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Achieving Justice for Victims of Rape and Advancing Women's Rights: A Comparative Study of Legal Reform

Haiti Edition with Recommendations on the Haiti Draft Law on the
Prevention, Punishment and Eradication of Violence Against Women

A TrustLaw publication by the Thomson Reuters Foundation

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MADRE 

The City University of New York

CUNY SCHOOL OF LAW

Law in the Service of Human Needs

CENTER FOR
Gender & Refugee
STUDIES

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Foreword

Thomson Reuters Foundation launched TrustLaw in July 2010. Our goal: to spread the practice of pro bono worldwide and empower people with trusted information. At the centre of TrustLaw is TrustLaw Connect, a global marketplace connecting NGOs and social enterprises with lawyers willing to work at no cost.

This is the “Haiti Edition” of a report prepared at the request of MADRE, the international women’s human rights organisation and KOFIV, its Haitian sister organization. The first edition focused on the rape laws and procedures in six jurisdictions. This second edition includes the comparative research and adds a comparison of the current and proposed Haiti law with the best practices identified in those six countries, applying the analysis of the first report to the Haiti Draft Law on the Prevention, Punishment and Eradication of Violence Against Women. A French translation of the report is forthcoming.

This report follows KOFIV and MADRE’s efforts to strengthen rape law in Haiti, where there was a dramatic increase in sexual violence after the earthquake of January 2010, and rape has only been considered a crime against the person since 2005.

Our own engagement in Haiti at the Thomson Reuters Foundation started right after the earthquake when we triggered for the first time our Emergency Information Service, distributing actionable information to the local population about where they could find water, medical assistance or shelter.

In January 2011 we launched Haiti in Focus, through which we put all our free legal, humanitarian and media services to work for Haiti’s recovery, and in May we hosted a first-of-its-kind forum of Haitian government officials, police, lawyers, prosecutors, doctors and women’s groups in Port-au-Prince, alongside MADRE and their local partner KOFIV.

Now with this report – produced thanks to the great commitment and dedication of Morrison & Foerster, in a leading role, and DLA Piper, Latham & Watkins and Reed Smith – the Foundation, KOFIV and MADRE hope to offer not only direct support to those involved in the redrafting of sexual violence legislation in Haiti but also an invaluable resource for the development of gender-based violence legislation all over the world.

A handwritten signature in black ink that reads "M. Villa". The signature is written in a cursive style and is underlined with a single horizontal line.

Monique Villa,
CEO, Thomson Reuters Foundation

Introduction

The catastrophic earthquake that struck Haiti on January 12, 2010, displaced more than one million people from their homes into makeshift outdoor encampments. Within months, reports of frequent rape in and near the encampments, primarily affecting women and girls but also men and boys, began to filter out. The rapes have prompted a variety of responses focused on meeting victims'¹ immediate medical and psychological needs, initiating investigations and prosecutions, and improving security in the encampments to prevent additional attacks. They also once again have focused attention on the status of the law in Haiti concerning rape and other forms of sexual abuse, giving fresh impetus to long-standing calls for rape law reform.

MADRE, a U.S. based organisation that promotes the human rights of women worldwide, along with its sister organization KOFIV, a grassroots Haitian women's organization, requested this report in order to support the Haiti law reform effort. MADRE is engaged in this effort together with its sister organisation, KOFIV, a grassroots organisation of Haitian women.² Interestingly, this is not the first report of its kind that was prompted by conditions in Haiti. This report builds and expands upon a prior work that was prepared at the request of the Haitian *Ministère a la Condition Féminine et aux Droits des Femmes* ("Ministry of Women's Affairs and Rights" or MCFDF) and published by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in 2007 as *Gender Justice, Best Practices*.³ *Gender Justice* surveyed international human rights law as well as the laws of several nations in order to offer "best practices" for achieving gender justice in a nation's laws and policies. More specifically, *Gender Justice* examined a variety of international law sources to distill human rights principles that govern five areas of women's rights and offered as "best practices" examples from several jurisdictions of statutes and policies that implement these principles effectively.

The work presented here builds directly on *Gender Justice*. While *Gender Justice* addressed multiple areas of the law that affect women's rights – including rape, domestic violence, termination of pregnancy, paternity, and non-marital cohabitation – this report discusses only rape and other sexual violence. This report relies on *Gender Justice* for the enunciation of human rights principles that are relevant to sexual violence. It expands upon *Gender Justice* by surveying more jurisdictions, and delving more deeply into the law of those jurisdictions.

¹ Although the term "survivor" is often preferred to "victim" in the United States and elsewhere, it should be noted that women in Haiti often choose to call themselves "victims" and, moreover, the word is used as a legal term for one who experiences a crime. The use of the term victim should not be understood to imply a lack of agency.

² KOFIV (Komisyon Fanm Viktim Pou Viktim or the Commission of Women Victims for Victims) is a Haitian women's group founded in 2004 to assist and empower women victims of sexual violence. MADRE also collaborates with other Haitian grassroots organisations including FACDIS, FAVILEK and KONAMAVID as well as the public interest law firm, the *Bureau des Avocats Internationaux* (BAI). International collaborators include the Institute for Justice & Democracy in Haiti (IJDH), the Center for Gender & Refugee Studies (CGRS), and the Center for Constitutional Rights (CCR).

³ Raoul Wallenberg Institute, *Gender Justice, Best Practices* (2007), <http://www.rwi.lu.se/pdf/publications/reports/genderjustice.pdf>. This report also builds on the work of the former Director General and staff of the MCFDF who, before perishing in the earthquake, worked tirelessly to make passage of a law addressing violence against women a reality.

This report, produced to support the process of law reform in Haiti, should be equally useful to persons in other jurisdictions where the law still reaches only the narrowest definition of rape and where victims of unwanted sexual contact remain intimidated from reporting it by a sense of futility and fear of humiliation. As stated in *Gender Justice*, “Governments and NGOs facing a legislative drafting process [will] benefit from a list of practical, good examples where the human rights of women are secured and satisfactorily fulfilled. Such a list will be inspirational and offer legislative solutions for adoption and implementation.”⁴ This report, in text and references, supplies many concrete examples of laws and policies from a range of jurisdictions that implement women’s human rights, including models for statutes, protocols for victim services, and guides to police and prosecutorial procedures. Taken together, these materials point the way toward achieving changes in law and policy concerning sexual assault that respect the experiences of victims and advance gender justice.

In this Haiti edition of the report, the legal team researched the applicability of the international framework and best practices discussed herein to the draft law on the Prevention, Punishment, and Eradication of Violence Against Women that is under discussion in Haiti.⁵ It produced recommendations for revisions to the draft law. Those recommendations, and an English translation of the draft law that has been marked to show the recommended revisions, are appendices to this report.

⁴ *Gender Justice* 11.

