length.[141]

The subsequent judgment stated, "while she was on the bed he lay down on top of her and raped her by penetrating her vagina, he ejaculated inside her vagina and then left the room ... Beating her, cursing at her and threatening to give her over to

"In cases of wartime rape, the investigators need to focus on the conditions the victims were in-were they in a concentration camp, were there elements of coercion. Discussing the details of the act is completely unnecessary."

-N, entity level prosecutor in FBiH

138 *See* ICC, *Elements of Crimes*, (2011), pg. 7. Available at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf

139 Interview with I, an entity level judge in RS.

140 Interviewees speculated that unnecessary questions about details of the sexual violence act stem from a lack of knowledge.

141 *See Dzevad Dulic*, Court of BiH, First Instance Verdict, 11 September 2015, paras. 75-78.

chetniks for them to rape her, he brought her back to the room, threw her on the bed, lay down on her and raped her, first vaginally and then orally by putting his bloody sex organ into her mouth, slapping her the entire time, and ejaculating into her mouth."[142]

This account of events reads almost like a pornographic script and includes information that anyone would have difficulty disclosing, let alone an individual grappling with trauma and facing a courtroom of strangers.[143]

Similarly, in *Jasko Gazdic*, the prosecutor asked the victim about what type of underwear she was wearing, what position she assumed during the act, whether there was only vaginal intercourse, and so on.[144] These questions were posed after the victim had already confirmed that she was raped and as such, were wholly unnecessary.

Victims' Reactions

In forcing victims to relive the horror of the crime in full, prosecutors may generate feelings of shame.

Victims interviewed for the report, for example, consistently emphasised the embarrassment involved in such descriptions. For wartime sexual violence victim Alma, the most uncomfortable part of her trial before the Court of BiH was discussing the details of the rape.

L, an entity level witness support officer, noted that she has heard similar stories throughout the course of her work. After testifying, some wartime sexual violence victims tell her, "I was so ashamed I couldn't even tell the judges what happened. I was embarrassed and didn't want to give specifics."

142 *Dzevad Dulic*, First Instance Verdict, pg. 4.

143 *See also Marijan Brnjic*, First Instance Verdict, 9 December 2016, para. 99-"he led her into one of the rooms in the house and raped her by forcing her to take all her clothes off and pushed her on a bed and raped her, after which he forced her to put his sex organ into her mouth by pulling her hair, he then pushed her over the bed and anally raped her".

144 ACIPS, *Prosecution of Wartime Sexualized Violence,* (2012), pg. 36.

There is no reason for prosecutors to detract from what could be an empowering experience in court –one with the potential to counteract the stigma imposed by society—by asking victims questions that revive the shame myth.

D. "Men Cannot Be Raped":[145] The Shaming of Male Sexual Violence Victims

There is a massive societal taboo surrounding the rape of men during the war, as reflected by the reluctance of courts and prosecutors to designate such offences as sexual violence.

The PSVI Principles detail the particular stigma that accompanies male-on-male rape; "if men and boys are understood as sexually impenetrable and as those who penetrate the bodies of women and girls, being sexually violated carries implications of 'emasculation' and disempowerment … Men and boys may also face the stigma and 'shame' of assumed homosexuality, thereby experiencing double stigmatisation".[146]

"There is a stereotype in our society that men are the powerful ones and not the targets of rape. In our cultural matrix there is a lot of stigma in that regard."

-D, a neuropsychiatrist who works with wartime rape victims

This "double stigmatisation" means that men often undergo more self-loathing than their female counterparts and, correspondingly, may remove themselves even further from the public eye.[147] Under-reporting is severe, evidenced by the fact that the number of male sexual violence victims is still unknown and almost no interviewees had worked on cases involving such crimes.

The notion that "men cannot be raped" emerges within domestic jurisprudence. As discussed above, rape is defined as the invasion of a person's body with a sexual organ or object.[148] Forced anal sex, forced vaginal sex, and forced oral sex therefore constitute rape, no matter the gender of the parties involved.

