SYNERGY for JUSTICE

Foreign, Commonwealth & Development Office

CARSV STIGMA TOOLKIT FOR JUSTICE

Part B Tools

THE MYTH DEBUNKER

CHALLENGING THE MYTHS AND MISCONCEPTIONS ABOUT CARSV

“CARSV STIGMA TOOLKIT FOR JUSTICE”

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"One of the most overlooked problems within criminal proceedings is the wide-spread effect of rape myths and stereotypical role models. It is an established fact in psychological research that legal judgments are systematically influenced by prejudice, which is particularly a problem in cases of sexual violence. The legal regulations for victim protection do not change the influence of underlying concepts of gender stereotypes and rape myths on criminal proceedings. All too regularly, their effects may even lead to secondary victimisation. The problem is exacerbated when the victim is the only witness, which raises the importance of the questioning of the victim and heightened susceptibility to stereotypes and misconception."

WOLD AND WERNER, 2021

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INTRODUCTION

The Myth Debunker forms part of the Synergy for Justice CARSV Stigma Toolkit for Justice and has been designed as an accompaniment tool to Part A — The Competency Assessment. It can also be used as a stand-alone guide for training or as a reference tool for criminal justice actors, such as judges, prosecutors, victim advocates, investigators and others.

Sexual violence myths are widely held "*prejudicial, stereotyped or false beliefs about sexual violence, sexual violence victims, and perpetrators*" whose cultural function is to deny, minimise or justify this form of violence.[1] Such myths and associated misconceptions are a clear manifestation of stigma, stigmatised views and prejudicial attitudes about sexual violence. They are deeply influenced and driven by culture and social narratives, which in turn are highly gendered. As a result, there will be some variation across countries and jurisdictions as to how precisely stigma manifests in justice processes.

Such myths and misconceptions pervade and manifest within our justice systems and, often subconsciously, within actors within the justice systems. "*Myths can overlap and [be] deployed subtly..*"[2] Their impact is significant. "*Research [...] has shown that those who hold stigmatising attitudes are more likely to excuse the perpetrator as not guilty and to believe the survivor consented or in some other manner bears blame for what happened.*[3] *At its most basic level, [...] police and investigators are less likely to investigate allegations of sexual violence; prosecutors less likely to pursue charges for sexual violence; and judges less likely to convict on such charges.* ***Structural stigma imports social power imbalances and prejudices into the justice process and revictimises survivors by giving authority to the disbelief, victim-blaming and dismissive biases already targeting them on an interpersonal level.***[4] ***As a result, it critically limits access to justice and contributes to the attrition of sexual violence cases, feeding the continuing cycle of violence, impunity and social inequality."***[5]

With such pervasive influence, it is important that criminal justice actors can recognise sexual violence myths and know how to effectively counter such myths if they are introduced into the proceedings. "*It is [...] imperative that international criminal justice actors commence an honest and well-informed discussion about misconceptions concerning the nature and seriousness of conflict-related sexual violence crimes. These misconceptions are a reality that any prosecution office in the future will have to grapple with. One of the most fundamental lessons learned by the Office of the Prosecutor [ICTY] is that dismantling misconceptions [...] is the key to improving accountability outcomes for this category of crime.*"[6]

The objective of The Myth Debunker is to assist justice actors in recognising these myths and misconceptions, and to counter them before they harm survivors and affect the outcome of the investigation, the prosecution and the adjudication process for Conflict and Atrocity Related Sexual Violence (CARSV). This guide highlights some of the most common myths. Each section addresses one type of myth, with examples of how to recognise it at different stages of the criminal justice process. For

1 Adapted from Burt's 'rape myths' (1980), Cultural Myths and Supports for Rape, J Pers Soc Psychol, 217. See also Gerger et al (2007) The Acceptance of Modern Myths About Sexual Aggression Scale, Aggress Behav, 422-440 "*descriptive or prescriptive beliefs about rape (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence*".

2 Law Commission of England and Wales (2023) Evidence in Sexual Offences Prosecutions: A consultation paper.

3 Temkin et al., (2018) Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study, Fem Criminol, 207.

4 Gopalan et al., (2016) Proving Crimes of Sexual Violence, in Brammertz & Jarvis (2016) Prosecuting CRSV at the ICTY, 130.

5 Synergy for Justice (2022) CARSV Stigma Toolkit for Justice Pilot Version, 18.

6 Jarvis & Vigneswaran (2016) 3 Challenges to Successful Outcomes in Sexual Violence Cases, in Brammertz & Jarvis (eds.) (2016) Prosecuting Conflict-Related Sexual Violence at the ICTY, 35.

each myth, the facts are presented, supported by data, science and influential dicta, to counter those misunderstandings. The reader is presented with those facts and suggested ways to counter that myth.

NOTE: Many of the myths have overlapping aspects, given the common threads of gender and intersectional discrimination at their roots.

I. MYTHS AND MISUNDERSTANDINGS ABOUT WHAT CARSV IS

Common Myths

CARSV is the violent penile rape of a woman by an unknown and armed male soldier.

Men cannot be the victims of CARSV. Women do not perpetrate CARSV.

Sexual violence is a crime of passion, driven by sexual desire or lust.

Sexual violence is different and separate from other forms of violence or patterns of violence.

The Facts

1) Conflict-related sexual violence can take many different forms, some of which are penetrative and some of which are not.

Leading experts in this field have studied sexual violence across more than 129 conflicts over 26 years. They found that "*[r]ecent research shows that sexual violence likely occurs in all conflicts, but with immense variation in effects (Cohen & Hoover Green, 2012), form and severity (Wood, 2010).*"[7] There is now a *"critical recognition that rather than being ubiquitous, wartime sexual violence exhibits significant variation (Wood, 2006) across conflict and actors, forms of violence, identities of the targeted groups (including male victims and survivors), and locations."*[8]

Different descriptions of the varying forms of conflict-related sexual violence can be found in:

★ **The Rome Statute of the International Criminal Court (ICC):** The definition includes "rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilisation or any other form of sexual violence of a comparable gravity", as a form of sexual violence under crimes against humanity (Article 7.1.g) and war crimes (Article 8.2.b.xxii and 8.2.e.xi).

★ **The Colombian Criminal Code:** While Article 206 penalises rape, Article 207 penalises any 'violent sexual act', defining that as any 'diverse sexual act different to rape'.[9]

Some resources and examples of different typologies of sexual violence:

★ **The Hague Principles on Sexual Violence:** This document provides an extensive list of types of acts of sexual violence, including, for example: disseminating or producing media of a nude/partially nude person or a person engaged in acts of a sexual nature; having someone perform movements with a sexual association or bodily functions that are normally conducted in private, or having someone undergo procedures to determine or alter their sexual orientation or gender identity; inspecting someone's genitals, anus, breasts, or hymen without medical or similar necessity.[10]

7 Cohen & Nordas (2014) Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989-2009, J Peace Res, 418-428; Cohen & Nordas (2021) Conflict-Related Sexual Violence, Annu Rev Polit Sci, 193-211; Dumaine et al. (2022) Repertoires of Conflict-Related Sexual Violence: Introducing the RSVAC Data Package, J Peace Res, 611–621; Seelinger & Wood (2022) Sexual Violence as a Practice of War: Implications for the Investigation and Prosecution of Atrocity Crimes, in Hola et al. (eds.) (2022) The Oxford Handbook of Atrocity Crimes, 649-674.

8 Cohen & Nordas (2014), ibid; Cohen & Nordas (2021), ibid.

9 Colombia (2000) Criminal Code, Law No. 599.

10 WIGJ (2019) The Hague Principles on Sexual Violence. See also Bastick *et al.* (2007) Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector and OSRSG-SVC (2021) In Their Own Words: Voices of Survivors of Conflict-Related Sexual Violence and Service-Providers.

★ **The International Criminal Tribunal for the Former Yugoslavia (ICTY):** After pleading guilty to counts of sexual assault and others, **Todorović** was found guilty of the crime against humanity of persecution. The sexual assaults included forcing male survivors to orally rape each other and bite each other's genitals, as well as the beating and kicking of their genital.[11] In a different case, **Furundžija** was found guilty of torture, including for forcing a female survivor to undress and rubbing a knife along her inner thigh and lower stomach while threatening to insert it inside her vagina, as well as forcing a male survivor to witness sexual abuse against a female survivor.[12]

> *"I am a 43-year-old Congolese refugee man in Uganda. … I was dragged into a military pickup, blindfolded with a piece of black cloth and driven to an undisclosed location … The soldiers placed me in a circle, undressed me and slapped me hard on my face … [They] made a hole in the ground, and a lady soldier who was among them asked me to have sex with that hole. … One of them grabbed my genitals hard, and I could feel someone removing my pants roughly. I was left totally naked. Several hands held me down and I could feel someone trying to force his penis into my anus and rape me, and they were laughing loudly … One of the female soldiers tried to push a stick in my anus, and I cried loudly of pain.."*[13]

2) Conflict-related sexual violence is not always violent, physically forced or at gunpoint.

See Section **II. Expectations of Force**.

3) The victims of conflict-related sexual violence are not just women and girls. Men and boys are also victims of CARSV.

4) The perpetrators of conflict-related sexual violence are not just men, and not just soldiers.

Rooted in gender stereotypes, women are often believed to be passive victims of sexual violence, while men are seen as active aggressors. The belief that men cannot be victims and women cannot be perpetrators has been proved to be a common misconception, as research shows both circumstances continue to take place inside and outside of conflicts.

"Evidence shows that sexual violence is perpetrated not only by men against women. Men are victims and survivors of many types of sexual violence. The exact prevalence remains unknown; however, male victimisation seems to be far more frequent than previously assumed, and silence about male victimisation is now less common (Carpenter 2006, Sivakumaran 2007, Edström & Dolan 2019, Traunmüller et al. 2019). In addition, there is growing evidence regarding female perpetrators in particular cases (Johnson et al. 2008, Cohen 2013, Sjoberg 2016) as well as recognition of the targeting of gender and sexual minorities, although data remain sparse (Tschantret 2018)."[14]

11 Prosecutor v. Todorović, ICTY-95-9/1-S, Sentencing Judgement (31 July 2001), paras.38-40.

12 Prosecutor v. Furundzija, ICTY-95-17/1-T, Trial Judgement (10 December 1998), paras.40, 127, 264, 267. These charges have been confirmed by the Appeals Chamber (21 July 2000), para.79. See also Prosecutor v. Akayesu, ICTR-96-4-T, Trial Judgement (02 September 1998) para.688 (includes acts which do not involve penetration or even physical contact); Prosecutor v. Milutinović et al., ICTY-05-87-T, Trial Judgement (26 February 2009) para.199. E.g. Tribunal Oral en lo Criminal Federal de Bahia Blanca, Fracassi, Eduardo René and others (93001103/2011/TO1), Reasons for judgement of 25 November 2015, 1 March 2016, at 1554–1561 (referring to incidents of forced nudity and sexual groping of female prisoners by prison guards) discussed in Kravetz (2020) Accountability for Sexual and Gender-Based Violence During Mass Repression and in Conflict, JICJ, 307, at 313.

13 OSRSG-SVC (2021), ibid.

14 Dumaine *et al.* (2022), *ibid*, 198.

Facts about men and boys as victims[15]

Lack of reporting is often rooted in social stigma, legal barriers and the coding of crimes, feeding into the myth that male survivors of CARSV do not exist.[16] Additionally, research presents extensive proof of male survivors in a multitude of conflicts. These reports include findings in Bosnia and Herzegovina, Croatia, the Democratic Republic of the Congo (DRC), Iraq, Kenya, Liberia, Libya, Myanmar, Peru, Somalia, South Sudan, Sri Lanka, Syria, Ukraine, and Uganda, among many others.[17]

- ★ **Peru:** Research found that 22-29% of sexual violence events listed in the annexes of the Peruvian Truth and Reconciliation Commission's Final Report included male victims.[18]
- ★ **Liberia:** 32.6% of male combatants interviewed post-conflict reported exposure to sexual violence.[19]
- ★ **DRC:** 23.6% of men interviewed reported being exposed to sexual violence in their lifetime. Of those 23.6%, 64.5% reported being exposed to conflict-related sexual violence.[20]
- ★ **Syria:** In a study of 138 former detainees in Syria who had undergone a Medical Expert Report, 87.7% disclosed some form of sexual violence in detention.[21]

Facts about female perpetration

Women also commit CARSV. In fact, they have been recorded across various conflicts including DRC, Haiti, Iraq, Ivory Coast, Liberia, Rwanda, Sierra Leone and others.[22]

- ★ **DRC:** A 2010 survey showed that 41% of female and 10% of male survivors of sexual violence reported that their perpetrators were female.[23]
- ★ **Sierra Leone:** Interviews with ex-combatants showed that some female combatants from the Revolutionary United Front perpetrated sexual violence, including gang rape.[24]
- ★ **International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Nyiramasuhuko:** A female politician and the Minister of Family Affairs and Women's Advancement was found guilty of conspiracy to commit genocide, genocide, crimes against humanity (including rapes) and violations of common Article 3 Geneva Conventions (including for outrages of personal dignity).[25]

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15 See Ministrere Public et les Parties Civiles v. Eliwo Ngoy et al., DRC Military Court, Judgement, (12 April 2006), 32 in which the Court interprets the national law using the ICC/Elements of Crime to ensure rape against men is recognised and prohibited. Gopalan (2023) Breaking Binaries and Honing-in on Harms Inclusive Approaches Towards Sexual and Gender-Based Crimes, s.8.2.1 in Sendze et al. (eds), Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability for Africa and in the World, (The Hague, Asser Press). Dolan (2014) Mainstreaming CRSV against Men and Boys, Briefing Paper.

16 Touquet (2018) Unsilenced: Male Survivors of Conflict-Related Sexual Violence in Sri Lanka Speak, 9-10.

17 Touquet et al. (2020) From 'It Rarely Happens' to 'It's Worse for Men': Dispelling Misconceptions about Sexual Violence against Men and Boys in Conflict and Displacement, J Hum Affairs, 25-34; De Brouwer (2015) Conflict-Related Sexual Violence: Achievements and Challenges in International Criminal Law and the Role of the Military, Militair-rechtelijk Tijdschrift, 57.

18 Leiby (2009) Digging in the Archives: The Promise and Perils of Primary Documents, Politics Soc, 82.

19 Johnson et al. (2008) Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Post conflict Liberia, JAMA, 676-690.

20 Johnson et al. (2010) Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo, JAMA, 558.

21 LDHR/SFJ (2018) The Soul Has Died: Male Sexual Violence in Syria Detention Centres. Elliott et al. (2020) Bridging the Gap Between the Reality of Male Sexual Violence and Access to Justice and Accountability, JICJ, 469-498.

22 Gopalan (2023), ibid, s.8.2.3-5. Brouwer & Ruiz (2019) Male Victims and Female Perpetrators of Sexual Violence in Conflict, in Mouthaan & Jurasz (eds.) (2019) Gender and War: International and Transnational Justice Perspectives, 169-208.

23 Johnson *et al.* (2010), ibid, 558; Cohen (2013) Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War, World Polit, 383-415.

24 Cohen (2013), ibid.

25 Prosecutor v. Nyiramasuhuko, ICTR-98-42-A, Trial Judgement (24 June 2011). Drumbl (2012). "'She Makes Me Ashamed to Be a Woman': The Genocide Conviction of Pauline Nyiramasuhuko, 2011". Michigan Journal of International Law, Nowrojee (1996). Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath. Human Rights Watch.

★ **ICTY, Prosecutor v. Karadžić:** Trial judgement includes a range of sexual violence against men, including direct female perpetration (a woman threatened to slit male detainees' throats if they did not lick her buttocks) (as foreseeable as part of a joint criminal enterprise JCE III).[26]

Facts about perpetration by people other than soldiers

It is also often believed that soldiers who are strangers to the survivor are the exclusive perpetrators of CARSV. Reports regularly define CARSV as sexual violence by soldiers, rebels and other armed actors, making data harder to come by. Many civilians/non-combatants have been charged with or convicted of sexual violence as an underlying act of an international crime, including government ministers, police officers, radio broadcasters, newspaper editors, other detainees, instrumentalised civilians, etc.[27] Since the 1990s, there have also been reports of perpetration of sexual violence against civilians by UN peacekeepers.[28]

It is also important to understand that CARSV does not always happen during attacks or in dark alleys. For example, sexual violence in Rwanda also occurred in 'safe places' such as churches, hospitals and out in the open, publicly, in front of others.