⁵ The authors of this report are aware that the Haitian Women’s Ministry, in collaboration with the Organization of American States (OAS), the International Senior Lawyers Project (ISLP), and Duke University, has recently conducted comparative research regarding laws pertaining to the prevention of violence against women in Argentina, Brazil, France, Mexico, Spain and Venezuela and a review of Haitian criminal and civil codes in light of best practices. Project Completion (Final) Report to U.S. Agency for International Development (USAID)/Haiti Protection of Vulnerable Groups – Women and Disabled Program (April 2009-May 2011) Grant # 521-G-00-09-00026-00, July 2011, http://www.sedi.oas.org/ddse/documentos/discapacidad/Report_Vulnerable_Groups.pdf. The Ministry’s studies, however, do not appear to be publicly available. This series of reports does not seek to reinvent the wheel, but rather, to supplement the research, provide specific guidance for attorneys prosecuting these cases in Haitian courts, and encourage public participation. This report will be made publicly available to attorneys, advocates and other members of civil society that wish to advance reform. A public discussion is imperative. Not only will public buy-in ensure that legal reforms take place, it will also ensure that legal reforms have their intended effect – to influence the behavior of actors in the justice system and society at large.

Executive Summary

This report was commissioned by MADRE through the TrustLaw Connect programme of the Thomson Reuters Foundation. TrustLaw Connect enlisted four major international law firms to study the law of rape in a sample of jurisdictions from around the world. The report builds upon an earlier report, *Gender Justice, Best Practices*, prepared in 2007 by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at the request of the Haitian Ministry of Women's Affairs and Rights. This report studies the laws and policies that address rape and other forms of sexual violence in Brazil, Canada, France, South Africa, Sweden and the United States (specifically the states of California, New York and Pennsylvania). These jurisdictions represent a diversity of cultures and histories but almost all have contemporary and sophisticated rape and sexual violence statutes. The research investigated the statutory definitions of sex crimes and punishments, policies for the care and support of victims of such crimes, and investigation and prosecution procedures. The research generated a small library of information and reference materials that will be separately organized and made available to MADRE and KOFIVIV.

Chapter I identifies the standards of the *Gender Justice* report as an appropriate set of international human rights standards for measuring laws and policies addressing sexual offenses. In the last twenty years gender-based violence has become widely recognized as a violation of human rights, a change from its former treatment as the isolated action of individuals or the product of specific cultural or religious practices. The crime of rape has been transformed from its origins as a crime against men's private property to a crime against human rights.

Eleven criteria were distilled from the *Gender Justice* report. Legal definitions of rape and related crimes shall be gender neutral, rape is defined on the basis of lack of consent, consent is not implied by lack of resistance, corroborating evidence is not required for conviction, rape within marriage is criminalized, consent is presumed to be lacking under specific age limits, the law does not recognize mitigating circumstances, sexual offenses are defined as crimes of violence against persons, not crimes against morality, investigation of such crimes is mandatory, and there is the possibility of financial compensation within the criminal trial. Chapter I finds that there is a high level of conformance with these standards in the jurisdictions that were studied although there is some individual variance on how the standards were met.

Chapter II examines the relevant rape statutes in more detail. Chapter II has four parts. It addresses the definition of consent, what acts are criminalized, procedures for protecting victims during trial such as rape shield laws, and the range of punishments for sexual offenses. In each area of inquiry, it summarizes the treatment of the issue by the jurisdictions that were studied. The corresponding sections of the Haiti draft law, if any, have been reviewed for consistency with international human rights standards and the criminal law of the six jurisdictions previously studied and proposed amendments and comments on the draft law are set forth.

Consent

Contemporary statutes typically cover not only sexual intercourse without consent but also other types of sexual conduct. Consent, rather than the use of force, is the touchstone of modern definitions of rape in the criminal law. Consent is defined as the absence of coercion. The circumstances in which consent is not found include the use of force and threats of force, coercion, fraud, and incapacity by virtue of mental or physical status or age. All of the jurisdictions studied recognize that consent is absent where sexual conduct is achieved by force. Consent is also considered absent where there is an abuse of authority or a trust relationship or where fraud, fear, or coercion is involved. Some jurisdictions limit a defendant's ability to escape responsibility where a defendant mistakenly believes in consent. All the jurisdictions deny consent by virtue of marriage or present or past relationships.

Prohibited Acts

Contemporary statutes typically criminalize not only sexual intercourse without consent but also other forms of nonconsensual sexual penetration and, in many cases, sexual touching. Sexual acts against children or others with limited ability to consent often trigger additional criminal provisions. Nearly all jurisdictions criminalize incest but the definition of the protected group varies. The newest area of criminal jurisdiction is crimes involving the internet, especially involving contact with children that result in prohibited sexual activity.

Trial Procedures

In a major change from the past, most jurisdictions no longer require corroborating evidence but find that the victim's testimony alone can be sufficient to convict. Most jurisdictions limit or prohibit the introduction of evidence about a victim's personal sexual history via "rape shield" statutes. The identity of the victim is protected in all jurisdictions although the procedures vary. Where minors are involved, there are always special provisions to protect them yet obtain their testimony. The courts are often empowered to limit access to the courtroom in special circumstances.

Punishments

The base level of punishments ranges from two to six years in Sweden to fifteen years imprisonment in France. Monetary fines are sometimes authorized. All jurisdictions provide for increased penalties when specific aggravating factors are present. Other factors that increase sentences include multiple participants in the attack and use of drugs or weapons. Again, sex crimes involving children or others of limited capacity may result in increased punishment.

Chapter III moves from the statutory world to the law in practice. It has two major parts: the first addresses victim support measures and the second addresses police, prosecution and judicial procedures. There are many good practices that are described in publicly available materials.

Victim Support Measures

Hospitals are often the first agencies that victims of rape have contact with. Most of the jurisdictions studied have established special rape treatment centers or employ medical staff who have received specialized training on the care of rape victims. In all jurisdictions, victims of sexual assault are entitled to emergency medical care, including protection from pregnancy as well as sexually transmitted diseases. In addition, in some of the jurisdictions, victims have access to rape crisis advocates whose role is to support them in their immediate dealings with medical and police personnel.

Nearly all jurisdictions provide some form of continuing psychological care or trauma counseling for the victim.

Several jurisdictions make substantial efforts to support victims throughout the legal process. Such measures include special pre-trial programs educating victims about the judicial process or even a plaintiff assistant or rape advocate. Nearly all the jurisdictions provide some form of financial assistance to victims of sexual assault as part of general crime victim compensation schemes. These vary, and may include free medical and psychological care, emergency accommodations and travel assistance funds.

Most jurisdictions authorize a protective order from the court to prevent contact with the alleged sex offender. Other measures include the option to temporarily jail the alleged assailant to protect the victim, restricting visiting rights of the aggressor with his or her children or protecting information concerning the victim's address.

Rape Reporting, Investigation and Procedure

In most jurisdictions the initial report of rape is made to the police. The law generally requires that reports of rape be investigated; the old idea that only rapes immediately reported be investigated has been abandoned. Law enforcement officers are often trained on appropriate procedures for handling reports of rape but the extent and intensity of training varies considerably. Finally reports of rape can be made by others than the victim including social workers, doctors or school officials.