145 Excerpt of interview with L, an entity level witness support officer in FBiH.

146 PSVI, *Principles for Global Action: Preventing and Addressing Stigma Associated with Conflict-Related Sexual Violence*, (September 2017), pg. 17.

147 *See* OSCE, *Investigating Wartime Sexual Violence*, (June 2016), pgs. 6, 10.

148 *See* ICC, *Elements of Crimes*, (2011), pg. 7.

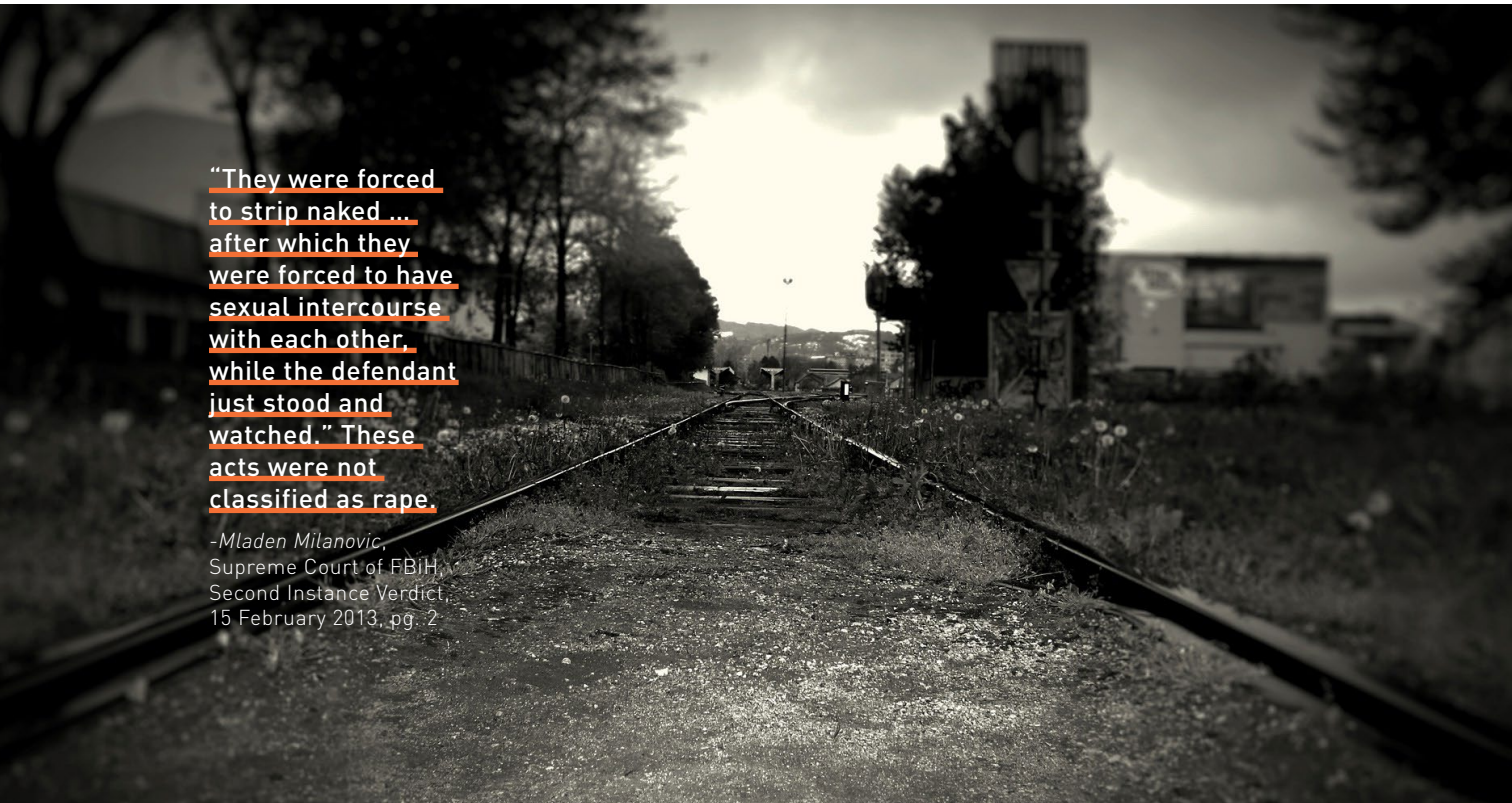
In many cases of male sexual violence, however, judicial actors refrain from characterising the crimes as such.[149]