★ **ICTR, Prosecutor v. Rukundo:** A survivor testified how Rukundo, a Catholic priest, locked her in a room, forced her to lie on the bed and then sexually assaulted her. This took place after the survivor, whose family had been killed, requested protection from the accused.[29]

Facts about acquaintance rape related to conflict

At the same time, data has completely debunked the belief that all forms of sexual violence are perpetrated by strangers. In fact, for most cases of broader forms of sexual violence in peacetime, perpetrators are acquaintances, friends or relatives of the survivor.[30] Acquaintance perpetration is also reported for CARSV:

★ **Former Yugoslavia:** Reports exist from Bosnian Muslim women who were raped by people they knew before the war started. This included schoolteachers, doctors, colleagues, and neighbours.[31]

★ **Rape (in peacetime):** It has been reported that 80% to 90% of rapes in Western countries are perpetrated by someone the survivor knew.[32]

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26 Prosecutor v. Karadžić, ICTY-95-5/18-T, Trial Judgement (24 March 2016) paras.201-2503. Prosecutor v. Plavšić, ICTY-00-396&40/1, Sentencing Judgment (27 February 2003) para.29. See also Nadine K (Germany, Koblenz Court including aiding and abetting sexual slavery, Generalbundesanwalt, *Anklage gegen ein mutmaßliches Mitglied der ausländischen terroristischen Vereinigung "Islamischer Staat (IS)" wegen Beihilfe zum Völkermord, Verbrechen gegen die Menschlichtkeit, Kriegsverbrechen u.a. Erhoben*, 29 September 2022.

27 E.g. ICTR Gacumbitsi and Akayesu (commune bourgmestres), Nahimana (radio broadcaster) and Ngeze (newspaper editor). See also ICC Defendants. See also Alaa M, a doctor working in Syrian regime detention centres, charges included two counts of deprivation of reproductive capacity in relation to an alleged incident in which the accused doused the genitals of a 14- or 15-year-old boy with alcohol and set him on fire (Generalbundesanwalt, Erweiterter Haftbefehl gegen einen mutmaßlichen Mitarbeiter des syrischen Militärischen Geheimdienstes erwirkt, 21 December 2020. See also Drumbl, *ibid*, describing the formation of 'rape squads' in Rwanda using HIV+/AIDS patients released from hospital for this purpose.

28 Bastick *et al.*, *ibid*, 2007, p. 14; Cohen *et al.*, Do States Delegate Shameful Violence to Militias? Patterns of Sexual Violence in Recent Armed Conflicts, 2015; Regarding sexual abuse by WHO aid workers during Ebola crisis in the DRC: WHO, Final Report of the Independent Commission, 28 September 2021; Fraulin *et al.*, It Was with My Consent Since He Was Providing Me with Money: A Mixed Methods Study of Adolescent Perspectives on Peacekeeper-Perpetrated Sexual Exploitation and Abuse in the Democratic Republic of Congo, 2021.

29 Prosecutor v. Rukundo, ICTR-2001-70-T, Trial Judgement (27 February 2009) paras.366, 381, 574.

30 'Acquaintance rape' has a high association with higher PTSD scores than 'stranger rape'; see for example: Tarzia *et al.*, (2018) Exploring the Relationships between Sexual Violence, Mental Health and Perpetrator Identity, BMC Public Health 18:1410.

31 Tompkins (1995) Prosecuting Rape as a War Crime: Speaking the Unspeakable, Notre Dame Law Rev, 866-867.

32 Persson & Dhingra (2022) Attributions of Blame in Stranger and Acquaintance Rape: A Multilevel Meta-Analysis and Systematic Review, TVA, 795-809; Lilley *et al.*, (2023) Intimate Partner Rape: A Review of Six Core Myths Surrounding Women's Conduct and the Consequences of Intimate Partner Rape, Soc Sci, 1-20.

> *"Some of the local Serbs wore black stockings on their heads to disguise their faces because they didn't want to be recognized. [Nevertheless], I recognized many of them. [They were] colleagues — doctors with whom I worked. The first [man] who raped me was a Serbian doctor named Jodic … I had known Jodic for 10 years. We worked in the same hospital. I would see him every day in the employees' cafeteria … Another doctor whom I had previously known also raped me; … I wasn't allowed to say anything. Before he raped me, he said, 'Now you will know who we are. You will remember forever.'"*[33]

5) Sexual violence is a form of violence committed as part of a broader pattern of violence, often as a demonstration or exercise of power and dominance over opponents, women or other groups.

"*[C]haracteristics of wartime rape emphasize the extent to which […] rape is an expression of dominance and power, rather than sexual desire. Even in peacetime, some convicted rapists express feelings of anger, hate, control and domination, rather than sexual desire per se."*[34]

★ **ICTY, Prosecutor v. Milutinovic:** *"Furthermore, the Chamber considers it inappropriate to place emphasis on the sexual gratification of the perpetrator in defining the elements of 'sexual assault'. In the context of an armed conflict, the sexual humiliation and degradation of the victim is a more pertinent factor than the gratification of the perpetrator."*[35]

See also Sections **VII. Trivialisation or Minimisation** and **VIII. Honour and Shame**, which address minimisation or justification of sexual violence as 'a crime of passion', the inevitable exercise of male biological urges or a crime of '(dis)honour'.

Manifestation in Justice Processes: Recognising Impacts

1 **Barriers to access to justice:** Survivors may not recognise what has happened to them as sexual violence due to internalised stigma and misinformation. Legislation may have restricted definitions of sexual violence by being gendered — defining sexual violence through reference to a penis penetrating a vagina, failing to define or include the multitude forms and typologies of sexual violence (by all genders against all genders), including gravity thresholds as an element of a crime or as a jurisdictional threshold, and requiring the use of force or violence. Male survivors of male perpetrators "*may also fear criminalization and being labelled as homosexual, in light of misconceptions that only homosexual men can be raped*" and some laws that may criminalise homosexuality without reference to consent.[36]

★ **Norway:** *"'Azmina' never considered reporting. 'When I realized it was a rape, many months had passed, and there was no evidence. I didn't want to see the person again. I read the statistics and knew there was little chance to get him punished."*[37]

33 Tompkins (1995), *ibid*, 867.

34 Cohen *et al.* (2013) Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward; Wood (2006) Variation in Sexual Violence during War, Polit Soc, 307-342; Wood (2009) Armed Groups and Sexual Violence: When Is Wartime Rape Rare?, Polit Soc, 131–61; Chiroro *et al.* (2004) Rape Myth Acceptance and Rape Proclivity: Expected Dominance Versus Expected Arousal in Acquaintance-Rape Situations, J Interpers Violence, 427-442.

35 Prosecutor v. Milutinović *et al.* (26 February 2009), *ibid*, para.199.

36 Elliott *et al.* (2020), *ibid*, p.481.

37 Amnesty International (2019) Time for Change: Justice for Rape Survivors in the Nordic Countries.

2 **Non-recognition or characterisation by justice actors:** Incorrectly recognising sexual violence only as the penile rape of women leads to non-recognition and impunity at all stages of the process; for example, police not recommending SV charges or 'non-criming' a matter/crime report, prosecutors failing to charge SV crimes, or judges acquitting.[38]

★ **Bosnia, Prosecutor v. Mejakić et al.:** *"While witnesses spoke of male sexual violence, including oral rape of men as well as genital mutilation and forced nudity, the sexual violence findings seem only to relate to sexual violence against women. Further adjudicated facts relating to sexual violence in Omarska camp from the ICTY explicitly related to only women as the victims."*[39]

3 **Credibility and evidence assessments:** If the form or dynamics of the sexual violence do not fit the stereotype of CARSV, then witnesses/victims could have their testimony doubted and be questioned on their credibility and reliability.

4 **Asking questions about unnecessary details about the crime:** If only rape is recognised, then justice actors will often ask very detailed (potentially retraumatising) questions to establish penetration or to try to establish the use of force.

5 **Stigmatising language:** When this language is used, it minimises the crime or conflates it with consensual sexual relations. For example, in the **Bosnian** case of Prosecutor v. Vlačo, the verdict repeated a witness's description of '*forced … intercourse like homosexuals*' twice to describe forced anal rape.[40]

How Do We Counter These Myths in Justice Systems?

A The law should ensure gender-inclusive definitions and elements of sexual violence crimes. There should be annotations and explanatory notes to the law, which give a broad range of inclusive examples of different typologies, victimologies and perpetration and for any gravity thresholds.

B Investigative plans, templates and tools should emphasise and prompt accurate and broad understandings of CARSV with illustrative examples and provide a check on biases and assumptions. Senior leadership sign-off on joint investigative plans (investigation and prosecution) can provide supervision and mentoring on the breadth of CARSV. An intersectional analysis should inform investigations and charging.[41]

C Self-reflection exercises can be used to counter unconscious bias and misconceptions, and to intentionally understand positionality and power differentials as part of training and at key decision and assessment points along the criminal justice process.[42]

38 Gopalan (2023), *ibid*, p.272, fn.32, 34. Factors such the gender of the investigator may affect how a crime is recorded.

39 Elliott *et al.* (2020), *ibid*, 488, fn.90 discussing Court of Bosnia and Herzegovina (First Instance Panel) Prosecutor v. Mejakić *et al.*, X-KRŽ-06/200, First Instance Verdict (30 May 2008) paras.105, 128-130, 142, 202.

40 First Instance Verdict, Vlačo (S11K00712112Kro) Court of Bosnia and Herzegovina (First Instance Panel), 4 July 2014 paras. 319, 331. E.g. LJ Hallett quoted in Stern (2010) The Stern Review: … An Independent Review into How Rape Complaints Are Handled in England and Wales, p29.

41 Gopalan (2023) Intersectional Approaches to Investigating and Prosecuting International Crimes: Sexual and Gender-Based Crimes, in Carsten Stan (ed), the International Criminal Court in its Third Decade (Brill, (publication pending), s.1.6-1.9.

42 Gopalan (2023), Intersectional approaches, *ibid*, s.1.10.

D Prosecution charging guidelines should address typologies and accurate reflections and contextualisations of CARSV within patterns of broader violence. There should be supervision and checks on charging practices by a CARSV specialist.

E Bench books for judges should give gender-inclusive and accurate definitions and explanations of CARSV with examples and case law around typologies.

F Provide training in the use of the Non-Stigmatising Language Guide for Justice Actors, which includes using inclusive language for survivors/victims, and ensuring the language used does not conflate CARSV with consensual sexual relations.[43]

43 Gopalan (2016), Time to Act – Accountability for CRSV in Sri Lanka "*Stigma arising from sexual violence crimes can present a powerful challenge that permeates the judicial process. Nonetheless, while recognising the reality of such socially constructed harms, efforts must be made to avoid reinforcing them in the judicial process.*"

II. EXPECTATIONS OF FORCE

Common Myths

Survivors scream, resist and fight back against perpetrators; therefore, signs of physical resistance or physical violence should be present.

Failure to resist, or an absence of injuries, implies consent.

The Facts

1) Evidence of use of force or violence, or the presence of injuries, is not required in international law, and in most national laws as well.

★ **ICC Rules of Procedure and Evidence Rule 70(3):** "*[C]onsent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.*"

★ **ICTY, Prosecutor v. Kunarac**: The court rejected "*the Appellants 'resistance' requirement as "they [had] offered no basis in customary international law.*" It was *"wrong on the law and absurd on the facts."* "*[F]orce is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are 'factors [other than force] which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim'. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.*"[44]

★ **Convention on the Elimination of Discrimination against Women (CEDAW), Tayag Vertido v. The Philippines:** "*[T]here should be no assumption in law or in practice that a woman gives her consent because she has not physically resisted the unwanted sexual conduct, regardless of whether the perpetrator threatened to use or used physical violence.*"[45]

★ **European Court of Human Rights (ECHR), M.C. v. Bulgaria:** "*[R]equiring proof of physical resistance in all circumstances risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy.*" The court found that member states had positive obligations under the Convention to "*require … the penalisation and effective prosecution of any non-consensual act, including in the absence of physical resistance by the victim.*"[46]

★ **Spain, Supreme Court La Manada *"Wolfpack"* case:** *"The specific reference made in the Istanbul Convention to consent, as a manifestation of the free will of the person depending on the context, makes clear the impossibility of interpreting an absence of physical resistance as such will, it must be manifested expressly or be clearly inferred from the circumstances surrounding the event."*[47]

There are many reasons why there may be no signs of resistance or use of violence, and this should never be required by law or in evidence. In conflict, there are many coercive circumstances which remove any ability of a survivor to resist or consent. Some examples are being detained or being held

44 Prosecutor v. Kunarac, ICTY-96-23&IT-96-23/1-A, Appeal Judgement (12 June 2002) paras.128-129.

45 Tayag Vertido v. The Philippines, CEDAW Doc No. CEDAW/C/46/D/18/2008, Communication No. 18/2008 (29 November 2007) para.8.5. See also from India: Gopi @ Saravanan v. State, India, High Court of Judicature at Madras Order (23 December 2021) para.12; Rao Harnarain Singh Sheoji Singh v. State, India, High Court of Punjab-Haryana Order (12 August 1957) para.7, *"mere absence of a valiant and violent effort on the part of the victim certainly does not amount to consent."*

46 M.C. v. Bulgaria, ECHR Application No. 39272/98, Judgement (04 December 2003) para.166.

47 Supreme Court, Appeal No.396/2019, Decision No. 344/2019, Madrid, 4 July 2019.

captive, the presence of soldiers or weapons, the aftermath of combat operations, threats to retaliate, multiple perpetrators, the commission of other crimes, fear or threat from surrounding violence, etc.[48] Investigation and evidence should focus on these coercive circumstances and the perpetrator's actions, rather than focus on irrelevant and harmful expectations of signs of resistance from a survivor.

2) Scientific research has found that, in many cases of sexual violence including rape, there are no genital injuries, and often no bodily injuries at all.

In conflict/crises settings, access to a medical examination can be severely restricted. Further, "*victims of rape may well suffer no genital or other physical injury (Bowyer & Dalton 1997; Sygar, Fine & Eckhart 2004).*"[49] While of course there are cases with very significant physical damage, such as fistulas, anal bleeding, and reproductive and sexual health impacts, in many cases medical examinations and reports may not include physical signs of injuries on victims at all, and this would not be uncommon.[50]

- ★ One study found that of 819 survivors of sexual violence, 52% had general body injuries, 20% presented genital/anal trauma and 41% presented no injuries at all.[51]
- ★ In another study specifically on anal penetrative assaults, with 239 victims (65.3% female and 34.7% male), anal injuries did not occur more frequently in one sex than another (21.15% rate for females, 21.69% for males). No association was found between the type of assault and presence of an anal injury. A greater proportion of single-suspect assaults (22.8%) resulted in anal injury than multiple-suspect assaults (13.9%). The presence of anal injury was significantly associated with time since the assault across all subjects, with those examined after 72 hours being less likely to have injury.[52]
- ★ In a recent study in Mali,[53] out of 443 sexual and gender-based violence (SGBV)survivors, 26.6% presented with torn clothes, 17.6% with scratch lesions, 13.7% with bruising and 23% with genital lesions. There was no statistically significant relationship between the presence of genital lesions and the number of accused.[54]

It should also be noted that skin pigmentation can affect the detection of injuries or bruising. "*Race was a significant factor, explaining … [that] bruises were either not visible or did not accurately reflect the severity of the injury.*"[55] Any insistence on evidence of injuries or bruising could therefore discriminate against those with darker skin pigmentation.