The jurisdictions studied universally recommend that the victims have a medical examination as promptly as possible after a sexual attack so evidence is collected before it is compromised or gone. Procedures also should be established to ensure that evidence is properly retained, while giving the victim time to decide whether to press charges. A common practice is to have a standard rape kit and a supplemental search kit for use when officials suspect drugs were used to facilitate the assault.

Nearly all jurisdictions have a specialized police unit dedicated to sex crimes. Police officers in such units receive special training and, for the most part, follow detailed protocols for interviews and conducting investigations. One jurisdiction has a specialized unit for particularly serious crimes and a second unit for sexual offenses against minors.

Special provisions are in place in many jurisdictions to ensure that child victims of sexual attacks are cared for and protected. It is common to have specialized units to investigate offenses against children. During interviews and testimony, children may be assisted by a third party.

Most jurisdictions also have special units of prosecutors trained to handle sexual assault offenses. Where special units do not exist or are being implemented, sex crimes are handled within the scope of other specialized units such as child victim units.

Prosecutors generally must undergo special training to prosecute sex crimes, including in some cases specifically violence against women and minors.

In several jurisdictions, the judiciary receives special training for the administration of rape trials. The training is provided variously, sometimes by governmental authorities and sometimes by NGOs.

South Africa, as well as at least one jurisdiction in the United States, has established specialized courts for sex offenses in some jurisdictions. The South African courts have produced higher conviction rates for these crimes. The court in the United States is a relatively new entity and there undoubtedly will be lessons learned from its experience.

This edition of the report focuses on applying the international framework and best practices discussed in the original report to the draft violence against women legislation circulating in Haiti. Based on this analysis, it recommends that the drafters consider a number of revisions to Haiti's proposed new law. For the convenience of the drafters, a summary of those recommendations is included as Appendix A and a mark-up of the draft law with proposed amendments is included as Appendix B.

Chapter I: Compliance with International Human Rights Standards for Rape Law

A. From Private Offense to Violation of Human Rights

“It is currently undisputed that violence against women can constitute a human right violation regardless of whether it occurs within the public or the private sphere of life.”⁶ This single sentence encapsulates a lengthy and, indeed, stunning recent history of rape law reform. Fewer than twenty years ago, scholars critiqued then-prevailing human rights norms in the *Harvard Human Rights Journal*, writing, “Gender-based violence is not recognized as a violation of human rights, but rather as the product of particular cultural or religious practices or the isolated actions of individuals.”⁷

This sea change in attitude toward the significance of rape and other forms of gender based violence was predated by a “wave of feminist advocacy” for rape law reform.⁸ A brief review of the reform movement is necessary to understand the significance of the human rights standards that now apply to the law of rape.

Taking the United States as an example, before the reform movement of the 1970s and 1980s, the common law definition of rape as “unlawful carnal knowledge of a woman by force and against her will” prevailed in state law.⁹ A woman’s testimony that she did not consent to a sexual act was insufficient for conviction as a matter of law. Not only were corroboration, “earnest resistance,” and timely report requirements standard, but complainants were cross-examined on their personal sexual history to test whether they had a “tendency to consent.” Rape statutes reached only acts that involved “penetration,” and husbands were exempted from prosecution for rape, because wives were considered to have given blanket and irrevocable consent to sexual acts when they married. Further, rape law’s central concern with forced sex between strangers was rooted as much in protecting what was seen as a father’s or husband’s property interest in controlling sexual access to “their” women as in concern for women’s well being. Thus, rape laws with severe penalties, often life imprisonment or death, coexisted with widespread and tacitly accepted sexual abuse of women who were not under a father’s or husband’s protection, as well as men’s own wives and children.

The rape reform movement challenged each of these aspects of prevailing law. The particulars of reform are detailed more thoroughly below, but the overall impact was to uproot rape from its original categorization as a crime against men’s private property and replant it as a crime against the bodily integrity of anyone who is made to engage in sexual activities without consent. This paved the way for recognition of rape and other sexual violations as crimes against human rights. Legal changes won by national women’s rights movements were paralleled by and contributed to developments in

⁶ *Gender Justice* 23.

⁷ Pamela Goldberg & Nancy Kelly, *Recent Developments: International Human Rights and Violence Against Women*, 6 *Harvard Human Rights Journal* 195 (1993).

⁸ Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 *Berkeley Women’s Law Journal* 72 (2001).

⁹ See generally *id.* at 72-75 for a brief summary of the rape law reform movement.

international human rights law, so that today international norms related to gender-based violence complement and reinforce domestic norms and obligations.¹⁰

As summarized in *Gender Justice*:

[G]ender-based violence is acknowledged to constitute a form of discrimination with detrimental effects on women's ability to enjoy human rights on a basis of equality with men. . . . Relevant rights are, *inter alia*, non-discrimination and equality, equality before the law, right to the highest attainable standard of physical and mental health, right to life, right to be free from torture and inhuman or degrading treatment, right to security and liberty of persons, right to equality in the family, right to housing and judicial rights.¹¹

B. Human Rights Standards Set Forth in the *Gender Justice* Report

In 2007, at the request of the Haitian Minister of Women's Affairs and Women's Rights, the International Legal Assistance Consortium commissioned the Raoul Wallenberg Institute of Human Rights and Humanitarian Law to prepare a report on "best practices" in gender justice from around the world. The results of this report, titled *Gender Justice, Best Practices* and referred to here as *Gender Justice*, were presented at a meeting in Haiti in September 2007.

Gender Justice defines best practices in several areas—including rape, domestic violence, and termination of pregnancy—with the guidance of international human rights standards. In particular, it notes that a best practice is a "practice that represents significant steps toward the realization of the rights in question and that demonstrates the state's willingness and commitment to the full implementation of international human rights standards."¹² The *Gender Justice* report provides relevant human rights standards, as ascertained from a variety of human rights sources, and then discusses laws and policies drawn from a study of several countries that its authors believe comply with these standards. With respect to rape, *Gender Justice* focused on the practices followed in Canada, South Africa and Spain.

Best practices, as the concept is used in *Gender Justice*, offer a spectrum of possible 'legal' approaches that meet international human rights standards within a specific area. But statutory law is clearly insufficient on its own: "A legal statute can be ever so good, but if it is not implemented properly, it remains too abstract."¹³ Thus, "[b]esides legal technical solutions, the practice, as evident from the word itself, shall also entail policies

¹⁰ See, e.g., Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (entered into force July 1, 2002); Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Report of the Fourth World Conference on Women, U.N. Doc. A/ CONF.177/20/Rev.1 (Oct. 17, 1995); Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 33 I.L.M. 1534 (entered into force Mar. 5, 1995); Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

¹¹ *Gender Justice* 23. The report also notes general agreement that legislation on this subject should be "non-discriminatory and equal for women and men alike." *Id.*

¹² *Gender Justice* 12.