Examples from the Courtroom: Avoiding the Word "Rape"

In *Ramo Zilic*, the Accused ordered two prisoners to engage in oral and anal sex. When one of the prisoners could not perform, Zilic burned his genitals and berated him for impotence.[150] The sexual nature

149 This was also a problem at the ICTY. *See* Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, (2016), pgs. 41-42.

150 *Ramo Zilic and Esad Gakic*, Mostar Cantonal Court, First Instance Verdict, 4 November 2015, pgs. 41-42.



> of the crime notwithstanding, the Mostar Cantonal Court labeled the Accused's actions "inhuman treatment", avoiding the word "rape."[151]
>
> Similarly, in *Branko Vlaco*, guards forced detainees into oral intercourse.[152] Although these offences fulfilled the definition of rape, the Court of BiH ultimately classified them as "other inhumane acts."[153]

By refusing to charge or convict perpetrators for rape in cases of sexual violence against males, judicial actors add to the shame already inflicted on male victims and bolster the myth that the rape of men is somehow unspeakable; that men truly are the "sexually impenetrable."

151 *See Ramo Zilic and Esad Gakic*, pg. 2. *See also Ibro Macic,* in which the Accused was convicted of inhuman treatment, not rape, for forcing prisoners to have oral sex; *Ostoja Minic et al.*, Bijeljina District Court, First Instance Verdict, 11 April 2014, in which Velimir Popovic was convicted of inhuman treatment, not rape, for forcing prisoners to have oral sex.

152 *Branko Vlaco*, Court of BiH, First Instance Verdict, 4 July 2014, para. 311.

153 *Branko Vlaco*, Court of BiH, First Instance Verdict, pg. 6.

X. SHAME MYTH RECOMMENDATIONS

A. Eschew the Language of Shame

prosecutors and judges

Going forward, prosecutors and judges must avoid all language that suggests sexual violence victims should feel shame, including references to rape as a violation of honour; a crime with moral implications; and the worst thing that can happen to a woman. These phrases, as discussed above, lend credence to the shame myth.

B. Explain Identity Protection Measures to Victims

prosecutors and judges

Prosecutors and judges should fully explain all identity protection options to victims, so as to ensure that victims are able to make informed decisions about the measures that work best for them. In particular, judicial actors should take care to clarify the consequences of closed proceedings, audio-visual distortion, and pseudonyms during the investigation.

Having provided victims with all relevant information, prosecutors and judges should refrain from imposing measures that contravene victims' wishes.

"It is important that prosecutors and judges very clearly explain the rights of victims. For example, identity protection measures were very important for me."

-Aida, a wartime sexual violence victim who testified before the Court of BiH

C. Trainings for Prosecutors

HJPC, CEST, and relevant international organisations

The HJPC, CEST, and relevant international organisations should initiate trainings on both identity protection measures and the legal criteria for proving wartime sexual violence.

"Some prosecutors are not familiar with the new technology."

-F, an entity level prosecutor from FBiH

It is likely that prosecutors' failure to explain identity protection measures stems from a lack of knowledge. At the entity level, the technology necessary for audio-visual distortion and testimony from a separate room was established only recently, as part of the National War Crimes Strategy. As entity level prosecutor A stated, "my general impression is that because we just got this equipment, judges and prosecutors do not have enough practice in applying measures of protection."

It would thereby be useful for CEST to coordinate with the HJPC and international organisations in including the topic of identity protection measures—namely, how to explain options to victims, what to do when victims reject protection, the benefits and disadvantages of closed proceedings vs. audio-visual distortion/testimony from another room— in its training program for prosecutors.

Likewise, in order to forestall unnecessary and traumatising questions about the details of sexual violence, CEST and relevant actors should organise a course for prosecutors on how to prove wartime rape absent these minutiae; the course would emphasise the role that coercive circumstances can play in fulfilling the legal requirements.