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48 Prosecutor v. Bemba, ICC-01/05-01/08, Trial Judgement (21 March 2016) paras.102-109; Prosecutor v. Kunarac *et al.*, ICTY-96-23-T & IT-96-23/1-T, Trial Judgement (22 February 2001) paras.645, 667, 711, 761, Appeal Judgement, para.130; Prosecutor v. Delalic *et al.*, ICTY-96-21-T, Trial Judgement (16 November 1998) paras.960- 961; Prosecutor v Furundzija (10 December 1998), *ibid*, paras.89, 271. For example, in Rwanda, many of the survivors had no visible injuries because not fighting back was the only way to survive.

49 Temkin *et al.*, (2018), *ibid*; Orchowski *et al.*, (2020) False Reporting of Sexual Victimization: Prevalence, Definitions, and Public Perceptions, in Geffner *et al.*, (eds.) (2020) Handbook of Interpersonal Violence and Abuse Across the Lifespan, 8: Further, sexual assault does not always result in outward signs of injury (Tark and Kleck 2014).

50 Use of staining and colposcopy techniques may increase detection, but the rate remains modest. See Lincoln *et al.*, (2013) Macroscopically detected female genital injury after consensual and non-consensual vaginal penetration, Journal of Forensic and Legal Medicine, 20: 884-901 see tables of studies at 886-887.

51 Sugar *et al.*, (2004) Physical Injury after Sexual Assault: Findings of a Large Case Series, Am J Obstet Gynecol, 71-76. See also Hilden *et al.*, (2005) Genitoanal Injury in Adult Female Victims of Sexual Assault, Forensic Sci Int, 200-205, finding 32% of [ ] sustained genitoanal injury, and concluding that *"Most women do not have visible genitoanal injuries. … The severity of the assault is a poor predictor of genitoanal injury."*

52 Buswell *et al.*, (2022) Identifying the Prevalence of Genito-Anal Injuries amongst Clients Attending St Mary's Sexual Assault Referral Centre following an Allegation of Anal Penetration, J Forensic Leg Med, 102392.

53 Doumbia *et al.* (2023) Sexual and Gender-Based Violence at the 'One Stop Center Care Unit', The Referral Health Centre In Commune V of the District of Bamako, Mali, Sch J Med Case R, 257-263.

54 See also Ohayi (2018) Prevalence and Pattern of Genital Injuries Among Adolescent Rape Victims attending Enugu State University Teaching Hospital, South East Nigeria, J Obstet Gynaecol, 10-13 (44.9% prevalence genital injuries).

55 Deutsch *et al.* (2017) Bruise Documentation, Race and Barriers to Seeking Legal Relief for Intimate Partner Violence Survivors: a Retrospective Qualitative Study Journal of Family Violence, J Fam Viol, 769-773.

In comparison, a much higher prevalence of broad poor health outcomes and psychological impact for sexual violence survivors are more commonly recorded. This area of expert evidence may potentially be useful to complement any forensic medical examination of a survivor's acute physical injuries.[56]

For more, see Chapter Six — Medical and Forensics of the CARSV Stigma Toolkit for Justice, Part A.

Why is that?

In the face of intense fear, threat and coercive circumstances, human beings respond in different ways, sometimes physiologically and involuntarily through what's commonly referred to as 'fight, flight or freeze'. Few people in fear, faced with the threat of violence, will react by fighting or resisting. In fact, active resistance is not the common reaction to sexual violence. "*Most victims do not respond to assaults with extreme levels of physical resistance, as it is common for individuals to experience a 'freeze' response to sexual trauma (Marx et al., 2008).*"[57] Studies have proved this by showing that when survivors are exposed to extreme threat, involuntary physical paralysis ('freezing') may occur. This reaction is often known as 'tonic immobility'.[58]

★ **Tonic Immobility:** A 2017 study showed that out of 298 female survivors of rape, 70% reported significant tonic immobility during the assault, 48% reported extreme tonic immobility and 81% reported significant fear during the assault.[59]

Survivors might also choose to not fight back in the hope of protecting themselves from further violence, or even fatal violence. As such, neither the failure to resist nor the absence of injuries should ever be seen as an implication of consent nor as a reason to doubt that the sexual violence occurred.

Male survivors

The mistaken belief that survivors 'should' or 'would' always fight back is also common for male survivors, who are expected to be able and willing to fight back against perpetrators due to gender stereotypes surrounding masculinity and assumptions of physical strength. This is particularly the case if the perpetrator is female. Male survivors have also disclosed tonic immobility during sexual violence, highlighting that it is not a gender-specific reaction.[60]

> *"I couldn't move or make any noise, I just froze. My head stopped working, I was just opening my eyes and I couldn't do anything. I was very powerless, and my body felt dead. […] My body just froze because I couldn't believe that those two guys were doing that to me. I couldn't move my arms or legs or even try to fight … my mind just blocked …"*[61]

56 See e.g. Baslie *et al.* (2021) Chronic Diseases, Health Conditions and Other Impacts Associated with Rape Victimization of U.S. Women, J Interpers Violence 36(23-24); Basile *et al.* (2015) Sexual Violence Victimisation and Associations with Health in a Community Sample of Hispanic Women, J Ethn Cult Divers Soc Work 24:1-17: Kivlahan *et al.* (2023) Longitudinal Impact of CRSV Experienced by Men in Detention Since the Onset of the Syrian Conflict (available as a pre-print before peer review – unpub.).

57 Orchowski *et al.* (2020), *ibid*, 5-9.

58 Möller *et al.* (2017) Tonic Immobility during Sexual Assault – A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression, Acta Obstet Gynecol Scand, 932-938.

59 Möller *et al.* (2017), *ibid*. See also Dhawan & Haggard (2023) Neuroscience Evidence Counters a Rape Myth, Nat Hum Behav.

60 Mgolozeli & Duma (2020) "They Destroyed My Life because I Do Not Feel like a Man Anymore", Heliyon, 9.

61 Mgolozeli & Duma (2020), *ibid*, 4.

Manifestation in Justice Processes: Recognising Impacts[62]

1. **Legislative provisions requiring use of force:** Through its wording or interpretation, legislation may still require the use of force for the elements of a crime, or it may not recognize the existence of coercive circumstances and the impossibility of giving free consent in such circumstances. This can create barriers to accessing justice by a survivor, including at the stage of investigation if the police or investigators decide there has been 'no crime' without the use of force.

2. **Survivors themselves are less likely to report if there are no injuries:** A recent study found that patients receiving a forensic medical examination after sexual assault were 2.5 times more likely to report to the police if there was a documented injury (regardless of the location of the injury).[63] This is likely to be due to internalised stigma.

3. **Perceived lack of evidence or a 'weak' case by investigators or prosecutors:**[64] Investigators may assess the case as weak or 'no crime' because of a lack of evidence of injuries or resistance.[65] In a qualitative study in 2017, lawyers and advocates confirmed that documentation of bruises impacted the legal outcome of cases, including the severity of the charges and the relief/ reparations received.[66]

4. **Questioning of survivor's credibility or consent:** For example, in a recent case in England, Defence Counsel argued, "*C said that D had used force to prise her legs apart, force to pull her shoulders down yet she had no injuries at all, no red marks*" and "*Would a victim not at least scream or do something to show some kind of resistance? … She did not offer any resistance whatsoever to get rid of him.*" The victim had testified that she was scared for her life.[67] Not only are these questions or submissions irrelevant in law and incorrect, in fact, they blame and harm the survivor, which is known as 'revictimisation', as survivors are made to feel that they should or could have done something different.

5. **Reducing the culpability of the accused:** Assigning blame to the survivor and focusing on victim conduct, rather than on the conduct of the accused, leads to non-investigations, decisions not to charge, acquittals and reduced sentences where there is a conviction.

   ★ **Finland:** *"'The fact that a sexual partner says 'No, I don't want to' before sexual intercourse or between intercourses, is not always a sufficient signal to the other person that consent and willingness to continue sex is not present.' District court judgement, acquittal in a case with multiple accused".*[68]

62 These myths have been found frequently in sexual violence cases: Temkin *et al.* (2018), *ibid* and, Temkin & Krahé (2008) Sexual Assault and the Justice Gap: A Question of Attitude, Bloomsbury: In English trials, lack of torn clothes or injuries used by the defence in 3/8 trials, failure to resist in 3/8 trials. Zydervelt *et al.* (2016) Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?, Br J Criminol, 551-569: In New Zealand cases, the defence used lack of injury or damage to clothes in 33% of cross examinations, and lack of resistance in 24% of the cases. In St George *et al.* (2021) Blaming Children: How Rape Myths Manifest in Defence Attorney's Questions to Children Testifying about Child Sexual Abuse, J Interpers Violence, NP13902-NP13927: in US child sexual abuse cases, 28% included questioning on lack of force or resistance.

63 Downing *et al.* (2022) Factors Associated With Law Enforcement Reporting in Patients Presenting for Medical Forensic Examinations, J Interpers Violence, NP3277-NP3278.

64 Huda (2022) "*No Signs of Rape*": Corroboration, Resistance and the Science of Disbelief in the Medico-Legal Jurisprudence of Bangladesh. TRIAL International (2018) Rape Myths In Wartime Sexual Violence Trials, 34-46.

65 Sinclair (2022) The attrition problem: The Role of Police Officer's Decision Making in Rape Cases, JIPOP, 135-150.

66 Deutsch *et al.* (2017), *ibid*.

67 Temkin *et al.* (2018), *ibid*.

68 Amnesty International (2019) Time for Change, *ibid*, p.44 (Finland).

How Do We Counter These Myths in Justice Systems?

A Provide training, guidelines and tools to investigators (with prompts and explanations in evidence assessment forms/templates, crime elements/evidence worksheets, etc.); to prosecutors (in charging guidelines); and to judges (in bench books) on coercive circumstances, and an accurate understanding of the role of forensic evidence, including that no injuries does not mean there was no sexual violence. An intersectional analysis should inform investigations and charging.[69]

B Call expert witnesses, including medical forensic experts, who understand and can counter misunderstandings about injuries.

C Ensure prosecutors are conscious of and fully prepared to object to any questions or submissions about lack of resistance or lack of evidence of injuries, or any minimisation of the crime based on that (with law and case law to support).

D Gather and present holistic impact evidence which goes beyond physical harm and considers psychological, social, legal, economic and other forms of harm.

E Train judges on the coercive circumstances of sexual violence, including those specific to conflict. During assessment of the case or during sentencing, Judges should not analyse whether a survivor fought back or not, or offered resistance or not. Judges should use medical expert evidence to support these judgements. Bench books can provide useful references and case law examples.

69 Gopalan (2023) Intersectional Approaches, *ibid*, s.1.6-1.9, (2023) Breaking Biases, *ibid*, s.8.2.5.

III. CONSENT

Common Myths

If a survivor had prior consensual sexual relations with the perpetrator, they must have consented this time, too.[70]

If a survivor was willing to engage in sexual acts with other people before or after the sexual violence, they must have been willing to engage in sexual acts on this occasion with the perpetrator, too.

If a survivor's body had a physiological response to the sexual violence, it implies the consent and enjoyment of the survivor.

A survivor could have consented even under wartime coercive circumstances.

The Facts

1) All persons have the full right of autonomy, privacy and the non-violation of bodily integrity in each situation, on every occasion.

The rights to bodily integrity (physical, psychological, sexual, etc.) and autonomy over one's own body encapsulate "*the right to have one's own body whole and intact and (on reaching an age of understanding) to take decisions about one's own body*".[71] Leading legal experts and judges have described the right to bodily integrity as "*the most important of civil rights*",[72] "*the right to be free from physical interference*".[73] It is "*the right to exclude all others from the body, which enables a person to have his or her body whole and intact and free from physical interference.*"[74] These rights include sexual autonomy and the right to be free from any (sexual) interference by another person.

★ **European Court of Human Rights (ECHR), Pretty v. UK:** *"Sexual life is part of private life. [...] Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."*[75]

In terms of sexual contact or acts, all persons involved have the right to free, full and voluntary consent to such acts as part of their rights to bodily integrity and autonomy. States have a positive duty to protect all persons from any violation of their bodily integrity (and to undertake effective investigation and prosecution of any such violation).[76]

★ **Beijing Declaration and Platform for Action:** "*The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.*"[77]

70 This could even extend to non-sexual prior relations or even being seen with them before.

71 In Re A (Children) (Conjoined Twins), England and Wales, Court of Appeals Decision [2001] Fam 147, 258.

72 R (on the application of Justin West) v. Parole Board, UK, Supreme Court Appeals Decision [2002] EWCA Civ 1641, 49.

73 Feldman (2002) Civil Liberties and Human Rights in England and Wales (2nd ed.) Oxford, 241.

74 Herring & Wall (2017) The Nature and Significance of the Right to Bodily Integrity, Cam Law J, 566-588.

75 Pretty v. The United Kingdom, ECHR Application No. 2346/02, Judgement (29 April 2002) para.61.

76 M.C v. Bulgaria, *ibid*, paras.153, 164-166; I.G. v. Moldova, ECHR App. No. 53519/07, Judgment (15 May 2012) para.42.

77 Fourth World Conference on Women (1995) A/CONF.177/20, 96 and A/CONF.177/20/Add.1.

★ **World Association for Sexual Health:** "*3. The right to autonomy and bodily integrity. Everyone has the right to control and decide freely on matters related to their sexuality and their body. This includes the choice of sexual behaviours, practices, partners and relationships with due regard to the rights of others.*"[78]

Consent should not be assumed. Nor should the burden of proving non-consent be shifted to the victim.

★ **Canadian Supreme Court, R. v. Ewanchuk:** The belief that women have the burden of actively showing non-consent rather than that men have the responsibility to ascertain consent "*denies women's sexual autonomy and implies that women are walking around this country in a state of constant consent to sexual activity.*"[79]

★ **ECHR, M.C. v. Bulgaria:** "*the development of law and practice [...] reflects the evolution of societies towards effective equality and respect for each individual's sexual autonomy*", responding to an amicus curiae submission by InterRights which stated, [80] "*The equality approach starts by examining not whether the woman said 'no', but whether she said 'yes'. Women do not walk around in a state of constant consent to sexual activity unless and until they say 'no', or offer resistance to anyone who targets them for sexual activity. The right to physical and sexual autonomy means that they have to affirmatively consent to sexual activity.*"[81]

As discussed above, there are many factors that can affect a person's ability to voluntarily and freely consent to any act, including additional coercive circumstances present during a conflict.

2) This means that prior consensual sexual activities between the perpetrator and survivor are not relevant to the question of consent on a different occasion.

Consenting previously to a sexual act or consenting to marriage does not create an irrevocable consent, or assumption of consent, to sexual acts thereafter. In each instance, each person involved in a sexual act has the same right of autonomy and bodily integrity to decide whether to consent to that act, in those circumstances, at that time. Consent between current or former partners should never be assumed or implied.

★ **Scotland, S. v. HMA:** "*[R]ape has always been essentially a crime of violence and indeed no more than an aggravated assault ... Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. [...] The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. [...] Logically the only question is whether or not as matter of fact the wife consented to the acts complained of.*"[82]

★ **UK House of Lords, R v. R:** *"[T]he idea that a wife by marriage [or by prior sexual relations] consents in advance to her husband [or partner] having sexual intercourse with her whatever her state of health or however proper her objections [...], is no longer acceptable. It can never have been other than a fiction. [...] We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."*[83]

78 World Association for Sexual Health (2014) Declaration of Sexual Rights: see also 5) The right to be free from all forms of violence and coercion.

79 R v. Ewanchuk, Canada, Supreme Court - Alberta Court of Appeal Decision [1999] 1 S.C.R. 330, 372.

80 M.C. v. Bulgaria (04 December 2003), *ibid*, paras.127, 165.

81 M.C. v. Bulgaria, Written Comments by InterRights, pursuant to Rule 61, 12 April 2003.

82 Stallard v. H.M. Advocate, Scotland, Decision (15 March 1989) S.L.T. 469, 473.

83 R v. R, United Kingdom, House of Lords Decision [1992] 1 AC 599.

★ **England, R v. S:** The judge did not permit cross-examination on prior sexual acts alleged to have occurred between the parties a few days prior to a violent rape committed upon a woman by her husband.[84]

3) The fact that a person has decided to participate in sexual activities on other occasions with other persons is not relevant to the question of consent on this occasion with the perpetrator(s).