¹³ *Gender Justice* 12.

for implementation and the outcome of implementation in the society.”¹⁴ Therefore, in addition to giving examples of statutory language, *Gender Justice* also gives examples of policies that accompany statutes and make their implementation more effective.

For each aspect of law studied, *Gender Justice* lists criteria drawn from international human rights standards that a nation’s laws should, at minimum, meet. As a starting point for the analysis presented here, here are key human rights criteria for rape laws, as identified in *Gender Justice*.¹⁵

- 1: Legal definitions of rape and other sexual offenses are gender neutral
- 2: Rape is defined based on lack of consent, not use of violence/force/coercion
- 3: Consent is not implied by lack of resistance
- 4: Corroborating evidence is not required for conviction; the victim’s testimony can be sufficient
- 5: Rape within marriage is criminalized
- 6: Incest is defined as a specific crime
- 7: Specific age limits, under which consent is presumed to be lacking, protect young persons
- 8: The law does not recognize any discriminatory mitigating circumstances, such as defense of honor or reduced sentences if the rapist marries the victim
- 9: Sexual offenses are defined as crimes of violence against persons, not as crimes against morality
- 10: Crimes are treated as public offenses so investigation is mandatory
- 11: There is a possibility of financial compensation within the criminal trial

C. Conformance with Human Rights Standards in the Jurisdictions Studied

In general, the jurisdictions studied herein—Brazil, Canada, France, South Africa, Sweden and the United States (California, New York and Pennsylvania)—have a high level of conformance with the human rights standards for the law of rape that are set out in *Gender Justice*. Here is a summary of findings regarding these jurisdictions:

¹⁴ *Gender Justice* 12.

¹⁵ These criteria are drawn from *Gender Justice* 23-25, 87-88.

1: Legal definitions of rape and other sexual offenses are gender neutral

Legal definitions of rape and other sexual offenses are gender neutral in all jurisdictions studied.

2: Rape is defined based on lack of consent, not use of violence/force/coercion

In most jurisdictions studied, the most serious rape and sexual assault offenses are usually premised upon force, violence or threats. Lower level rape and sexual assault offenses are usually premised upon lack of consent alone, without the need to show force, threats or violence. Many jurisdictions studied provide that a rape or sexual assault offense is more serious, that is, deserving of greater punishment, when committed against a member of a vulnerable class of persons, such as children under a particular age or people with mental disabilities, and do not require any showing of force, threats, or violence in these cases.

3: Consent is not implied by lack of resistance

Resistance is not generally required in most jurisdictions studied, particularly where the victim is disabled, intoxicated, threatened, intimidated, confused or vulnerable. One jurisdiction explicitly states that consent must be free and voluntary, and that the victim must understand the nature of the act. One jurisdiction studied requires positive cooperation to show consent, whereas another jurisdiction studied requires that a defendant who claims consent must show that a reasonable person would have understood the victim's words and acts as showing consent.

4: Corroborating evidence is not required for conviction; the victim's testimony can be sufficient

Most jurisdictions studied provide that the victim's testimony may be sufficient to convict, without corroborating evidence, particularly where the testimony is consistent across different times. One jurisdiction requires a forensic examination if the rape is reported while it is still possible to obtain traces of the crime, but that jurisdiction permits conviction without forensic examination evidence if the prosecution brings forth other equally convincing evidence of the crime. In that jurisdiction, if the rape is reported at a time when it is not possible to do the forensic examination, testimony of the victim and witnesses can replace forensic examination.

5: Rape within marriage is criminalized

All jurisdictions studied prohibit rape and sexual offenses within marriage. One jurisdiction, however, presumes that encounters between spouses are consensual, which can be rebutted by proving lack of consent.

6: Incest is defined as a specific crime

Incest is defined as a crime independent from rape in most jurisdictions studied. One jurisdiction studied does not define incest as a crime, but provides for higher punishments in cases of sexual assault perpetrated by a family member.

7: Specific age limits, under which consent is presumed to be lacking, protect young persons

All jurisdictions studied provide that consent to sexual acts will be absent as a matter of law if the victim is below a specified age. In some jurisdictions, the minimum age of consent varies according to the age of the perpetrator, so, for example, a 16 year old cannot by law consent to sex with someone who is over 21, but can consent to sex with a partner of the same age. In other jurisdictions, the minimum age of consent is the same in all circumstances.

8: No discriminatory mitigating circumstances, such as defense of honor or reduced sentences if rapist marries victim

None of the jurisdictions studied establish any mitigating circumstances for rape.

9: Sexual offenses are defined as crimes of violence against persons, not as crimes against morality

In most of the jurisdictions studied, sexual offenses are defined as crimes against the person. In one jurisdiction studied, sexual misconduct is defined as a crime against the victim's "sexual dignity," which is effectively part of their person.

10: Crimes are treated as public offenses so investigation is mandatory

In all jurisdictions studied, investigation is mandatory.

11: There is a possibility of financial compensation within the criminal trial

While several jurisdictions studied provide for financial compensation to a victim through a criminal trial, the more common provisions entitle rape victims to the same benefits as other victims of crime, such as reimbursement for the costs of medical expenses, counseling, destroyed property and loss of wages.

Chapter II: Statutory Provisions

This chapter examines rape statutes in detail, describing which sexual offenses are generally punishable by law, statutory safeguards concerning the trial of sexual offenses, and the range of punishments for these offenses. It also analyzes relevant sections of Haiti's Draft Law on the Prevention, Punishment and Eradication of Violence Against Women and evaluates whether the draft law complies with international human rights standards. In many instances, the Haiti Draft Law is in compliance with customary criminal law. However, there are a few critical changes the drafters should consider making to bring the law into full compliance, in particular, related to the evidentiary burden required for convictions and the definition of consent.

Consent is the touchstone of contemporary definitions of rape in the criminal law. The old requirement that sexual contact be achieved by force in order to be criminal has been largely abolished. Rather, rape and other forms of sexual assault are defined as sexual contact occurring without consent.¹⁶ Consent is defined with reference to voluntariness and the absence of coercion, as, for example, "positive cooperation in act or attitude pursuant to an exercise of free will,"¹⁷ or "voluntary agreement . . . to engage in the sexual activity in question,"¹⁸ as well as the capacity to consent. Defining consent, or more precisely, defining when consent is absent is the subject of Part A, below.

Contemporary statutes typically reach not only sexual intercourse without consent, but also other types of sexual contact. The acts prohibited in the jurisdictions studied are the subject of Part B. Statutory provisions that protect victims during trial are discussed in Part C. The authorized punishments for sexual offenses are the subject of Part D.

A. Consent

The jurisdictions studied recognize a range of circumstances in which sexual contact is criminal because it occurs without consent. These circumstances include the use of force and threats of force, coercion, fraud, and when the victim is incapable of consent for one or more reasons, including age. Because consent is often the contested issue in rape prosecutions, defining the circumstances where consent will be found absent is a critical aspect of rape law.