"Prosecutors should find a way to ask questions in order to make the whole process easier for the victim."

-Alma, a wartime sexual violence victim who testified before the Court of BiH

D. Allow Victims to Use Their Own Vocabulary

prosecutors and judges

When victims testify before courts, prosecutors and judges will inevitably have to ask some questions about the act of sexual violence, even if they avoid the details. This line of examination is often distressing for victims.

Best practices outlined by the PSVI and OSCE stress that judicial actors should use the victim's own vocabulary to speak with the victim about the rape, reducing discomfort to the

greatest extent possible.[154]

In some cases, victims might not be familiar with terms such as "penetration." In *Jasko Gazdic*, for example, the victim stated that she did not know "what vaginal intercourse meant", instead referencing "the things" the perpetrator did to her.[155]

In other instances, victims may feel uneasy with overtly sexual terms. Entity level prosecutor F recounted a case in which the victim hailed from a more conservative background. Recognizing that it would be "very sensitive to ask the victim directly if penetration happened", F employed the victim's own expressions to obtain the relevant information. He asked the victim, "did the defendant force you to do what happens between a man and a woman?"

In F's experience, it is vital to know the "personality of the victim, her education level, marital status, and whether she lives in a city or village, in order to adjust the questioning."

"I remember one judge asking the victim, who only went to school until the 4th grade, if the defendant had penetrated her. She was confused and said no, because she did not know what penetration meant. The situation was resolved when another judge, understanding the issue, rephrased the question and asked if the defendant had put his genitals in her genitals. The victim felt humiliated in the moment for her level of education."

-V, entity level judge in FBiH

E. Facilitate Compensation Claims

prosecutors, judges, and BiH authorities

In pursuing compensation claims, victims are able to take an active role in the proceedings, counteracting notions that they have been shamed into passivity; that they are the aforementioned "objects of rape", forever destroyed by the sexual violence act. Judges, prosecutors, and the BiH authorities should thereby fulfill their responsibilities

154 See OSCE, *Wartime Sexual Violence: A training module for judges, prosecutors and witness support officers,* (2014), pg. 162-"Be led by the witness's choice of vocabulary for objects or body parts, particularly for the genitals"; Wilton Park Conference, Preventing Sexual Violence Initiative: Shaping Principles for Global Action to Prevent and Tackle Stigma, (November 2016), pg. 5-"Stigma can be created and compounded by language, including words imposing identities or narratives on survivors/victims or their experiences."

155 *Jasko Gazdic*, First Instance Verdict, para. 137.

with respect to compensation claims, facilitating victims' empowerment.

In the Bosnian justice system, survivors testifying in criminal proceedings have the same role as any other witness; they provide evidence relevant to establishing the commission of the crime. As a result, survivors often feel like procedural instruments, with little control over their cases.[156]

Compensation claims, however, are a mechanism through which victims can assert their agency. Under the BiH CPC, victims are authorised to file compensation claims for damages arising from criminal offences.[157] In order to prove the validity of their claims, victims serve as official parties to the proceedings, putting forth their own evidence, making oral arguments, and so on.

Although the BiH criminal justice system has grown more amenable to compensation claims over the last several years, with courts issuing the first ever awards in 2015, judges and prosecutors do not always meet their obligations in this regard.[158] Meanwhile, the uneven provision of free legal assistance prevents victims, who are typically indigent, from undertaking the highly technical claim procedure.[159]

Given the importance of compensation claims in empowering victims and destabilising the shame myth, judicial actors should continue building upon recent progress and ensure that survivors receive the information/assistance necessary to realise their right to compensation. The BiH authorities should likewise take steps to implement a functioning system of free legal aid.

156 TRIAL International, *Compensating Survivors in Criminal Proceedings: Perspectives from the Field*, (November 2016), pg. 20. Available at http://trial.ba/wp-content/uploads/2016/11/TRAIL_english_web-1.pdf

157 *See* Article 193 of the BiH CPC.