Furthermore, proffering the sexual history of a survivor as 'evidence' does not help prove whether consent was given in this instance. Such an approach is often rooted in stigmatising beliefs that punish the free exercise of the right to sexual autonomy of women, rooted in prejudicial gender narratives expecting and imposing virginity and chastity as somehow part of female values. At the same time, it puts the blame on the survivor rather than the perpetrator and makes wrongful assumptions by believing that someone with, for example, an active sex life would choose to engage in sexual acts with the perpetrator.

★ **UK House of Lords, R v. A:** Lord Slynn: "*Evidence of previous sex with the accused also has its dangers. It may lead the jury to accept that consensual sex once means that any future sex was with the woman's consent. That is far from being necessarily true and the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances.*" Lord Steyn, *"It is true that each decision to engage in sexual activity is always made afresh."*[85]

★ **Restriction of sexual history as evidence:** Sexual history as evidence has been restricted in some jurisdictions, including the ICC (Rule 71 Rules of Procedure and Evidence),[86] ICTY (Rule 96 of Rules of Procedure and Evidence), UK (Youth Justice and Criminal Evidence Act of 1999, Section 41), DRC (Law amending the Code of Penal Procedure 2006, Art.1) and Canada (Criminal Code, Section 276): *"[E]vidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief."*

See when sexual history is used to attack the credibility of survivors in Section **VIII. Honour and Shame**.

4) The body has involuntary automated physiological reactions and responses, which do not indicate either pleasure or consent to the sexual violence.

The human body has involuntary physiological reactions to many different stimuli; a physical response to sexual violence (including signs of arousal such as vaginal lubrication, an erection or ejaculation/an orgasm) neither indicates pleasure nor consent to that violence.[87] The published literature is limited.

★ A review of the male response to sexual violence describes erections and orgasms as involuntary responses to unwanted stimuli. Findings highlighted the importance of distinguishing between physiological arousal and consent.[88]

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84 R v. S, England and Wales, Court of Appeals Decision [2010] EWCA Crim 1579, 1, 33.

85 R v. A, United Kingdom, House of Lords Decision [2001] UKHL 25; R v. White, England and Wales, Court of Appeals Decision [2004] EWCA Crim 946, in which evidence that the victim was a prostitute was held to be irrelevant to the issue of consent; R v Winter, England and Wales, Court of Appeals Decision [2008] EWCA Crim 3, a complainant disclosing to the suspect that she had a sexual relationship with another man was irrelevant to consent or his belief in consent; R v. Darroch (2000) 191 DLR (4th) 539,568 "*actual consent must be given for each instance of sexual violence.*" State of Punjab v. Gurmit Singh, India, Supreme Court Judgement, 1996 AIR 1393, 1996 SCC (2) 384 but caution required relating to stigmatising language.

86 UN Mechanism for International Criminal Tribunals (2012) Rules of Procedure and Evidence, Rule 118; United Nations Transitional Administration in East Timor Special Panel for Serious Crimes (2000) Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, Rule 34.3.

87 Levin & Berlo (2004) Sexual Arousal and Orgasm in Subjects Who Experience Forced or Non-Consensual Sexual Stimulation – A Review, J Clin Forensic Med, 82-88.

88 Bullock & Beckson (2011) Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology, JAAPL, 197-205.

★ A 1982 interview study of 11 adult male survivors of female perpetrators found that 37% had experienced orgasm, while also reporting extreme use of force and threats.[89]

Extreme fear and anxiety can lead to submission and dissociation, which, in turn, can result in physical arousal and orgasm in some settings. The prevalence of this response is unknown due to a lack of high-quality science and the tremendous shame potentially involved in sharing this deeply personal and confusing response. It is important to understand the devastating and confusing impact such bodily responses have on survivors, especially given the stigma and victim-blaming that surrounds sexual violence. This distinction is important to note, as bodily reactions should not be seen as indicators of consent.[90]

5) In wartime there are many coercive circumstances during which a survivor cannot voluntarily consent to sexual acts.

Case law at the ICTR and ICTY has established that coercive circumstances may include threats, intimidation, extortion and other forms of duress that prey on fear or desperation. More importantly, it has established that coercion may be inherent in specific circumstances, such as during armed conflicts, under any form of captivity and during detention.[91] See also Section **II. Expectations of Force**.

★ **ICTY, Prosecutor v. Mujimana:** *"[C]oercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape … circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent."*[92]

★ **ICTY, Prosecutor v. Kunarac:** This applies to cases where victims are *"held in de facto military headquarters, detention centres and apartments maintained as soldiers' residences".* The Appeals Chamber stated, "*[t]he circumstances in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say true consent will not be possible*", so there is a *"need to presume non-consent."*[93]

★ **ICTY, Prosecutor v. Kvočka:** 'Alleged' consent to sexual acts in exchange for the safety and better treatment of her husband in a detention camp were found to be coercive circumstances.[94]

During the justice process, the focus should always remain centred on the elements of the crimes and ultimately on the conduct and knowledge of the accused.[95] For sexual violence as an underlying act of an international crime, such as crimes against humanity or war crimes, that means showing 1) that the perpetrator committed an act of a sexual nature against one or more persons (or caused a person to engage in such an act), 2) by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against the person(s), or by taking advantage of a coercive environment or other incapacity to give genuine consent. Centering arguments on the survivor's behaviour enforces victim-blaming attitudes and stigma.

89 Sarrel & Masters (1982) Sexual Molestation of Men by Women, Arch Sex Behav, 11:117-131, at 126.

90 Sarrel & Masters (1982), *ibid*. See Dolan (2014), *ibid*, "*And where understandings of sexuality and physiology are limited, it is not surprising that if a victim has a physiological response such as an erection, this is mistakenly taken to mean that he was enjoying it.*"

91 Prosecutor v. Akayesu (02 September 1998), *ibid*, para.688; Prosecutor v. Kunarac *et al.* (12 June 2002), *ibid*, paras.131-133; Prosecutor v. Furundzija, ICTY-95-17/1-T, Trial Judgement (10 December 1998) para.271.

92 Prosecutor v. Muhimana, ICTR-95-1B-T, Trial Judgement and Sentence (28 April 2005) para.546.

93 Prosecutor v. Kunarac *et al.* (12 June 2002), *ibid*, para.130-133.

94 Prosecutor v. Kvočka *et al.*, ICTY-98-30/1, Trial Judgement (2 November 2001) para.555.

95 Amnesty International (2011) Rape and Sexual Violence: Human Rights Law and Standards in the ICC, 16.

Coercive circumstances should always be documented and considered throughout the criminal process. As stated in case law, the presence of coercive circumstances completely negates the possibility of giving consent, making any arguments or assessment of evidence based on consent legally irrelevant.

Manifestation in Justice Processes: Recognising Impacts

1. **Barriers to access to justice:** Survivors can internalise stigma, stereotypical understandings of sexual violence (e.g., it is perpetrated only by strangers) and self-blame, which can result in them either not recognising what happened as sexual violence or fearing being blamed or shamed because of their physiological reaction, sexual history or past relationship with the perpetrator.

2. **Reducing the culpability of the accused:** Assigning blame to the survivor rather than the accused leads to non-investigations, decisions not to charge, acquittals and reduced sentences when there is a conviction. Assuming consent in acquaintance cases has the same effect. [96]

3. **Ignoring or misunderstanding coercive circumstances:** At the investigation stage, investigators may imply or infer consent, based on prior relationships or 'consent' under duress, leading to 'no-criming' or no charges. Equally, the defence sometimes raises the issue of consent in CARSV, without regard for coercive circumstances. [97]

4. **Cross-examination on sexual history:** Questions about a prior relationship with the accused are common in cases related to broader forms of sexual violence. [98] They also occur in CARSV cases, even despite clear laws and evidence rules excluding such questions or evidence. [99] Additionally, despite evidential rules against raising sexual history to infer consent, it is also common for survivors to face questions about their sexual history during the trial. [100] Often, judges and prosecutors do not take appropriate steps to prevent or stop this line of questioning.

5. **Assessment of evidence:** All these factors — sexual history, prior relationships, physiological responses and failure to recognise coercive circumstances — potentially influence adjudication and assessment of evidence, including by police and prosecutors preemptively de-selecting 'bad witnesses' or 'hard cases', or not proceeding with charges over doubts that they can secure convictions. These factors can also affect judicial determinations.

6. **When the justice process harms survivors:** Stigmatised, victim-blaming misconceptions deepen a survivor's own internalised questions of self-blame and shame, causing retraumatisation and revictimisation.

96 Wolf & Werner (2021) Victims' Rights Looking Good on Paper – How Criminal Prosecution in Germany Fails Victims of Sexual Violence, Ger Law J, 808. "*Studies have shown that this idea of 'real' rape also influences the assessment of cases by lawyers, for example, as in cases where a partner is the perpetrator, fixing the perpetrator's responsibility as 'lower' and the victim's complicity as 'higher'. Research also indicates that cases involving non-strangers are less likely to proceed.*"

97 TRIAL International (2018), ibid, 7: "*Notwithstanding these restrictions, courts regularly permit the defence to call witnesses to testify about the consensual relationship between victim and perpetrator.*"

98 Zydervelt *et al.* (2016), ibid, 12: 48% of cases involved questions about prior relationship with accused during cross-examination.

99 E.g. Prosecutor v. Mucić, ICTY-96-21, Decision on Redaction of Public Record (05 June 1997) para. 3, where the defence was able to question the survivor on their sexual history in spite of Rule 96 of the Rules of Procedure.

100 Zydervelt *et al.* (2016), ibid, 12. (NZ) 43% of cases involved questions about the sexual history of the victim. Temkin *et al.* (2018), ibid, 6 50% of cases did; Swemmer (2020) Justice Denied? Prosecutors and Presiding Officers' Reliance on Evidence of Previous Sexual History in South African Rape Trials, SACQ: defence and prosecution relied on sexual history evidence in SA

> *"I've got to deal with this now. I've got to deal with what this man did to me and also deal with being degraded through the court system. You hear of people getting assaulted, and I know I shouldn't think this, but I think "Poor person, they're going to have to go through that system."*
>
> **A New Zealand survivor** [101]

How Do We Counter These Myths in Justice System

A Ensure criminal procedure rules that exclude evidence about prior or subsequent sexual history. [102]

B Establish an early investigative and evidential focus on coercive circumstances — ensuring this is part of the investigative plan and that there are related prompts for investigators and prosecutors in work tools such as elements of crimes worksheets, proofing charts, etc.

C Require an evidential focus on the perpetrator's conduct and its relationship to coercive circumstances.

D Call expert evidence and studies on physiological response when relevant.

E Ensure a pre-trial 'ground rules' hearing, which sets clear ground rules, upholds or sets procedural protections to prevent irrelevant and stigmatising questions or evidence from being introduced. This should include the exclusion of any evidence of sexual history or around 'consent' where there are coercive circumstances.

F Train judges on procedural protections and why they are important. Judges should also be trained on coercive circumstances. Bench books can be useful references and reminders.

G Train prosecutors so that in each case, they are ready to object if procedural protections are infringed. They should be armed with arguments based on relevancy and a proper focus on elements of crimes, perpetrator conduct and coercive circumstances. Template sets of legal arguments should be available for prosecutors to adapt.

101 Gravitas (2018) Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences, Research Report, 21.

102 See ICC, Rules of Procedure and Evidence R70-72.

IV. CREDIBILITY AND DELAYED REPORTING

Common Myths

A 'real' survivor would seek help or report what has happened straightaway. Those who delay reporting or who only partially disclose are telling lies.

There are many people who make false reports because they regret consensual sexual activities or are seeking benefits or reparations.

If a survivor is telling the truth, there should be corroborating evidence. A survivor's testimony is unreliable, so corroborating evidence is required to prove the crime.

See also "*'Bad' women cannot be believed, and they make 'bad' witnesses*" in Section **VIII. Honour and Shame**.

The Facts

1) Sexual violence survivors commonly delay reporting what has happened, sometimes only being able to disclose the events many years later.

Delays in reporting are highly common in cases of sexual violence. In fact, most cases of sexual violence are reported to authorities after substantial delays.

"*The overwhelming body of current empirical studies, data, and other information establishes that it is not inherently 'natural' for the victim to confide in someone or to disclose, immediately following commission of the offence, that he or she was sexually assaulted.*"[103]

There are many reasons why survivors do not seek help or report what has happened straightaway, or at all, including fear of stigma[104] or retaliation, shame, post-traumatic stress, retraumatisation, distrust of authorities, age, educational level, unawareness of the possibility to report, and date/time of the assault.[105] Furthermore, within conflict (and occupation) settings, there may be no authorities to report to, or the perpetrators may be affiliated with those authorities.[106]

★ **England, R v. Valentine:** *"We now have a greater understanding that* ***those who are victims of sexual assault offences, be they male or female, often need time before they can bring themselves to tell what has been done to them****, that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or other members of their family."*[107] Though it now nears 30 years of age, this judgement has since been quoted throughout various jurisdictions.[108]

103 People v. Brown, United States, Supreme Court of California Decision (1994) 8 Cal.4th 746, 35 Cal.Rptr.2d 407; 883 P.2d 949.

104 Mukamana & Brysiewicz (2008) The Lived Experience of Genocide Rape Survivors in Rwanda. J Nurs Scholarsh. 40(4):379-84.

105 Klemmer *et al.* (2021) Understanding Spatial Patterns in Rape Reporting Delays, R Soc Open Sci, 1-3; Tavarez (2021) Waiting to Tell: Factors Associated with Delays in Reporting Sexual Violence, CUNY Academic Works.

106 Prosecutor v. Ntaganda, ICC-01/04-02/06, Public Redacted Version of the "Final Observations on Reparations of the Common Legal Representative of the Victims of the Attacks" (21 December 2020) para.11.

107 R v. Valentine, English Court of Appeal Decision [1996] 2 CrAppR 213; Singh (2006) Evaluating the 'First Report': The Persistent Problem of Evidence and Distrust of the Complainant in the Adjudication of Sexual Offences, SAJCJ, 44.

108 E.g. Director of Public Prosecutions v. A.C, Ireland, Court of Appeal Judgment (25 February 2020) Record Number 108/19, para.6; Keith Nichol v. R, Jamaica, Court of Appeal Decision [2018] JMCA Crim 8, para.35; The State v. Joseph Philip Mamie, Sierra Leone, High Court Appeal Judgment [2011] SLHC 1, paras.8-9.

★ **ICC, Prosecutor v. Ntaganda**: *"[I]n assessing the evidence and credibility of the witnesses who are allegedly [SV] victims, the Chamber found that cultural or communal stigmatisation, shame and fear, as well as the general lack of trust in authorities, were factors which can explain the difficulties faced in coming forward, especially in a conflict or post-conflict area like Ituri. Accordingly,* ***the Chamber considered delayed reporting of instances of rape, including after conversations with a counsellor or therapist, to be an understandable consequence of the victims' alleged experience****, and therefore found that late reporting does not, as such, affect the relevant witness's general credibility."*[109]

★ **India High Court of Kerala, XXX v. Kerala:** *"**The delay in a case of sexual assault cannot be equated with a delay in a case involving other offences since several factors weigh on the mind of the victim and members of her family.** In a tradition bound society like ours, particularly in rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there was a delay in lodging the [First Information Report]. The delay becomes fatal only in a case when there is doubt as to the genesis or genuineness of the prosecution case."*[110]

Such are the barriers to disclosure for survivors, it is estimated that between 80-99% of survivors **never** report sexual violence to the police. Multiple studies around the globe have confirmed this, showing that the many challenges survivors face permanently affect reporting.