1. Force

All jurisdictions studied recognize that there is no valid consent to sexual contact when the contact is achieved by force. "Force" is defined broadly, for example, as "force,

¹⁶ See, e.g. N.Y. Penal Law § 130.25 (defining third degree rape as sexual intercourse without consent); South African Sexual Law (Sexual Offences and Related Matters) Amendment Act, § 3 [hereinafter S. Afr. Amend. Act] (defining rape as an act of sexual penetration without consent), available at <http://www.justice.gov.za/legislation/acts/2007-032.pdf>. While Brazil defines only forced penetration as rape, it, too, recognizes other sexual crimes not involving force. Braz. Crim. Code arts. 215-216.

¹⁷ Cal. Penal Code § 261.6.

¹⁸ Can. Crim. Code §§ 265, 273.1. See also e.g. S. Afr. Amend. Act § 1(2) ("consent" means voluntary or uncoerced agreement").

violence, duress, menace, or fear.”¹⁹ While all jurisdictions recognize some sexual offenses that do not involve force, many treat sexual contact achieved by force as a more serious offense.²⁰ This is consistent with customary criminal law.

2. Coercion or fraud

The jurisdictions studied also recognize circumstances where consent, even if given, is not voluntary and the contact is therefore criminal. These include abuse of authority or abuse of a position of trust or power in relation to the complainant. Brazil, for example, defines sexual harassment as constraining a person for the purpose of obtaining a sexual favor or benefit “by making use of a hierarchically superior position or other special powers inherent to the exercise of one’s job position.”²¹ Many statutes specify that inducing consent to a sexual act by fraud, fear, or coercion is a crime. One jurisdiction defines this crime as inducing consent to a sexual act by causing fear that causes the victim to act “contrary to the person’s free will.”²² California’s statute specifies that there is no consent where the victim “was not aware, knowing, perceiving or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact; [or] was not aware, knowing, perceiving or cognizant of the essential characteristics of the act due to the perpetrator’s fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.”²³ French law prohibits rape and other “sexual aggressions,” defined as “any sexual harm committed with violence, constraint, threat or surprise,” and specifies that “the constraint may be physical or moral and may result from the age difference” between the actor and the victim or the “legal authority” of the actor over the victim.²⁴

Haiti Draft Law

The draft law is in accordance with international norms in that it criminalizes sexual contact achieved without consent, whether or not force is used. It defines the crime of rape based on the use of “violence, coercion, threat, surprise or psychological

¹⁹ Cal. Penal Code § 261; see also S. Afr. Amend. Act § 57 (force, intimidation, threat of harm to the person or person’s property); Can. Crim. Code § 272 (threatening to cause bodily harm to another person).

²⁰ See, e.g., Can. Crim. Code §§ 271-272 (defining offenses based on presence or absence of force); N.Y. Penal Law §§ 130.25, 130.30 & 130.35 (same); Braz. Crim. Code arts. 213 & 215 (defining rape as involving force, while recognizing other sexual crimes where victim impeded from stating free will); 18 Pa. Cons. Stat. Ann. §§ 3121 (sexual intercourse by force is first degree felony) & 3124.1 (sexual intercourse without consent is second degree felony).

²¹ Braz. Crim. Code art. 216. See also Can. Crim. Code § 273.1(2)(c) (no consent where accused “abus[es] a position of trust, power or authority”); S. Afr. Amend. Act § 1(3) (b) (recognizing absence of consent where “there is an abuse of power or authority” by accused); Fr. Crim. Code arts. 222-228 (abuse of trust is an aggravating factor used in sentencing).

²² Cal. Penal Code § 266c; see also Swed. Penal Code ch. 6, § 2 (prohibiting “sexual coercion,” defined as inducing a person to take part in a sexual act “by unlawful coercion,”); Brazil Crim. Code art. 215 (prohibiting sexual acts committed by fraud or by means that impede victim from stating his or her free will, or to obtain economic advantage); S. Afr. Amend. Act § 1(3) (a) (no consent where complainant submits to act as result of intimidation or threat to harm the person or property of complainant or a third person).

²³ Cal. Penal Code § 266c; see also S. Afr. Amend. Act § 1(2)-(3)(c) (consent entails “voluntary or uncoerced agreement” and is absent “where the sexual act is committed under false pretences or by fraudulent means”).

²⁴ Fr. Crim. Code arts. 222-22 & 222-22-1.

²⁵ Draft Law on the Prevention, Punishment and Eradication of Violence Against Women, Art. 280.1 (Haiti working group draft, revised after July 12, 2011 meeting) (hereinafter “Haiti Draft Law”).

pressure.”²⁵ It defines the crime of sexual assault as “any sexual relation that is unsolicited and unwanted, or any contact committed with the use of force, coercion, threat, surprise or psychological pressure.”²⁶ Specifically, the inclusion of the phrase “unsolicited and unwanted” in the sexual assault provision recognizes that sexual contact may be unlawful because it is nonconsensual, even in the absence of force or coercion. This accords with international norms.

In addition, the articles dealing with rape and sexual assault are gender-neutral, also in accordance with international norms. **However, because much of the draft law refers specifically to women victims, we suggest that the drafters clarify that sexual violence, specifically rape, sexual assault, and the suggested new crimes of unlawful sexual contact and incest, can be committed by both men and women, and that victims may be both male and female.**

3. Mistaken belief in consent

In addition to circumstances such as fraud, coercion, or abuse of power, some jurisdictions further limit a defendant’s ability to escape responsibility for a sexual assault by claiming a mistaken belief in consent. For example, Canadian law specifies that the accused’s belief that the complainant consented is not a defense when the belief arose from the accused’s self-induced intoxication, recklessness or willful blindness, or the accused did not take reasonable steps to ascertain the complainant’s consent.²⁷ Canada also expressly provides that consent is absent when the complainant revokes consent after initially having given it.²⁸ In New York, while a defendant may show consent through implied acquiescence, this defense will not hold where a reasonable person would have understood the victim’s words and expressions as showing a lack of consent.²⁹

Haiti Draft Law

The draft law is silent on the issue of a defendant’s mistaken perception of whether or not the complainant consented to a sexual act. We recommend addressing this issue, because defendants in rape and sexual assault cases often claim that they thought the victim consented to the acts.

The drafters should consider adding a provision that addresses a defendant’s claim of a mistaken belief in consent. Suggested language appears in the mark-up.

²⁶ Id. at Art. 280.

²⁷ Can. Crim. Code § 273.2.

²⁸ Can. Crim. Code § 273.1(2)(e).

²⁹ N.Y. Penal Law § 130.05.

4. Marriage

Old rape statutes legally excluded the possibility of prosecuting a husband for raping his wife. Those laws have been changed. Notably, the existence of a present or past relationship, including marriage, is not a defense to a sexual crime in any of the jurisdictions studied.³⁰ One jurisdiction, France, has gone beyond removing the marital exemption and considers a spousal relationship as an aggravating factor that can increase the penalty for rape.³¹

Haiti Draft Law

The draft law recognizes that a person can commit both rape and sexual assault against their spouse or ex-spouse, common-law spouse or ex-common-law spouse, or romantic partner or ex-romantic partner, whether or not the perpetrator and victim are co-habiting at the time of the offense. Indeed the law requires that the maximum punishment be applied in such cases.³² Likewise, the general definition of “violence against women” in Article 2 includes “marital rape.” This is in accordance with international norms.