158 TRIAL International, *Compensating Survivors in Criminal Proceedings: Perspectives from the Field*, (November 2016), pgs. 9-10; TRIAL International, *Enforcement of Damage Compensation Claims of Victims of War in Criminal Proceedings in Bosnia and Herzegovina*, (2015), pgs. 10-15. Available at http://trial.ba/wp-content/uploads/2015/10/ENG_Ostvarivanje-zahtjeva-za-naknadu-%C5%A1tete-%C5%BErtava-ratnih-zlo%C4%8Dina-u-okviru-krivi%C4%8Dnih-postupaka-u-Bosni-i-Hercegovini-%E2%80%93-stanje-problemi-i-perspektive-.pdf

159 TRIAL International, *Compensating Survivors in Criminal Proceedings: Perspectives from the Field*, (November 2016), pgs. 21, 38.

F. Characterise Acts of Sexual Violence Against Men as Rape

prosecutors and judges

As discussed above, prosecutors too often avoid charging perpetrators of sexual violence against males with rape and, correspondingly, judges too often avoid convicting said perpetrators of rape.

This practice implies that the rape of men is impossible, perpetuating the shame and silence surrounding such crimes.

Going forward, prosecutors composing indictments should take care to characterise any instances of forced anal or oral intercourse between men as sexual violence.

If a prosecutor fails to carry out his or her duty in this regard, the presiding panel should revise the legal characterisation of the crime in the verdict, ensuring that the rape of men is punished for what it is.

XI. CONCLUSION

Despite progress over the past several years, some judicial actors continue to draw upon the myths surrounding wartime sexual violence, perpetuating these stereotypes through questions asked in court, the language used in verdicts, the characterisation of crimes, the admission of certain evidence, the imposition of protection measures, and the acquittal of perpetrators. This report has endeavoured to describe and counteract the principal myths of promiscuity, consent, credibility, and shame.

"We are all humans, us that work in the judiciary. Here are still some people who think of rape in old fashioned terms."

-V, an entity level prosecutor in FBiH

Looking beyond the courtroom, interviewees emphasised the intersection between the judiciary and broader society. The bigotry fostered in villages, towns, and cities throughout the country governs the stereotypes that emerge in legal proceedings and prevents many victims from coming forward in the first place.

Those who *do* testify still confront prejudice at home; throwaway comments in the street, rude treatment from service providers, a shroud of silence within their own families, and/or scorn from loved ones.

Meanwhile, the patriarchal framework means that peacetime—not just wartime—rape, provokes the shaming and blaming of victims. In a recent case, for example, the Novi Travnik Cantonal Court convicted three men of gang-raping a young woman. The court acquitted the fourth gang rapist, however, because the victim "offered no resistance."[160] These sorts of judgments parallel those from wartime trials, evincing the continuing power of the promiscuity, consent, credibility and shame myths with respect to *all* manifestations of sexual violence.

Consequently, while the report at hand focuses on stigmatisation in the legal context, and, specifically, in wartime sexual violence cases, parallel efforts are imperative in every field:

160 *See David Rezo*, FBiH Supreme Court, Second Instance Verdict, 1 September 2016, pg. 2.

education, security, healthcare, media, and the broader judiciary. As noted by entity level prosecutor F, "we need changes in legislation and jurisprudence, yes, but the thing we need more broadly is a change in the culture itself."

The recommendations laid out in the report—legislative reform, the increased proactiveness of judges and prosecutors, trainings for all actors, funding for psychological support, and so on—thus represent a miniscule piece of what must be an exhaustive, multi-pronged initiative to transfer the burden of sexual violence from the victim to perpetrator, where it belongs.

"We are the victims, and we should not feel any shame ... but we are brought up to be silent, to keep silent."

-witness testifying in the *Slavko Savic* case. *Slavko Savic*, First Instance Verdict, para. 313

ABOUT TRIAL INTERNATIONAL

TRIAL International is a non-governmental organisation fighting impunity for international crimes and supporting victims in their quest for justice. The organisation provides legal assistance, litigates cases, develops local capacity and pushes the human rights agenda forward. TRIAL International has been present in BiH since 2008 and provides support to war time victims of serious human rights violations and their families in the quest for justice, truth and reparations.

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