★ **Australia:** Data from 2020 shows that approximately 87% of female survivors assaulted in the past 10 years did not file a report.[111]

★ **Hungary:** Research from the Women for Women Together Against Violence organisation estimated that only 0.24% of sexual violence cases are reported to the authorities.[112]

★ **Thailand:** From 2008 to 2013, 4,000 rape cases were reported per year, representing only 13% of yearly estimated rape cases in the country. Thus, 87% of rape cases went unreported to authorities.[113]

For more, see Introduction and Stigma in Justice sections at the start of CARSV Stigma Toolkit for Justice.

2) False reporting of sexual violence is extremely rare.

"*There is neither scientific proof nor research findings that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences.*"[114]

Many people, including justice actors, believe that sexual violence reports are extremely common and easy to make. This could not be further from the truth, as numbers continuously show that only 0.2-10% of all reported cases are estimated to be false.[115] However, even these estimates may be inflated due to myth-based prejudices of police officers, who might incorrectly designate accusations as false.[116] Leading studies on false reporting have established the following as contributing factors to

109 Prosecutor v. Ntaganda, ICC-01/04-02/06, Trial Judgment (8 July 2019) para.88.

110 XXX v. State of Kerala, India, High Court of Kerala at Ernakulam Judgment (01 July 2022) CRL.A No. 649 of 2021, para.13.

111 Australian Institute of Health and Welfare (2020), *ibid*.

112 Parti & Robinson (2021), *ibid,* 159.

113 Skinnider *et al.* (2017), *ibid.* See also Amnesty International (2019) Time for Change, *ibid*, estimates 90% in Norway.

114 Mukungu v. Republic, Kenya, Court of Appeal Decision (2003) AHRLR 175 (KeCA 2003) para.12.

115 Burrowes (2013) Responding to the Challenge of Rape Myths in Court. A Guide for Prosecutors, 8; Ferguson & Malouff (2016) Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates, Arch Sex Behav, 11-13; Orchowski et al. (2021), *ibid*; Koon-Magnin (2022) Sexual Assault and Harassment in America: Examining the Facts, 81; Lilley *et al.* (2023), *ibid*.

116 E.g. the Dehli Comission of Women in India alleged that 53% of official rape reports filed between April 2013 and July 2014 were false. This statistic is so far off the common average, it at the very least is a reflection of the common myths and misconceptions surrounding sexual violence. See: Brereton (2017) Perpetuating Myths of Women as False Complainants in Rape Cases in India: Culture v. The Law, Int J Comp Appl, 52.

overestimation of false reports: variation in prevalence rates, disproportionate media coverage of false accusations, cognitive biases and stereotypes about sexual violence.[117]

★ **Spain:** the government reported that in 2016, only 0.18% of cases regarding violence against women were established as false. This percentage represents just 194 out of 1,055,912 cases. Though not all 194 cases related to sexual violence, conclusions can nonetheless be drawn from this finding — in particular, that false reporting occurred in less than 194 reports of sexual violence by women in 2016.[118]

★ **United States:** Multiple studies have confirmed that only about 4.5-5% of reports of sexual assault were false or 'baseless'.[119] One study concluded this percentage based on registered rape reports from the Uniform Crime Reporting Program of the Federal Bureau of Investigations.[120]

★ **Australia:** Murray & Heenan (2006) examined 850 rapes reported to the police over a 3-year period and reported that 2.1% of cases were classified as false reports.[121]

Given all the potential harms and consequences for survivors when they do report, it is not surprising that false reporting is extremely rare.

3) Corroborating evidence for sexual violence is not required in international law, nor in most national laws.

Many countries have confirmed through their legislation and case law that corroboration of testimony by survivors regarding sexual violence is not required.[122]

★ **ICTY Rules of Procedure and Evidence:** Rule 96 states that *"In cases of sexual assault: (i) no corroboration of the victim's testimony shall be required"*. This rule has been reflected in the Court's case law, for example, in the trial judgement of **Dusko Tadic**.[123]

★ **UN Model Law:** *"Article 56 Principle of Evidence in Cases of Sexual Violence. In cases of conflict-related sexual violence, the court shall be guided by and, where appropriate, apply the following principles: a. No corroboration of the victim's testimony shall be required. […]"*[124]

★ **Bosnia and Herzegovina, Prosecutor v. Janković:** *"[T]he Court is free in its evaluation of the evidence submitted and corroboration is not required in general or in particular. This rule applies equally to the testimony of a victim of sexual assault. […]* ***The judgment as to the credibility of a witness lies solely in the domain of the Court, with judges free to draw any conclusion they see fit, providing it passes the threshold of reasonableness.*** *Witness FWS-95 clearly passed this threshold beyond a reasonable doubt in the eyes of the Court and thus has been given full credence."*[125]

★ **Bangladesh High Court, Al-Amin & Ors v. State:** "*[T]he testimony of a victim of sexual assault is vital, and unless there are compelling reasons which necessitate corroboration of her statement, the court*

117 Orchowski *et al.* (2021), *ibid*.

118 This percentage does not represent cases of sexual violence against men either. Fiscalía General del Estado de España (2017) Capítulo III: Fiscales coordinadores y delegados para materias específicas, 459-460.

119 Ferguson & Malouff (2016), *ibid*; De Zutter et al (2017) The Prevalence of False Allegations of Rape in the United States from 2006-2010, J Foren Psy, 1-5.

120 De Zutter *et al.* (2017), *ibid*.

121 Murray & Heenan (2012) Reported Rapes in Victoria: Police Responses to Victims with a Psychiatric Disability or Mental Health Issue, Curr Issues Crim Justice, 364. For other countries: UK 0.6% Lilley *et al.* (2023), *ibid*; Crown Prosecution Service (2017) Rape Prosecutions: Key Facts.

122 ICJ (2015) Sexual Violence Against Women: Eradicating Harmful Gender Stereotypes and Assumptions, 13-16.

123 Prosecutor v. Tadic, ICTY-94-1-T, Opinion and Trial Judgement (7 May 1997) para.536.

124 OSRSG-SVC (2021) Model Legislative Provisions and Guidance on Investigation and Prosecution of Conflict-Related Sexual Violence, 30, 64.

125 Prosecutor v. Janković, BiH Case No. X-KR-05/161, Section I for War Crimes Verdict (16 February 2007) 58.

should find no difficulty in convicting an accused on her testimony alone if it inspires confidence and is found to be reliable." To do so, the Court noted, would be to treat victims of sexual violence equally with other victims and witnesses of violent crimes, for whom decisions of credibility are made on a case by case basis and not subject to general rules."[126]

★ **South Africa, S v. J:** Speaking of the 'cautionary rule' that required the testimony of sexual assault survivors to be treated with caution: "*It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.*"[127]

Manifestation in Justice Processes: Recognising Impacts

1 **Barriers to access to justice:** As noted above, survivors may face many barriers to reporting the crime; fear that they won't be believed is just one of many possible barriers. The raising of an eyebrow in disbelief by a police officer can be enough to deter victims from continuing their participation in the justice process. [128]

2 **Common beliefs among criminal justice actors that reports of sexual violence are often false claims:** This leads to police disbelieving survivors, and 'non-criming' or not recommending charges to prosecutors. [129] **A Ukrainian study** found that 55% of judges, 58% of prosecutors and 59% of police officers believed that there were false claims or credibility issues with domestic violence cases reported to them. [130] These incorrect views are also shared by members of the public. [131]

3 **Perceptions of delayed reporting:** This can lead to investigators/prosecutors considering the case a 'weak' or 'bad' one, with issues of victim credibility, which can subsequently lead to 'no-criming' or no charges. Similar assessments by judges can lead to acquittals. [132] In **a New**

126 ICJ (2015), *ibid* for full discussion. Al-Amin & Ors v. State of Bangladesh, Bangladesh (Bangladesh High Court) 51 DLR (1999) 154; State of Punjab v. Gurmeet Singh, India, 1996 Cri LJ 1728; Andrew Apiyo Dunga & another v. Republic, Kenya, Appeal Judgment [2010] eKLR; People of the Philippines v Feliciano "*Saysot*" Cias, Philippines, Supreme Court Decision [G.R. No. 194379, June 01 : 2011]; Inoka Gallage v. Kamal Addararachchi and Another, Sri Lanka, Supreme Court Decision (2002) 1 Sri LR 307; People v. Fierro, United States, Supreme Court of Colorado Decision (1980) 606 P.2d 1291, 1293, 199 Colo. 215.

127 S v. J, South Africa, Supreme Court of Appeal Decision, [1998] (2) SA 984, Case No. 35/97; R v. Makanjuola, R v. Easton, England, Court of Appeals Decision [1995] 3 All ER 730 (CA) "*simply because the witness is a complainant of a sexual offence ... There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable.*"; People v. Rincon-Pineda, United States, Supreme Court Decision (31 July 1975) 538 P.2d 247,14 Cal.3d 864,123 Cal.Rptr. 119 "*criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants.*"

128 Payne (2009), Rape: The Victim Experience Review, UK Home Office; Angiolini (2015) Report on the Independent Review into the Investigation and Prosecution of Rape in London, 55-56 "*I remember watching that officer's eyes to see if there was any sign of disbelief or disgust, but I saw only compassion. Just a raised eyebrow or a flippant remark and I would have been as far away from there as possible and would never have reported to the police again.*"

129 Or acquittals, see e.g. Bizimungu (2018), ibid, 'The court finds that if the complainant was raped, she would have informed her employer or other neighbours. She would not have kept silent while it is clear that this is an adult and bright 23-year-old young woman who would not be victimised and then go to sleep without telling anyone.' PP v. Kwizera Emmanuel and Bashaka Bosco, Rwanda, 27 January 2012.

130 DCAF & La Strada-Ukraine (2017) Criminal Justice Practice and Violence Against Women. One study showed, through interviews with 40 police officers who were involved with a rape case in the past 12 months, that police officers in the United Kingdom – on average – believed that 53% of reported raped were false. Participants' answers ranged from 5% to 90%: McMillan (2018) Police Officers' Perceptions of False Allegations of Rape, J Gend Stud, 9-21. Kelly et al. (2005) A Gap or a Chasm: Attrition in Reported Rape Cases, 46-53: reviewed data from 2643 cases, found that 0.2% were arrested for false allegations, but 8% had been recorded as false by the police. Bizimungu (2018) The Impact of Rape Myths on the Legal Process for Rape in Rwanda, p.69; 86.2% of criminal justice interviewed believed false claims of rape were widespread.

131 Ireland: Telephone interviews with 3,120 individuals concluded that 40.2% of participants considered accusations of rape to often be false. McGee et al. (2013) Rape and Child Sexual Abuse: What Beliefs Persist about Motives, Perpetrators, and Survivors?, J Interpers Violence, 7; Spain: A 2017 study showed that of 295 university students, 41% believed that more than 10% of reports on sexual crimes were false. Rosado et al. (2016) University Students' Beliefs and Opinions about Sexual Aggressions and Child Sexual Abuse, ACSPC, 82, 86.

132 E.g. Mukhtar Mai *et al.* v Abdul Khaliq *et al.* Criminal Appeals No.163 to 171, S.M case no. 5/2005 (Supreme Court of Pakistan 2011, pp.36-37 (where an 8-day delay reporting was fatal because it was an adult divorcee and not an unmarried virgin (therefore had less to fear from stigma according to the Supreme Court).

Zealand study, the use of delayed reporting as a cross-examination challenge was found in 71% of cases. [133]

4 **Attacks on credibility:** During cross-examination, other attacks on credibility can be made, accusing victims of lying, making false reports and having ulterior motives for reporting sexual violence. **In a UK study**, in 7 out of 8 observed sexual violence trials, the defence argued that the allegations were false.[134] In the New Zealand study introduced above, 76% of the survivors were cross-examined on ulterior motives for disclosing sexual violence.[135] Even in a study involving child abuse, 26% of child survivors were cross-examined on motives to lie.[136]

5 **Setting standards of proof higher in sexual violence cases:** Pervasive questions and stereotypes of false reporting or unreliable female survivors lead to higher standards of proof being set at all stages of the processes, including at the judgement stage. For example, TRIAL found in **its study of Bosnia**, "*In contravention of [international] standards, certain BiH courts have responded to cases lacking corroborating evidence by subjecting victims to abnormally high standards of credibility and/or acquitting perpetrators.*"[137]

6 **Harm to survivors:** All these manifestations revictimise and stigmatise survivors as messages, decisions, questions and outcomes doubt their honesty and reliability.

How Do We Counter These Myths in Justice Systems?

A Call expert evidence and studies on the rarity of false reporting and the frequency of delayed reporting, and the reasons why.

B Set up procedural protections, including evidential rules on corroboration, with pre-trial hearings, which should set very clear ground rules around what is irrelevant and therefore excluded.

C Provide training for the prosecution and briefs ready on case law and dicta in preparation for arguments on delayed reporting, false reporting and corroboration standards.

D Provide training for judges and bench books with laws and dicta, with explanations of why there is delayed reporting, the real levels of false reporting and the law on corroboration. Judges should be trained and ready to take over questioning or intervene to protect vulnerable witnesses and prevent harm (for example, when questioning is repetitive, aggressive or misleading, or when evidence or questions are irrelevant and perpetuating myths and stigma).

E Provide training for the defence, along with good practice manuals that include the use of non-stigmatising language and that avoid using stereotypes and irrelevant issues to make a case.

133 Zydervelt *et al.* (2016), ibid, 12. See also Temkin et al. (2018), ibid, 6: In 25% of observed trials, the defence used this to argue about delayed reporting.

134 Temkin *et al.* (2018), ibid, 8.

135 Zydervelt *et al.* (2016), ibid, 12. Zydervelt et al. (2016), ibid, 12.

136 St George et al. (2021), ibid, NP13915.

137 TRIAL International (2018), ibid, 8.

V. WHAT TRAUMA LOOKS LIKE

Common Myths

'Real' survivors are highly traumatised individuals who will cry or show other signs of distress.

A 'real' survivor would remember all the details if they were being truthful.

Survivors must automatically be given all possible protection measures to protect them from more trauma.

Psychosocial support or therapy for survivors contaminates their evidence.

The Facts

1) Trauma manifests differently for everyone; survivors should not be expected to experience the same emotions, or present in similar ways.

"*Psychological responses to traumatic events vary significantly and in part depend on social, cultural and political aspects of their situation.*"[138]

Studies show that survivors can experience emotions such as fear, anxiety, anguish, shame, self-blame, depression, guilt, anger, apathy and many more as a psychological consequence of sexual violence.[139] Trauma manifests differently for everyone; survivors should not be expected to all experience the same emotions, or present in similar ways.[140] Other aspects, such as age and gender, can also influence the way in which trauma manifests through emotions.[141] "*Some [victims] externalize their emotions in obvious ways — by weeping, screaming, becoming agitated, … — while others repress or hide their emotions and remain calm on the surface. The way in which people express their suffering does not necessarily reflect their underlying feelings. The absence of outward signs of emotional distress does not mean that a person is not suffering, will not develop disorders later on, or does not need help.*"[142] Many survivors may continue to lead highly functioning lives, internalising their trauma and pain, trying not to show weakness or vulnerabilities. "*Most common trauma of women remains confined to the sphere of private life, without formal recognition or restitution from the community.*"[143]

Sometimes the impact of trauma can manifest in dissonant ways, such as a total calm or flat demeanour, smiling, laughter or sexualised behaviour, which can also occur during the recalling of traumatic events.[144] How trauma manifests is not relevant to any consideration of whether that person is being truthful or whether they are a survivor of sexual violence or not.

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138 Michels (2020) The Psychologist-Client Relationship at the ICC: a Roadmap for Development of the Client-Victim Relationship, in Jasini & Townsend (2020) The Impact of Victim Participation at the ICC: Bridging the Gap Between Research and Practice, 120, citing Bracken (1998) Hidden Agendas: Deconstructing Post-Traumatic Stress Disorder, in Bracken & Petty (eds.) (1998) Rethinking the Trauma of War; De Jong *et al.* (2003) Common Mental Disorders in Post-Conflict Settings, The Lancet, 2128-2130. Smith (2020) Victim Testimony at the ICC: Trauma, Memory and Witness Credibility, also in Jasani & Townsend (2020), *ibid*, 132-133: *"Victims of the same or similar events do not necessarily suffer from the same or similar traumatic symptoms. In addition to the nature, degree and duration of a traumatic episode, the victim's personality and the extent to which he or she has been able to process the experience will influence the traumatic response."*

139 Josse (2020) 'They Came with Two Guns': The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts, Int Rev Red Cross, 184-187.