5. Lack of capacity to consent in adults

Nearly all jurisdictions define situations in which an adult complainant is deemed either permanently or temporarily incapable of consenting to sexual activity.³³ Thus, it is a crime to have sexual contact with people who cannot consent by reasons of mental illness or mental disability. For example, South African law details that there is no consent where the complainant is “mentally disabled,” which is defined as unable to appreciate the nature or consequences of sexual acts, unable to resist, or unable to communicate unwillingness to participate in the act.³⁴

³⁰ See, e.g., S. Afr. Amend. Act § 56(1) (existence of a marital or other relationship is not a valid defense to rape or sexual assault); Fr. Crim. Code art. 222-22 (sexual crimes may be charged “regardless of the nature of the existing relationship between the aggressor and its victim, including when they are related by marriage”); Can. Crim. Code § 278 (husband or wife may be charged with sexual assault whether or not living together). However, statutes that criminalize, for example, any sexual touching of a minor, may make exceptions for married minors. See, e.g., Can. Crim. Code § 150.1(2.1)(b) (marriage is defense to crime of touching person under age 16 for sexual purpose).

³¹ Fr. Crim. Code art. 222-24 (enhanced penalty where rape committed by the spouse, concubine, or civil partner of the victim).

³² Haiti Draft Law Art. 280.

³³ France does not address a lack of capacity to consent in its definition of sexual crimes. However, it does consider certain states of vulnerability as an aggravating factor for sentencing purposes. Fr. Crim. Code art. 222-28. French case law also provides examples of situations in which the courts have concluded that a rape or other sexual aggression has occurred based, in part, on the victim’s state of vulnerability. See, e.g., Cass. Crim., 25 June 1857 (the French Supreme Court held in 1857 that there is rape where a person sneaked into the room and the bed of a woman who was asleep while her husband was absent and took advantage of the woman’s mistake to have sex with her).

³⁴ S. Afr. Amend. Act §§ 1(1) (definition of “person who is mentally disabled”) & 57 (mentally disabled person is incapable of consent). In Brazil, a sexual act perpetrated on someone who “(i) lacks the proper judgment to practice the act, due to mental retardation or other intellectual disability, or due to an infirmity; or (ii) cannot offer resistance for any other reason” is a “crime per se” and does not require proof of lack of consent or that the act be accomplished by violence or under serious threat. Braz. Crim. Code, art 217-A, ¶ 1. See also Can. Crim. Code, § 273.1(2)(b) (no

Likewise, most jurisdictions studied recognize a variety of temporary circumstances where consent is impossible. In Sweden, for example, rape includes improperly exploiting the victim's lack of consent due to unconsciousness, sleep, intoxication or other drug influence, illness, physical injury, mental disturbance, or otherwise helpless state.³⁵ California criminalizes sexual contact where the victim is at the time "unconscious of the nature of the act, and this is known to the accused," defining "unconscious of the nature of the act" to include "incapable of resisting because the victim . . . was unconscious or asleep [or] was not aware, knowing, perceiving or cognizant that the act occurred."³⁶

Haiti Draft Law

The draft law increases the penalty for rape to forced labor for life "if the rape is committed on a person whose particular vulnerability by reason of her age, handicap, illness, infirmity, physical or psychological disability or pregnancy, is apparent or known by the perpetrator."³⁷ To some extent, this language recognizes that persons with such "vulnerability[ies]" may be limited in their ability to consent to sexual contact. However, this provision fails to recognize that certain circumstances negate the possibility of consent.

The drafters should add provisions that criminalize sexual contact with persons who are temporarily or permanently incapable of consent. Suggested language for a new provision on unlawful sexual contact appears in the mark-up.

6. Lack of capacity to consent due to age

All jurisdictions recognize an age of consent, that is, the earliest age at which a young person is seen as having the capacity to consent to sexual contact. In general, any contact with children below such an age is criminal. The most common age of consent

consent where complainant is "incapable" of consenting); N.Y. Penal Law § 130.5 ("A person is deemed incapable of consent when he or she is . . . (b) mentally disabled; or (c) mentally incapacitated"); 18 Pa. Cons. Stat. Ann. § 3121, § 3123, § 3125, and § 3126 (criminalizing sexual contact with a victim "who suffers from a mental disability which renders the complainant incapable of consent").

³⁵ Swed. Penal Code ch. 6, § 1.

³⁶ Cal. Penal Code § 261(a)(4). See also S. Afr. Amend. Act § 1(3)(d)(recognizing absence of consent where complainant unable to appreciate the nature of the sexual act, asleep, unconscious or under the influence of a substance which adversely impacts on the complainant's consciousness or judgment); Can. Crim. Code, § 273.1 (consent means the voluntary agreement of the complainant to engage in the sexual activity in question. No consent is obtained where the complainant is incapable of consenting to the activity); N.Y. Penal Law, § 130.5 ("Lack of consent results from . . . (b) incapacity to consent." "A person is deemed incapable of consent when he or she is . . . (c) mentally incapacitated; or (d) physically helpless . . ."); 18 Pa. Cons. Stat. Ann. § 3121, § 3123, § 3125, and § 3126 (criminalizing sexual contact with a victim "who is unconscious or where the person knows that the complainant is unaware that the [conduct] is occurring [or] . . . where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance").

³⁷ Haiti Draft Law Art. 280.2.

in the jurisdictions studied is 15, 16 or 17.³⁸ Some jurisdictions, recognizing that teenagers are sometimes in consensual sexual relationships with their peers, either relax the age of consent or provide for minimal punishment for sexual acts between teenagers who are close in age.³⁹

Haiti Draft Law

The draft law imposes an increased penalty of forced labor for life for those who rape a child “under the age of fifteen.”⁴⁰ However, there is no reference to a child’s incapacity to consent to sexual acts. Thus, an adult could claim that a child consented to sexual activity. Addressing this gap in the law is critical to bringing the draft statute into conformance with international human rights norms and to protecting children from sexual exploitation and abuse. **The drafters should criminalize sexual conduct with children under a designated age. Suggested language for a new provision on unlawful sexual contact appears in the mark-up.**

The reference to forced labor for life raises a separate issue. A number of contemporary jurisdictions have moved away from extremely harsh punishments because in practice they may have the unintended consequences of making juries and judges reluctant to convict because of the severity of the sentence that would result. **The drafters should consider whether the punishment would act as an effective deterrent or not.**

B. Prohibited Acts

Modern rape laws typically criminalize not only sexual intercourse without consent, but also other forms of nonconsensual sexual penetration and, in many cases, sexual touching.