140 Murphy & Mason (2021) Psychological Effects of Rape and Serious Sexual Assault, paras 23, 30, in Rook & Ward, Sexual Offences Law and Practice: "*Emotions will vary following rape and should initially be viewed as a normal reaction to an abnormal event. Individuals may be expressive and tearful, quiet and controlled, distressed, shocked or in denial.*"; Chaudhury *et al.* (2017) Psychological Aspects of Rape and Its Consequences, PBSIJ, 1-7.

141 Peterson *et al.* (2011) Prevalence and Consequences of Adult Sexual Assault of Men, Clin Psychol Rev, 1-24.

142 Josse (2010), *ibid*.

143 Herman (2001) Trauma and Recovery. Pandora.

144 Lodrick (2007) Psychological Trauma – What Every Trauma Worker Should Know, J Psychother Integr, 4, 13. And trauma can be magnified where survivors have been unable to disclose or talk about what happened; Mukamana & Brysiewicz, *ibid*.

2) Trauma affects how we process and recall memories of traumatic events. Gaps in memory do not impute credibility or reliability.

Decades of consistent research prove that trauma affects normal memory recollection.[145] "*During deeply traumatic events, it is believed that greatly heightened emotional arousal interferes with the processing and storage of information in explicit memory, and the process essentially fails. As a result, autobiographical memory of the event is fragmentary or non-existent. Such memories are accessed through qualitatively different 'pathways', and rather than arising voluntarily or consciously in the victim, respond to triggers or reminders of the event. […] where victims are able to retrieve memories, these are often not chronological and are fragmented. […] Where a victim has experienced rape and/or other forms of sexual violence, traumatic sequelae and hence memory retrieval can be additionally problematic for them. Avoidance and dissociation symptoms, for example, are significantly more pronounced in victims of SV than in victims of non-sexual trauma. Victims of SV also experience a higher PTSD symptom count when compared to victims of non-sexual trauma. […] whilst deeply problematic for the victims, may operate to enhance their recollection. […] Intrusive phenomena, such as flashbacks, however, may arise during testimony, and this in turn will affect victims' ability to concentrate and to provide a coherent account.*"[146] The recollection of each individual survivor may be impacted differently.

> *"I only told them what I remember. At this point […] I'd been thinking about what had happened and things were coming back to me, about sort of feelings and like hearing things […] I remember feeling him in my right ear, like breathing, and I could smell him. This is all coming back to me when I'm sitting speaking to the police."*[147]

International criminal courts and tribunals recognise that trauma can affect individual survivors' ability to recollect memories and that this does not necessarily impact their credibility and reliability.

★ **ICTY, Prosecutor v. Dragoljub Kunarac et al.:** *"Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution in providing proof to that degree of satisfaction more difficult, its absence in relation to peripheral details was in general not regarded as discrediting their evidence."*[148] This standard was later confirmed by the Appeals Chamber for the same case,[149] and further used throughout other cases of the same court.[150]

★ **ICC, Prosecutor v. Lubanga:** *"The Chamber has made appropriate allowance for any instances of imprecision […] bearing in mind the overall context of the case and the circumstances of the individual witnesses. Memories fade, and witnesses who […] suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account. […] The Chamber, when assessing [the] testimony, has taken these considerations into account and they are reflected in its overall assessment of the account in question."*[151]

145 Marschner (2016) Implications of Trauma on Testimonial Evidence in International Criminal Trials, 218-224, in Alston & Knuckey (eds.) (2016) The Transformation of Human Rights Fact-Finding.

146 Smith (2020), *ibid*.

147 Brooks-Hay *et al.* (2019) Justice Journeys: Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault, 6-7.

148 Prosecutor v. Kunarac et al. (22 February 2001), *ibid*, paras.562, 565, 679, 712; Marschner (2016), *ibid*, 221-224.

149 Prosecutor v. Kunarac et al. (12 June 2002), *ibid*, para.324.

150 E.g. Prosecutor v. Delalic et al., ICTY-96-21-A, Appeals Judgement (20 February 2001) para.485.

151 Prosecutor v. Lubanga, ICC-02/04-01/15, Trial Judgment (14 March 2012) para.103.

3) Individual survivors should be able to choose different protection measures, attuned to their individual needs.

As discussed above, external manifestation of trauma may not reveal the internal extent of the impact of trauma. All protection measures, including psychological support and intervention, should be tailored to the survivor's specific needs, with their input on the matter.[152] *"[O]ne of the key features of trauma is the sense of loss of control. […] The critical importance of the sense of loss of control as part of trauma makes it also a central aspect of the interaction with witnesses and victims. Facilitating participation in judicial proceedings at the ICC may contribute to restoring their dignity and agency. […] giving them an active role in the proceedings are actions that can potentially give survivors back a sense of control and ultimately bring recognition of their suffering and a form of restoration."*[153] Survivor agency and control over protection measures and understanding the process are key steps to avoid retraumatisation and revictimisation.

4) A court environment is a stressful environment which makes recalling traumatic events even harder for survivors.

"*Reliving the events over and over again provokes feelings of intense fear as well as physical symptoms of arousal and hyper-alertness. Exposure to multiple traumatic events may also lead to the development of a cognitive fear network, further amplifying the number of triggers that provoke generalised fear and other traumatic reactions. In addition to this vicious cycle of trying to forget and being forced to remember, trauma may lead to alterations in survivors' personality, and in their capacity to relate to others and to the world.*"[154]

The courtroom environment can also affect a survivor when recalling trauma.[155] The magnitude of formalities, such as justice actors wearing gowns and wigs, the use of inaccessible legal language, the physical position of a survivor in comparison to others (e.g., survivors sitting on a lower level in comparison to judges), can make testifying even more difficult.[156] Personal, repetitive, surprising and irrelevant questions during cross-examination and other power differentials can also impact a survivor during the justice process.[157]

> *"It just seems very scary when you go in because of the way the setup is and everything. It has to be that way, I know. But it's just very frightening, very daunting when you walk in and you see all the chairs and the benches and everything set out, and then you see all these people with their wigs on and the gowns." (Julia, witness — Crown Court study).*[158]

These stressors can affect a survivor's ability to recount what has happened in the way expected in justice proceedings. "*Testimony may be deeply distressing and problematic for these victims. They may comport themselves poorly in or out of court. Their memory of elements of their experiences might simply be unavailable*

152 Michels (2020), *ibid*, 122; Michels (2007) Expert Report – The Psychosocial Impact of War-Related Crimes on Victims of the Sierra Leonean Conflict, filed in Prosecutor v. Brima *et al.*, SCSL-04-16-T, Prosecution Submission Pursuant to Rule 100(A) of the Rules of Procedure and Evidence, 28 June 2007, 22457 (nb: link may not work); UNGA (2021) Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women (2021), 10-15, paras.15(h), 15(i), 17(i), 18(b), 20(c).

153 Michels (2020), *ibid*.

154 Michels (2020), *ibid*, citing Herman (1992) Trauma and Recovery, Van der Kolk (2015) The Body Keeps the Score: Mind, Brain and Body in the Transformation of Trauma; Michels (2007) Expert Report Brima case, *ibid*.

155 Michels (2020), *ibid*, 118, citing preliminary results of the project (Witness Feedback Project Ntaganda and Ongwen cases) "*Many of them also describe the process of travel and testifying as an additional stress factor, possibly amplifying the elevated stress levels already present and at least partly caused by trauma-related experiences.*"

156 Randell *et al.* (2020) Young Witnesses in New Zealand's Sexual Violence Pilot Courts; Kirby (2017) Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A question of "*Court Culture*"?, 6-9.

157 Randell *et al*. (2020), *ibid*; Ciorciari & Heindel (2016) Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges, and Fair Trial Demands, Va J Intl L; Craig (2018) Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession.

158 Kirby (2017), *ibid*.

or inaccessible to them, or their recollections may be jumbled, confused and incoherent."[159] The reaction to their testimony — for example, confrontation or challenge, disbelief or blame — can do significant harm to survivors.[160]

> *"You're made to feel as though you're the one that has done this. And that is hard because you've already been through the whole guilt stage, … like this is all my fault, maybe I shouldn't have said that, maybe I shouldn't have done that. Should have, would I, could I? […] When I came out of court, … I was done, I couldn't sort of function, as it were. I had to go to the doctor's, and he put me on medication and stuff like that, and that's the first time in the whole process where I had to be, and it was after court. It's not as though I had to when it happened because I was, like, okay. It wasn't until after court."*[161]

5) Psychological assistance and counselling can help survivors to be ready to give their best evidence when testifying.

"However, many of those affected do not want to begin with psychological therapy during the duration of the criminal proceedings, as this can be seen in court as falsifying their testimony. Police and even lawyers may therefore often advise against therapy, because it might be used against the victim. This can lead to long-term negative mental health consequences. Therefore, victims might be stuck in a process of victimisation until the end of trial."[162] In fact, early counselling and trauma-informed support can be critical for witnesses to give their best evidence, most accurately.[163]

Manifestation in Justice Processes: Recognising Impacts

1 **Credibility and evidence assessments:** "*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."*[164]

2 **Attacks on credibility:** **One UK study** observed this example: "*[The Defence Counsel] drew the jury's attention to C's demeanour in court; rather than showing distress, she was 'feisty' and responded with 'fiery irritation' to questions put to her … The jury was asked to consider whether this was the type of woman who would have submitted to rape … [and] invited to conclude that C's failure to show appropriate distress in court cast doubt on the legitimacy of her claim."*[165]

159 Smith (2020), *ibid*, 125.

160 E.g.. Parti *et al.* (2021), *ibid*.

161 Brooks-Hay *et al.* (2019), *ibid*, 22-23.

162 Wolf & Werner (2021), *ibid*, 815; Ginn (2013) Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY, EILR, 583 (Furundžija case).

163 Goodman *et al.* (2017) Psychological Counselling and Accuracy of Memory for Child Sexual Abuse, Am Psych. 72(9) 920-921. Cossins, Closing the Justice Gap for Adult and Child Sexual Assault (Palgrave MacMillan), p.558-559 *'[u]nacknowledged or untreated trauma and related symptoms' will interfere with the ability of a complainant to fully engage with the requirements of the legal process.*"

164 TRIAL International (2018), *ibid*, 8.

165 Temkin *et al.* (2018), *ibid*.

3 **Effect on survivors being able to give their best evidence:** Retraumatisation, distress and confrontation all reduce a survivor's ability to provide detailed and coherent evidence or the best available evidence. "*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.*"[166]

4 **Lack of access to psychological support or familiarisation with the process and people involved:** Survivors may be advised not to get counselling or participate in therapy before their trial or testimony, based on an assumption or foreseen challenge that it influences or contaminates their evidence. Equally, some prosecutors don't meet or establish trust with survivors in advance of testimony so that they cannot be accused of influencing their evidence. Lastly, psychological support may not be available and there may be no support or trusted person in court for the survivor, adding to the likelihood of retraumatisation and distress while testifying.[167]

5 **Revictimisation and stigmatisation of survivors in the justice process:** As described above, all these manifestations are likely to significantly harm survivors who engage with the justice process. Blanket assumptions about or enforcement of protection measures without consultation with victims about their needs and wishes infantilises survivors and is also a form of stigmatising them.[168]

How Do We Counter These Myths in Justice Systems?

A Implement training in understanding trauma and adopting trauma-informed approaches for all justice actors, which should be supplemented by bench books, guidelines and model submissions (with law, case law dicta and expert citations in support). Establish regular self-reflection and checks in the process against unconscious bias.

B Use expert evidence from psychologists to explain the impact of trauma on memory and recall, and the diversity of individual responses to trauma.[169]

C Don't make assumptions about a survivor's trauma — ask the survivor and discuss it with them. Ensure there is fully informed consent and empower decision-making by survivors in relation to protective measures and alternative means for testimony[170] (early in the process and with demonstration of the processes and measures).

D Ensure victim/witness familiarisation with and preparation for the justice system processes (to the fullest extent allowed by law).[171] Ensure that the survivor knows their rights, including that they can take a break, refuse to answer certain questions, etc.

166 TRIAL International (2018), *ibid*, 8.

167 TRIAL International (2018), *ibid*, 8.

168 TRIAL International (2018), *ibid*, 88-89.

169 Smith (2020), *ibid*.

170 E.g. video-recorded testimony outside the formal court setting, or through a psychologist, giving testimony via video-link outside of the courtroom, etc. See discussion in Cossins (2020), *ibid*, Chapter 9. Perissi & Taquet (2018) The Kavumu Trial: Complementarity in Action in the Democratic Republic of Congo (video-recorded interviews with psychologists)..

171 Found to increase the accuracy of the testimony, see e.g. Wheatcroft & Ellison (2012) Evidence in Court: Witness Preparation and Cross-Examination Style Effects on Adult Witness Accuracy. Behavioural Sciences & the Law, Behav Sci Law, 821-840.

E Hold a ground rules pre-trial hearing where protective measures are reviewed and ground rules are set to ensure a safe and effective environment for individual survivors to be supported to give their best evidence.[172]

F Ensure the survivor has a chosen known and trusted support person accompany them through the whole process, including to support them in court (in addition to their legal representation).

172 See Cossins (2020) Achieving Best Evidence for Vulnerable Witnesses: The Use of Trauma-Informed Theory to Reform the Sexual Assault Trial in Closing the Justice Gap for Adult and Child Sexual Assault (Palgrave MacMillan).

VI. WHAT PERPETRATORS LOOK LIKE

Common Myths

Perpetrators of sexual violence are 'monsters' who do not lead 'good' lives.

Ordinary people, like you and I, don't commit sexual violence.

The Facts

1) Anyone can be a perpetrator of sexual violence.

It may be hard to imagine that it is possible for someone who is part of a loving family or is similar to us in other ways could be guilty of perpetrating CARSV. Instead, we may expect or accept that perpetrators are 'monsters' or outsiders, or that they will present to us as 'evil' or manifestly 'bad' people.[173] As discussed earlier, perpetrators have included community and religious leaders, state officials, humanitarian/peacekeeping personnel, and women, none of whom fit the mould of a 'monster'.[174]

★ **England, R v. Andreous:** "*[A]n individual is not more or less likely to have committed an offence because of his culture, age, class or profession.*"[175]

2) Assumptions or biases about what 'real' perpetrators look like can lead to failure to recognise perpetrators or to hold them accountable.

Perceptions that doubt that an 'ordinary' person would perpetrate sexual violence can lead to biased and unfair trials, including the application of inappropriate mitigating factors at the sentencing stage.

★ **Affinity bias:** This is the natural tendency to trust and like those people who are similar to us, or to trust those around us whom we equally trust and like.[176]

- ***Successful persons:*** A study found that successful individuals, such as celebrities, receive more sympathy when accused of rape — leading to less moral judgement and less likelihood of the incident being labelled as rape.[177]

★ **Ethnicity bias:** A 2010 study surrounding judges in Israel courts showed the following: Arab suspects are 6.3% more likely to be released by an Arab judge than Jewish suspects are, while Jewish suspects are 10.4% more likely than Arab suspects to be released by a Jewish judge.[178]

★ **Racial bias:** A 2012 study surrounding felony trials in Florida between 2000-2010 showed that all-white juries were 16% more likely to convict black defendants than white defendants.[179]

173 Tavrow *et al.* (2013) Rape Myth Attitudes in Rural Kenya", J Interpers Violence, 9-10.

174 Bastick et al. (2007), *ibid*, 14; Cohen et al. (2015); WHO (2021), *ibid*; Prosecutor v. Rukundo (2009), *ibid*, paras.366, 381, 574.

175 R v. Andreous, England, Court of Appeal Decision [2014] EWCA Crim 1578.

176 UNODC (2019) Judicial Conduct and Ethics. Self-Directed Course, 41.

177 Nyúl *et al.* (2018) Perception of a Perpetrator as a Successful Person Predicts Decreased Moral Judgment of a Rape Case and Labeling it as Rape, Front Psychol, 1-10..

178 Gazal-Ayal & Sulitzeanu-Kenan (2010) Let My People Go: Ethnic In-Group Bias in Judicial Decisions–Evidence, JELS, 417.

179 Anwat *et al*. (2012) The Impact of Jury Race in Criminal Trials, Q J Econ, 1017-1055.

"The court system to me is like an Old Boys Club. They look after their own. For example, the judge saw this old white guy [offender] sitting there looking so frail [...] and felt sorry for him I think. So, the whole thing was taken away from the victim — who was the one to feel sorry for — and taken to the offender, who was treated like he was some fantastic bloke because supposedly he hadn't offended for so many years after offending against myself and two other victims."[180]

Manifestation in Justice Processes: Recognising Impacts

1 **Perpetrator affinity bias:** This occurs where justice actors see themselves in the perpetrator or cannot believe that anyone but a 'monster' would commit sexual violence. This can lead investigators to assess the case as 'hard' or to 'non-crime' it. It can affect charging decisions, and assessment of credibility and evidence, as well as sentencing.[181] In **one UK study**, in 25% of observed trials, the defence argued that 'real' perpetrators are different from ordinary persons.[182]

2 **Lower sentencing:** This is when inappropriate mitigating factors are used due to a greater empathy with the perpetrator.

- ★ **Bosnia:** *A court considered that the perpetrator was a 'family man' as a mitigating factor.* [183]
- ★ **England, R v. Harvey:** *A sentence was reduced on appeal to 30 months from 3.5 years for "forced buggery" of a boy who was 12 years old. Lawton LJ: "[T]his was an isolated incident ... in the experience of this court those who commit this kind of offence usually have fairly marked homosexual tendencies. There is nothing about this case to indicate that this man has got those tendencies."*[184]

3 **Attacks on credibility of the victim:** Usually, arguments of the defendant's good standing are accompanied with contrasting 'character-assessments' of the victim, shifting the focus from the perpetrator's conduct to the victim's character, reactions, demeanour, etc.

4 **Standard of proof:** Perpetrator bias can lead inadvertently to higher standards of proof, through corroborating evidence being sought or the 'creation' of doubt about a survivor's account because the perpetrator doesn't seem 'the type' or doesn't have a history of violence.

How Do We Counter These Myths in Justice Systems?

A Implement regular bias training and self-reflection for all justice actors, including judges, the prosecution, investigators, the defence and victim representatives.

B Establish built-in prompts, reminders and checks at all stages where there are evidential or witness assessments to counter perpetrator bias.

180 Gravitas (2018), *ibid*.

181 Parreira *et al.* (2013) Rape-Victim Empathy Scale (REMV): An Exploratory Study in a Portuguese Sample, Psychol Thought, 290, "*male participants were shown to be more empathetic towards the perpetrator than female participants.*"

182 See Temkin *et al.* (2018), *ibid*.

183 TRIAL International(2019) Punishing CRSV: Guidelines for Combating Inconsistencies in Sentencing, 27.

184 R v. Harvey, England, Supreme Court Appeals Decision (1984) 6 Cr App R (S) 184, cited in Javaid (2014) Male Rape in Law and the Courtroom, JCLI, 4.

C Impact evidence and sentencing submissions should focus on the gravity of the crime and should counter any misapplication of inappropriate mitigating factors.

D Create template submissions (to be adapted to each case) that contain citations countering inappropriate mitigating factors or counter-submissions for any proposition that the perpetrator doesn't fit the mould of a 'real' perpetrator.

E Keep the focus on coercive circumstances and perpetrator conduct — regardless of his/her profile or situation.

F Look for expert evidence to address any potential challenges to witnesses or any argument that the accused does not 'fit the mould'.

VII. TRIVIALISATION OR MINIMISATION

Common Myths

Sexual violence is not as serious or as important as other crimes. Other forms of sexual violence are not as serious as violent rape.

Men are not as impacted by sexual violence as women. Sexual violence is not as 'bad' for sexually active women.

Sexual violence is an unavoidable consequence of soldiers' (men's) biological urges and war.

'Boys will be boys'.

The Facts

There are many ways in which sexual violence is minimised, whether it is about the sexual violence itself, the type of sexual violence, its impact or harm, or the victim or their circumstances. Frequently, there is also minimisation or justification of the perpetration itself or the perpetrator. Minimisation, just as with the other myths, has historically served to protect perpetrators, reducing their culpability or seeking to afford them excuses or justifications for their actions or to deflect focus onto the victim. Minimisation and trivialisation should be taken as seriously as the other myths and misconceptions.

1) Sexual violence is extremely grave, and its impact deep and enduring. It is no less serious than murder. Sexual violence can be an underlying act of genocide (the destruction of a group).

"*[T]hese acts are serious violations of physical and/or psychological integrity and are therefore similar in harm and effect to other prohibited acts of genocide, crimes against humanity, and war crimes involving grave personal injury.*"[185]

★ **ICTR, Prosecutor v. Akayesu:** "*[R]ape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm.*"[186]

★ **ICTR, Prosecutor v. Rukundo, Appeal Judgement (Dissenting Opinion):** "*[T]he Majority's attempts to differentiate Rukundo's sexual assault from other acts of genocide by him is not reasonable. The core of the Majority's reasoning … indicates that it does not fully appreciate the seriousness of his crime, which, in my view, is not qualitatively different from the other killings or serious bodily injury for which he has been held responsible.*"[187]

★ **Guatemala:** Rodrıguez Sanchez case: "*The gendered roles of women and men were targeted through this violence, which had a destructive impact on both individual victims and their communities. The rulings concluded that sexual violence was one of the destructive means used by the military to inflict serious bodily and mental harm on the Mayan Ixil community as a whole.*"[188]

185 Oosterveld (2012) Contextualising Sexual Violence in the Prosecution of International Crimes, 190, in Bergsmo (ed.) Thematic Prosecution of International Sex Crimes.

186 Prosecutor v. Akayesu (02 September 1998), *ibid*, para.731.

187 Prosecutor v. Rukundo, ICTR-2001-70A, Appeal Judgement (20 October 2010) Pocar Dissenting Opinion, para.4.

188 Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente por Procesos de Mayor Riesgo, Jose´ Mauricio Rodrıguez Sa´nchez (C-01076-2011-00015), judgement 26 September 2018, as discussed in Kravetz (2020), *ibid*, at 319.

2) Rape or penetrative sexual violence is an extremely grave crime, but other forms of sexual violence can be as harmful or destructive, depending on the victim, the circumstances of the incident and the culture in which it takes place.

★ **ICTR, Prosecutor v. Rukundo, Appeal Judgement (Dissenting Opinion):** "*The jurisprudence of this Chamber is clear. In the Kunarac et al. …, the Appeals Chamber held that '[s]exual violence necessarily gives rise to severe pain and suffering, whether physical or mental.' In the circumstances of this case, I consider sexual assault of the witness CCH, although not itself rape, is of a similar gravity. The only aspect of this crime which separates it from rape is the lack of penetration. While this is significant, it does not alter the overall nature of the crime and the conclusion that this crime is of comparable gravity to rape, at least in terms of mental harm.*"[189]

★ **Australia:** A mental health study found that the association between PTSD and depression and non-rape forms of sexual violence were as high for as they were for rape and its psychological impacts.[190]

3) Sexual violence is part of the pattern of other forms of violence committed in conflict and should be contextualised within that.

"*Only by understanding connections between sexual violence and other crimes, and the role it plays in the conflict, are we able to accurately label and reflect the criminal conduct in the charges. […] A prosecutor must look more broadly at how those individual acts fit into wider patterns of criminal conduct against other victims and at the effects of the crimes at large.*"[191]

★ **ICTY, Prosecutor v. Sainovic:** It was found that the Trial Chamber *"failed to properly consider the context in which the rapes had occurred and erred in finding that there was no evidence from which discriminatory intent could be inferred."*[192]

4) Comparisons or reductions of the suffering or impact on any group of victims or individual victim of sexual violence are incorrect and irrelevant.

Common myths or gendered narratives seek to compare the effect or impact of one group of victims against another. One example is when we minimise the impact of sexual violence on men through gendered assumptions of physical or psychological strength or invincibility. Another example occurs when the harm done to women is minimised based on their sexual experience (before or after the sexual violence). Some laws put virginity as an aggravating factor, thereby implying that it is not as bad for women who are not virgins, women who are wives or women who have had children. Many of the earlier myths that suggest 'It's not really sexual violence', e.g., when committed by a husband, partner or former partner, also exist as trivialisation or minimisation versions — 'It's not so serious', 'No harm done', etc.

Minimisation of sexual violence against sexually active women

Any attempted comparison of the gravity of sexual violence or its impact based on different levels of sexual experience of victims has no basis in science or reality. Further, the demarcation of virginity (rather than by age or development stage) as an aggravating factor for sentencing or to elevate the crime

189 Prosecutor v. Rukundo (20 October 2010), *ibid*, para.9. See also Prosecutor v. Furundzija, Trial Judgement, *ibid*, para.126.

190 Tarzia *et al.* (2018), *ibid*.

191 Baig *et al.* (2016) Contextualizing Sexual Violence, 174-175,in Brammertz & Jarvis (eds.) (2016), *ibid*.

192 Prosecutor v. Sainovic et al., ICTY-05-87-A, Appeals Judgement (23 January 2014) para.480. Cámara Federal de Casación Penal, Molina, Gregoriol, judgement 17 February 2012 discussed in Kravetz (2020), *ibid*, at 311-312.

to a more serious level drives harmful, invasive, non-scientific 'virginity' tests which have no forensic evidential value, and yet are often court-ordered.[193]

Minimisation of sexual violence against men

Sexual violence against men continues to be minimised by society as being impossible or not serious. These beliefs have been discovered in justice actors in various studies, one of which found that police officers in England are unlikely to take rape against men seriously.[194]

★ A 2022 study found that the impacts on male survivors include: [195]

- ***Mental health:*** PTSD, anxiety, depression, sleep disturbances, dissociation, auditory hallucinations, memory loss, confusion, suicidal ideation.
- ***Physical health:*** rectal damage, haemorrhoids, sexually transmitted infections, genital scarring, sexual dysfunction.
- ***Social and economic:*** ostracism, humiliation, shaming, death threats, inability to work.

★ A 2023 article (to be published) about the long-term impact of CARSV against men in Syria found significant impacts that have an effect for years after the violence.[196]

5) The 'excuse' that men have uncontrollable biological urges during wartime is not based on science and seeks to minimise or remove culpability for this grave crime.

"*The opportunist theory appears to have been central to the traditional exclusion of SGBV from criminal tribunals; as SGBV was historically relegated as a natural, unavoidable collateral of war — as Kirby said, 'just what soldiers do'.*"[197]

Leading academic experts who have studied CARSV in many different conflicts have found that *"theories of opportunism — predicated on the myth of uncontrollable male sexual desire — fail to explain patterns of perpetration at the individual level. Most men, given the opportunity, do not rape; even during the chaos of war, close contact with civilians is often unaccompanied by rape. […] These arguments, however, cannot explain the incidence of wartime rape: widespread rape occurs on the part of some groups in which fighters have regular access to sex workers or to sexual slaves, implying that sexual desire is not the key motivator. […] Sexual desire alone also does not explain the extreme brutality of rape, the incidence of rape with objects, sexual torture and mutilation, or the high frequency of gang rape during war. These characteristics of wartime rape emphasize the extent to which […], rape is an expression of dominance and power, rather than sexual desire. Even in peacetime, some convicted rapists express feelings of anger, hate, control and domination, rather than sexual desire per se."*[198]

193 International Forensic Expert Committee (2015) Statement on Virginity Testing, WHO *et al.* (2018) Eliminating Virginity Testing: An Interagency Statement, 17. Olson & García-Moreno (2017) Virginity Testing: A Systematic Review, Reprod Health, 1-10. Lamrani (2013) Rape as Loss of Honor in the Discourse of Moroccan Rape Trials, JLL, 1-18: In one rape case, a medical examination was administered to assess whether the hymen had been broken recently.

194 Javaid (2020) The Unheard Victims: Gender, Policing and Sexual Violence, Policing Soc, 412-428.

195 Chynoweth *et al*. (2022) Characteristics and Impacts of Sexual Violence Against Men and Boys in Conflict and Displacement: A Multicountry Exploratory Study, J Interpers Violence, 18-22.

196 Kivlahan *et al.* (2023) (unpublished/pre-print version at link) Longitudinal Impact of CRSV Experienced by Men in Detention Since the Onset of the Syrian Conflict.

197 Fowler (2021) Great Expectations: A Critique of the International Criminal Court's Commitment to Victims of Sexual and Gender-Based Violence, JICL, 31.

198 Cohen *et al.* (2013), *ibid*; Wood (2006) Variation in Sexual Violence During War, Polit Soc, 307-342; Wood (2009) Armed Groups and Sexual Violence: When Is Wartime Rape Rare? Polit Soc, 131-161; Chiroro *et al*. (2004), *ibid*.

Research has proved that SV is not necessarily perpetrated by all armed actors.[199] Furthermore, it shows that men do not have an uncontrollable sexual urge that 'justifies' them committing SV. Reenforcing these myths denies the responsibility of the perpetrator, leading to impunity.

★ **Rebel organisations:** A 2016 study concluded that communist rebel organisations commit less sexual violence than other groups.[200] A commonly used example is the Frente Farabundo Martí para la Liberación Nacional group in El Salvador. Reasons for this include stronger strategic incentives to avoid sexual violence and more ideologically committed recruits.[201]

Manifestation in Justice Processes: Recognising Impacts

1 **Access to justice:** If survivors are led to believe that the crimes against them are less serious than other forms of violence, they may not report them. Minimising comments made by first responder police will not only harm survivors but discourage them from proceeding.

★ **Viet Nam***: "'Raping a virgin is worse than raping a non-virgin', according to a male police officer in Viet Nam. This reflects the belief that once having been 'used', a female's sexual worth could not be much worse off by additional 'usage'. (female academic, Viet Nam)."*[202]

2 **Application of a gravity threshold:** This can lead to a failure to accept jurisdiction or charges against an accused.[203] See e.g., **ICC, Prosecutor v. Bemba**, in which the pre-trial chamber refused an arrest warrant in relation to charges of 'other forms of sexual violence, including forced nudity', based on a gravity threshold.[204]

3 **Failure to recognise:** A failure to recognise leads to a failure to investigate or charge.[205] Consider this example from **ICTY**: During an interview, one male prosecutor stated, "*It could be a question in some cases of lust, and that is not a war crime*"[206].

★ **ICTY, Tadić case:** *The crimes against Harambašić who died as a result of sexual violence, included forced nudity, forced subject of oral rape, genital mutilation as his testicles were bitten off, but the only charge was murder;* **Kvočka case***: Bahonjić and Jusufagić (alias 'Car') were severely beaten and orally raped by other prisoners. They then had objects inserted into their anuses. They died from the injuries sustained. Charges and conviction were for murder only;* **Brdanin case***: An old man was killed after refusing to rape a female detainee. The threat of assault was recognised for the female detainee, but not for the old man.*[207]

★ **ICTR, Muhimana case:** *A victim's genitals were amputated and hung on a pole and the person was beheaded — the accused was charged only with murder.*[208]

199 Koos (2017) Sexual Violence in Armed Conflicts: Research Progress and Remaining Gaps, TWQ, 1935-1951.

200 Hoover Green (2016) The Commander's Dilemma: Creating and Controlling Armed Group Violence, J Peace Res, 619-632.

201 Hoover Green (2016), *ibid*.

202 Skinnider *et al.* (2017), *ibid*, 42.

203 Jarvis & Vigneswaran (2016), *ibid*, 37 "*Defence Counsel also challenged the appropriateness of international jurisdiction over sexual violence crimes, arguing they were insufficiently serious.*"

204 Grey (2014) Conflicting Interpretations of Sexual Violence at the ICC, Aust Fem Stud, 273-288, at p.227; Prosecutor v. Akayesu (02 September 1998), *ibid*, para.688: Forced nudity can be underlying act of crimes against humanity and genocide.