³⁸ The age of consent is 17 in New York, N.Y. Penal Law § 130.05(3)(a); 16 in Canada, Can. Crim. Code § 150.1(1); 15 in Sweden, Swed. Penal Code ch. 6, § 6; and 14 in Brazil, Braz. Crim. Code art. 217-A. California does not set a specific age limit under which consent is presumed to be lacking, but criminalizes sexual intercourse with a minor, and defines a minor as a person under 18. Cal. Penal Code § 261.5. According to French case law, “the very young age of the victims does not allow them to realize the nature or the gravity of the acts imposed on them,” Cass. Crim., 7 December 2005, N°05-81.316, and victim age under 15 is an aggravating factor in sentencing a person convicted of rape or sexual violence. Fr. Crim. Code arts. 222-24 & 222-29. South African law states 12 as the minimum age of consent, S. Afr. Amend. Act § 57(1), but this applies only to consensual sexual contact with others ages 12-15; otherwise, 16 is the age of consent for sexual contact with adults. See S. Afr. Amend. Act §§ 15-16 (criminalizing consensual sexual penetration and sexual violation with child) and § 1(1)(b) (defining “child” in reference to §§ 15-16 as ages 12-15).

³⁹ For example, in circumstances where there is no abuse of trust or authority or condition of dependency, Canadian law permits a 12 or 13 year old to consent to sexual contact with someone no more than 2 years older, and a 14 or 15 year old to consent to sexual contact with someone no more than 5 years older. Can. Crim. Code §§ 150.1(2) & 150.1(2.1). In Pennsylvania, the age of consent is 16, but a person aged 13-15 may consent to sexual contact with someone no more than 4 years older. 18 Pa. Cons. Stat. Ann. §§ 3121(a)(6), 3122.1, 3123, 3125 & 3126. South Africa has similar provisions. S. Afr. Amend. Act §§ 15(2)(a) & 16(2)(a) (requiring written authorization for prosecutions when both parties are children ages 12-15) & § 56(2)(b) (allowing defense to charge of “consensual sexual violation” where person charged is a child and within two years of complainant’s age). California takes a different approach, defining as “unlawful sexual intercourse” any intercourse with a person under 18, but classifying it as a misdemeanor where the age difference is less than 3 years. Cal. Penal Law § 261.5(a)-(b).

⁴⁰ Haiti Draft Law Art. 280.2, ¶ 2.

1. Sexual contact without consent

Canadian law criminalizes as sexual assault all touching of a sexual nature without consent, and does not distinguish sexual penetration from other forms of sexual contact.⁴¹ New York's prohibitions include "forcible touching," defined as intentionally, forcibly touching the intimate parts of a purpose, for the purpose of degrading or abusing the victim, or satisfying the perpetrator's sexual desire, and "sexual abuse," defined as sexual contact without consent.⁴² In addition to rape and other acts of sexual penetration, South Africa also prohibits other types of forced sexual contact, as well as compelling other sexual acts including masturbation, exposing oneself, or being forced to witness sexual acts.⁴³

Haiti Draft Law

The draft law includes expansive language regarding activities that may constitute a sexual crime. It defines sexual assault quite broadly, as "*any sexual relation* that is unsolicited or unwanted, or *any contact* committed with the use of force, coercion, threat, surprise or psychological pressure, whether or not injuries result."⁴⁴ In addition, sexual acts not involving contact may be treated as crimes under Article 279 on sexual harassment. Sexual harassment is defined as: "*an act, gesture or behavior*, verbal or not, with a connotation that is sexual, sexist or lesbo/homophobe, or any other behavior based on sex or sexual orientation, *actual or perceived*, written or e-mail communication aimed at persecuting, intimidating, annoying, coercing, or monitoring a woman with the goal of undermining her emotional stability, dignity, prestige, or physical or psychological integrity, or with the goal of jeopardizing her job, promotion or reputation in or outside her workplace."⁴⁵ Such behavior is punishable by both imprisonment and fines. **The proposed language is consistent with customary criminal law.**

2. Acts involving persons with limited capacity to consent

Many jurisdictions recognize additional sexual acts as criminal when they are perpetrated against children or adults who lack the capacity to consent. These include

⁴¹ Can. Crim. Code § 271 (criminalizing "sexual assault"), as interpreted by Canada's Supreme Court in *R. v. Ewanchuk*, 1 S.C.R. 330 (Can. 1999) (defining elements of sexual assault to be touching of a sexual nature without consent).

⁴² N.Y. Penal Law §§ 130.52, 130.55, 130.50. Under New York law, the lack of consent necessary for a sexual abuse conviction may be shown by "any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct." N.Y. Penal Law § 130.05(2)(c).

⁴³ S. Afr. 2007 Amend. Act §§ 3-9. Other examples from the jurisdictions surveyed include Brazil, Braz. Crim. Code arts. 213, 215 (rape defined as sexual penetration, or the active or passive practice of any other libidinous act); Fr. Crim. Code arts. 222-22, 222-22-1, 222-27-222-31 (prohibiting and prescribing punishment for "sexual aggression," understood as sexual contact without consent and without penetration). Swed. Penal Code ch. 6, § 1 (defining rape to include sexual act "comparable" to sexual intercourse) & § 2 ("sexual coercion," defined as coerced sexual act other than rape); Cal. Penal Code § 243.4 ("sexual battery" is nonconsensual touching, directly or through clothing, of intimate part of another person); 18 Penn. Cons. Stat. Ann. § 3101, 3126 (criminal "indecent assault" includes nonconsensual touching of another person's sexual parts for purpose of arousing or gratifying sexual desire).

⁴⁴ Haiti Draft Law Art. 280 (emphasis added).

⁴⁵ *Id.* at Art. 279 (emphasis added).

New York, where “aggravated sexual abuse” is the use of a finger or object to penetrate a victim who is “physically helpless” or a child;⁴⁶ Sweden, where “sexual exploitation” is a sexual act induced by gross abuse of the victim’s dependency, lack of consciousness, mental disturbance, or other helpless state;⁴⁷ and Canada, which protects persons with a mental or physical disability against being induced by anyone in a position of responsibility or authority to touch themselves or another person “for a sexual purpose,” without consent.⁴⁸

Haiti Draft Law

There is no clear international norm in this area, but the drafters may want to consider expanding the acts that are prohibited when they involve persons with limited capacity to consent. In addition, see recommendation on p. 17 to criminalize sexual contact with persons who are temporarily or permanently incapable of consent.

3. Acts against children

Beyond defining an age of consent, below which any sexual contact with a child is criminal, nearly all jurisdictions provide children with additional protection against sexual abuse. Many jurisdictions, for example, punish sexual crimes against the youngest victims with the greatest penalties.⁴⁹ Some countries address children’s vulnerability to sexual exploitation in other ways. South Africa is a model in this respect, with prohibitions against any form of involvement with paying for a child to perform a sexual act or arranging anyone’s sexual access to children (regardless of the child’s consent); “sexual grooming of children,” meaning doing anything to prepare or induce a child to engage in a sexual act; or compelling children to observe sexual acts.⁵⁰ California, New York, Brazil and Sweden are among the other jurisdictions with some or all of these provisions.⁵¹

Haiti Draft Law

The draft law does not give children any special protection against sexual crimes. However, it is in accordance with the general practice in that, as previously noted, the penalty for rape is increased when the victim is a child under the age of 15.⁵² In

⁴⁶ N.Y. Penal Law §§ 130.66, 130.67, 130.70.