205 Jarvis & Vigneswaran (2016), *ibid*, 36, citing Leandro (2013) Gender Based Crimes as Tools of War in Armed Conflicts, 148, 150, in Instituto da Defensa Nacional (2013) Gender Violence in Armed Conflicts.

206 Sharratt (2011) Gender, Shame, and Sexual Violence: Witnesses and Court Members at War Crimes Tribunals, 58.

207 Elliott *et al.* (2020), *ibid*, 486.

208 Elliott *et al.* (2020), *ibid*, 486.

4 **Decontextualisation:** This occurs when judges see sexual violence as something qualitatively different from other crimes committed in the same context. It can lead to CARSV being decontextualised from the conflict and the patterns of attacks or violence of which it forms part.

★ **ICTR, Prosecutor v. Rukundo:** *This is as described in Judge Pocar's Dissenting Opinion above.*

★ **ICTY:** *"[A]s a result [of seeing SV as different from other violence], we are likely to overlook … connections between these acts and broader patterns of violence. […] Where [SV] investigations were pursued, some prosecutors were initially reluctant to charge them as anything other than isolated war crimes. […] As a result, evidentiary leads regarding [SV] were not always followed up on the basis that they were insufficiently connected to the case theory."*[209]

5 **Non-prosecution due to limited resources:** Minimisation of sexual violence can lead to investigation, charging and trial presentation decisions that deprioritise and reduce CARSV charges in favour of other forms of violence.

★ **ICTY:** *"Sexual violence was, at times, regarded as well down the hierarchy. Consistent with this, when the question of charging sexual violence as an underlying act of genocide was first raised, strong views were expressed that this would water down the gravity of the crime."*[210]

6 **Cross-examination:** cross-examination questions which seek to minimise the harm experienced survivors can be extremely harmful.

★ **USA:** *A New York judge asked a male victim of sexual violence by a woman,* "[W]hat's your problem? How could you not have liked this?"[211]

★ **An American study** *of child abuse criminal trials observed 40 lines of defence questioning of child victims in 122 cases that minimised the effect or harm on them.*[212]

★ **ICTY:** *The defence questioned a survivor on the basis that the accused had "only raped her once and didn't hurt her".*[213]

7 **Failure to recognise or emphasise the sexual component of crimes in judgements or sentencing:** This occurs when judgements fail to explicitly state that the underlying acts included sexual violence, and also when the language used in a judgement or sentencing fails to recognise the violence, rather than the sexual component.[214] In Prosecutor v. Đorđević, the ICTY Appeals Chamber entered convictions for CRSV but ultimately reduced the sentence.[215]

209 Jarvis & Vigneswaran (2016), *ibid*, 37-38.

210 Jarvis & Vigneswaran (2016), *ibid*, 38.

211 Walfield (2018) "Men Cannot Be Raped": Correlates of Male Rape Myth Acceptance, J Interpers Violence, 6408.

212 St George *et al.* (2021), *ibid*. See also Temkin *et al.* (2018), *ibid*.

213 Sharratt (2011), *ibid*, 66. See also ICTR Prosecutor v. Rukundo (2010), *ibid*, para.231.

214 See e.g., Prosecutor v. Mladic, ICTY-09-92-T, Trial Judgment (22 November 2017): In the 2,500+ page judgement, its scope spans the length of the Bosnian conflict, but not a single heading refers to any form of sexual violence. All CRSV is hidden as an unheaded sub-category of an underlying act of 'cruel and inhumane treatment', and characterised as persecution as a crime against humanity. It is covered in one paragraph, less than half a page; see Elliott *et al.* (2020), *ibid*.

215 Discussed in Gopalan (2019) CRSV in Kosovo – Gendering Justice through Transformative Reparation, in Mouthaan & Jurasz (eds), Gender and War in International and Transitional Justice Perspectives (Intersentia), p.292.

8 **Reduced culpability of the accused:** This can manifest all along the criminal justice process,[216] including within judgements or at sentencing.[217] Dicta by high-level judges can perpetuate or worsen stigma when their public comments minimise certain forms of sexual violence.

★ **ICTY:** *A senior male ICTY judge stated: "I do not understand the cruelty of the rapes, the mutilations, the markings, the killings. I can see that if a group of men were fighting in the bush for weeks, when the come [out], they rape. - that I understand."*[218]

★ **ICTY:** *An investigator deprioritising rape investigations stated: "So a bunch of guys got riled up after a day of war, what's the big deal?"*[219]

How Do We Counter These Myths in Justice Systems?

A Provide outreach to communities to counter minimisation and non-recognition of certain forms of sexual violence, and to assist survivors in recognising that there is a crime to report.

B It is important from the start to collect comprehensive impact evidence (physical, psychological, social, economic, legal, etc.) about individual and collective harms, and then to present this. This can include victim impact statements, where survivors consent.

C It is important from the start to collect evidence of the context in which SV took place, including patterns of violence across the context and contemporaneous forms of violence and conflict in the same location, and then to present this.

D Where there is evidence of additional factors of gravity or aggravating factors for sentencing, it is important to collect and present that, including, for example, multiplicity of incidences or perpetrators, public/witnessed aspect, 'vulnerability' of the victim (e.g., age, disabilities, minority group, displaced, etc.), brutality, animus and prejudice.

E Different experts from different disciplines can help counter all of the different forms of minimisation — speaking of the context, contextualising sexual violence into broader patterns of violence, the impacts of SV. Experts who know the context are critical.

F Establish policies that prioritise sexual violence, ensuring that investigators and prosecutors recognise SV, its gravity, and the importance of a full investigation and charges where there is evidence. There should also be training on and preparation of submissions and objection arguments that contain case law and dicta to counter minimisation.

G All justice actors should be trained on CARSV and its gravity. Judges should have bench books with accurate portrayals of CARSV, including its impact and gravity with authoritative dicta and case law, and with examples.

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216 E.g. St George & Spohn (2018) Liberating Discretion: The Effect of Rape Myth Factors on Prosecutors' Decisions to Charge Suspects, JQ, 1280-1308; Acquaviva *et al*. (2022) Blameworthy Suspects and "*Real Rape*": Assessing the Effects of Rape Culture-Specific Suspect Culpability Factors on the Police Decision to Arrest, VAW, 3865-3885; Amnesty International (2019) Time for Change, *ibid*, p.76 Decision 3-1479/2018, District court of Odense, p. 16, 23 March 2018, reducing sentence of two convicted rapists because one of the men had a prior relationship with the victim and 'the limited amount of violence' used.

217 See Javaid (2014), *ibid*, referring to R v. Harvey, case of rape of a 12-year-old boy, finding it was an isolated incident and that the perpetrator was heterosexual, reduced to the sentence to 30 months.

218 Sharratt (2011), *ibid*, 65.

219 Kuo (2002), 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 Case W Res JIL 305, 311.

VIII. HONOUR AND SHAME

Common Myths

Sexual violence brings shame and dishonour to the survivor, their family and/or community.

Respectable women don't do anything to 'invite' sexual interest. Women who are not 'respectable' put themselves at risk of sexual violence by the way they dress or act.

'Bad women' cannot be believed, and they make 'bad' witnesses.

The Facts

1) Sexual violence is a crime of violence; it's not an issue of 'dishonour' or 'immorality'.

★ **Scotland, S. v. HMA:** "*[R]ape has always been essentially a crime of violence".*[220]

★ **ICTR, Prosecutor v. Akayesu:** "*[R]ape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict [sic] harm on the victim as he or she suffers both bodily and mental harm.*"[221]

"*Sexual violence must be excised from the framework of sex and placed squarely in the realm of violent crimes — its sexual component deemphasised and the crime recognised as the violent attack on physical integrity and individual autonomy that it is. This approach can de-link sexual violence from damaging notions of morality, honour and dignity that perpetuate stigma.*"[222]

Viewing sexual violence as a crime of honour is premised on gendered patriarchal narratives that a woman's value is in her 'purity' or chasteness. It does not recognise the violation of a woman's autonomy and control over her bodily integrity as the primary harm. It is based on discriminatory notions that women's bodies are the passive object of men's sexual acts, without agency or choice. It does not distinguish sexual violence from consensual participation in mutually agreed sexual activities. It ignores the fundamental human right of each person to bodily integrity and autonomy,[223] and considers all sexual acts a 'defilement' of chastity and therefore value, regardless of consent or choice. It reduces women to agentless commodities or vessels of 'honour', to be protected or dishonoured primarily as a demonstration of 'masculinity' or dominance.[224]

2) The perpetrators are the ones to blame for committing sexual violence, not the victim.

Rape is a violation of another person's bodily integrity and sexual autonomy, and as such, is a criminal offence brought about by the acts of the rapist, **not** of the victim.

"*Logically and legally, therefore, the assessment of the perpetrator's action, and whether or not that person used force, threat of force, or coercion, must be the primary consideration. Where the perpetrator has used*

220 Stallard v. H.M. Advocate (15 March 1989), *ibid*.

221 Prosecutor v. Akayesu (02 September 1998), *ibid*, para.731.

222 Gopalan (2021) Rejecting Notions of "*Honour*" to Mitigate Stigma: Prosecutions for SV Before the Bangladeshi ICTs, 12.

223 See in Section **III. Consent**.

224 Gopalan (2021), *ibid*, "*Articulating SV as an attack against honour and situating this crime in the realm of social morality fuels the stigmatisation of survivors. […] The notion that SV is shameful because it tarnishes the honour of the individual, family, community and nation undergirds the process of stigmatisation. […] gender stereotypes associated with female chastity and male invincibility impede accountability for sexual violence.*"

such … coercion, it is not possible for the victim to exercise free will … . No further examination of the facts should be necessary."[225]

3) **The conduct, characteristics, age, gender, personality, appearance, clothing or history of the victim is irrelevant, both to whether the crime took place and to the victim's reliability as a witness.**

See also Section **III. Consent**.

★ **ICTY, Prosecutor v. Delalic: (expunging testimony regarding prior sexual history)** *"[I]n rape or other sexual assault cases evidence of prior sexual conduct of victims mainly serves to call the reputation of the victim into question. Moreover, it was considered that the value, if any, of [such] information […] in the context of trials of this nature is nullified by the potential danger of further causing distress and emotional damage to the witnesses."*[226]

★ **Canadian Supreme Court, R. v. Seaboyer:** *"The idea that a complainant's credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness."*[227]

These legal authorities also extend to other aspects of a victim's personality, character, clothing or conduct, such as going out alone or late, drinking alcohol, etc.

★ **ECHR, D.J. v. Croatia:** *"According to the Court, even a defendant's claim that the rape victim-survivor was under the influence of alcohol or allegations about her behaviour or personality do not relieve national authorities of their duty to carry out a proper investigation."*[228]

Manifestation in Justice Processes: Recognising Impacts

1 **Barrier to access to justice, including reparations:**[229] Barriers include: survivor fear of bringing shame to themselves or their families; or a fear humiliating questions or character assassinations as part of the justice process; or if investigators assume survivors will not wish to testify.

2 **Legislative framing:** The law itself may reflect this stigma, for example, by describing or categorising sexual violence as crimes of honour or morality, or as 'outrages of personal dignity', as it is in the Geneva Conventions. There are many countries where this is the case.[230]

3 **Failure to investigate, 'no-criming' or no charges:** Victim-blaming has influenced assessments about evidence or the prospects of a case, leading investigators and prosecutors to close cases or drop sexual violence charges.[231]

4 **The justice process revictimises and stigmatises survivors:** Assumptions and authoritative statements about a survivor's shame feed a cycle of shame and ostracism.

225 Amnesty International (2011) Rape and Sexual Violence, *ibid*, 16.

226 Prosecutor v. Delalic, ICTY-96-21-T, Decision for Redaction of Public Record (5 June 1997) para.43-48.

227 R. v. Seaboyer, Canada, Supreme Court Decision [1991] 2 SCR 577. R v. A (2001), *ibid*, para.95; R v. Harris, England and Wales, Court of Appeals Decision [2009] EWCA Crim 434, para.13, confirming refusal to allow cross-examination about complainant's "*life choices involving risky sexual behaviour*".

228 D.J. v. Croatia, ECHR App. No. 42418/10, Judgment (24 July 2012) para.94.

229 Gopalan (2021) 9-10.

230 E.g. Bangladesh in Gopalan (2021), *ibid*, Elliott *et al.* (2020), *ibid*.

231 E.g. D.J. v. Croatia (2012), *ibid*, in which investigators failed to conduct a proper and full investigation.

★ **Bangladesh International Criminal Tribunals:** *"Yet, the judicial narrative in … cases before the Bangladesh ICTs relied upon these very descriptions of rape that embed the shame and stigma that drive social ostracism [framing sexual violence as losing "honour", "highest self-worth", or "supreme wealth"]. Thus, the description of the harm endured, and loss suffered by survivors further stigmatises them in the courtroom, where they should be empowered, their voices heard, and their rights upheld. Such a framing of the crime also obscures the fact that rape is fundamentally a violent attack on the body, autonomy and security of a person. When rape is described [by the judges] as an act worse than death and when the loss suffered is depicted as irredeemable and perceived to define the survivor, then the scope for her recuperation and reintegration is greatly truncated."*[232]

★ **Bosnia:** *"Judicial actors frequently use language indicating that the victim should feel shame or dishonour as the result of the sexual violence offence."*[233]

5 **Harmful questioning or cross-examination:**

★ **USA:** *In a review of child abuse cases, 25% of children were questioned about 'precipitous behaviour' and 23% on their character.*[234]

★ **New Zealand:** *In sexual violence cases, 90% of survivors were questioned on their behaviour before or after, and 62% on their personal traits.*[235]

> *'Tiina' from Finland said: "In the District Court I was just asked all the time what I did wrong, why I didn't prevent the rape. How much I had drunk, why I didn't ask for help, why I didn't get a taxi. No one asked the perpetrator why he started following [me] or why he thought it was okay to start leading someone around town or stop them from getting into a taxi or anything."*[236]

6 **Taboos, shame and 'embarrassment' among justice actors:** Cultural norms conflating sexual violence with sex can lead justice actors to avoidance, not ask questions, or interact in awkward and unsupportive ways.

7 **Decontextualisation:** As above, conflating sexual violence with sex ('unwanted sex', driven by 'lust' and 'opportunism'), rather than as part of the pattern of violence and conflict around it, can lead to acquittals.

How Do We Counter These Myths in Justice Systems?

A Initiate a legislative review of criminal laws, procedure and evidence rules to ensure exclusion of irrelevant, inadmissible evidence or questions, or for applications for private records of victims that contain or perpetuate shaming and blaming stigmas.

B Provide training and resources for all justice actors, including judges, on CARSV as a crime of violence, within a pattern of violence within a conflict. Ensure that investigations/prosecutions are focused on perpetrator conduct, coercive circumstances and the elements of the crimes. Training

232 Gopalan (2021), *ibid*, 9.
233 TRIAL International (2018), *ibid*, 8.
234 St. George *et al.* (2021), *ibid*.
235 Zydervelt *et al.* (2016), *ibid*.
236 Amnesty International (2019) Time for Change: Justice for Rape Survivors in the Nordic Countries.

can help counter notions of 'honour' and 'shame'. Training and resources should teach the careful use of non-stigmatising, non-shaming language, and aim to both increase levels of comfort and confront taboos regarding talking about SV without embarrassment or shame.

C Leaders should be committed to proactively countering shame and blame within justice processes.

D Establish checks that are built into work processes within the justice system to specifically check for and removes stigmatising and shaming language.

E Provide training of prosecutors and prepare adaptable submissions, objections and response templates to exclude evidence, questioning or intrusive applications for private records that are founded on or informed by myths and misconceptions.

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