⁴⁷ Swed. Penal Code ch. 6, § 2.

⁴⁸ Can. Crim. Code § 153.1(1).

⁴⁹ See, e.g., N.Y. Penal Law §§ 130.25, 130.30 & 130.35 (escalating gravity of offense when victim is under 17, 15, and 11); Cal. Penal Code § 264.1 (enhancing penalty for crimes committed against child under 14); Fr. Crim. Code art. 222-24 (enhancing penalty for rape when victim is under 15).

⁵⁰ S. Afr. Amend. Act §§ 17-20.

⁵¹ Cal. Penal Code §§ 266h, 266i, 266j; N.Y. Penal Law §§ 235.22, 263.05, 263.10, 265.15; Braz. Crim. Code arts. 218, 218-A, 218-B; Swed. Penal Code ch. 6, §§ 4, 5, 8, 9 & 10. Similarly, while not thoroughly researched for this report, a number of jurisdictions, including South Africa, Canada, California, and New York, criminalize making, displaying, distributing and/or possessing child pornography. See, e.g., Can. Crim. Code § 163.1; S. Afr. Amend. Act §§ 10, 19-20; N.Y. Penal Law §§ 235.22, 263.05, 263.10 & 265.15; Cal. Penal Code § 311.4.

⁵² Haiti Draft Law Art. 280.2, ¶ 2.

⁵³ *Id.* at Art. 281.4.

addition, prostituting a child under the age of 16 triggers harsher sentencing.⁵³ These provisions are consistent with customary criminal law but the basis for making a distinction between 15 and 16 year old victims in the penalties is not clear. **The drafters may wish to consider adopting the practice of many jurisdictions, of enacting an increased penalty for sexual crimes against any minor, with penalties that are further augmented when the victim is of a very young age, such as under 15.**

4. Incest

All but one of the jurisdictions studied—Brazil—define incest as a specific crime.⁵⁴ The particular family relationships that give rise to the crime of incest vary among the jurisdictions studied, with some defining incest as sexual intercourse with an offspring, a grandchild or full blood sibling,⁵⁵ and others including a broader group, such as “ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood.”⁵⁶ France also includes any member of the family having legal or actual authority over the victim.⁵⁷ South Africa includes in its definition all persons “who are not legally permitted to marry one another,” which includes persons related as a result of adoption.⁵⁸ Among the jurisdictions studied, incest is a crime regardless of the age of the persons involved, except in France, whose incest law specifically protects only “underage” persons.⁵⁹

Haiti Draft Law

The draft law fails to comply with international norms, in that it does not define incest as a specific crime. Rape by a parent or guardian carries an increased penalty and results in cessation of parental rights, but this is too narrow a provision. The statute should criminalize sexual contact with minors within the family, and this prohibition should reach all sexual contact, not only contact that meets the statutory definitions for other crimes. Addressing this gap in the law is critical to protecting children. **The drafters should consider providing a definition for incest, as is often found in customary criminal law, and including it as a separate and distinct crime. Suggested language appears in the mark-up.**

⁵⁴ While Brazil does not have a specific crime of incest, sexual offenses carry higher penalties when committed by someone having authority over the victim, such as a parent, step-parent, uncle/aunt, or brother/sister. See Braz. Crim. Code, art. 226 II.

⁵⁵ See Swed. Penal Code ch. 6, § 7; Can. Crim. Code § 155.

⁵⁶ 18 Pa. Cons. Stat. Ann. § 4302; see also N.Y. Penal Law § 2225.24.

⁵⁷ Fr. Crim. Code art. 222-31-1.

⁵⁸ S. Afr. Amend. Act § 12(1).

⁵⁹ Fr. Crim. Code art. 222-31-1.

5. Crimes involving the Internet

Recognizing that the law cannot stay static and must respond to changing risks, some jurisdictions are amending their laws to protect against dangers posed by the Internet, to both adults and children. South Africa, Brazil and Canada prohibit online communications with a child for sexual purposes.⁶⁰ In France, the fact that the perpetrator of a sexual crime initiated contact with the victim online can add five years to the perpetrator's sentence,⁶¹ and in New York, a defendant who engages in sex with a child after contacting the victim online faces an additional five years added to the maximum sentence.⁶²

Haiti Draft Law

There is no mention of Internet-related sexual crimes in the draft law. Although the problem of adults using the Internet to find targets for sexual crimes might not currently be an issue in Haiti, it may become a concern in the future. **Thus, the drafters may want to consider including language prohibiting online communications with a child for a sexual purpose.**

6. Attempting, aiding and abetting

Most jurisdictions studied also impose criminal liability for an attempt to commit a sexual crime, or for aiding or abetting another in committing a sexual crime, regardless of whether the underlying crime involves the use of force.⁶³

Haiti Draft Law

The draft law criminalizes attempted sexual assault and attempted rape.⁶⁴ However, no mention is made of those who aid or abet a sexual crime. **Especially in light of the high incidence of group assaults in the encampments, the drafters should impose criminal liability upon persons who aid or assist the perpetrator of sexual crimes. Suggested language appears in the mark-up.**

⁶⁰ S. Afr. Amend. Act § 18(2)(d)(ii); Braz. Law No 8.069, of 13 July 1990 ("Law for the Protection of Children and Teenagers"), art. 241-D; Can. Crim. Code § 172.1.

⁶¹ Fr. Crim. Code §§ 222-24, 222-28.

⁶² N.Y. Penal Law §§ 255.26-255.27.

⁶³ See, e.g., Swed. Penal Code ch. 23, § 1 (imposing criminal liability where a person attempts a crime and there was a danger that such attempt would lead to the completion of the crime or completion was precluded only because of fortuitous circumstance); *id.* § 4 (imposing criminal liability where a person furthers a crime by advice or deed or induces another to commit a crime); S. Afr. Amend. Act § 55; Fr. Crim. Code art. 121-7 (imposing criminal liability for aiding or abetting the commission of a crime or offense or causing the crime or offense to be committed); Braz. Crim. Code art. 14, II (attempt); Cal. Penal Code § 264.1 (aiding and abetting rape); Can. Crim. Code § 21 (defining those who aid or abet another in committing an offense as "part[ies]" to the offense).

⁶⁴ Haiti Draft Law Arts. 280 and 280.1.

C. Trial Procedures

The jurisdictions studied have adopted statutes that govern aspects of trial procedure in order to improve the fairness of criminal proceedings involving sexual offenses.⁶⁵

1. Evidentiary requirements

Historically, rape prosecutions were often hampered by extraordinary corroboration requirements, which reflected not only the unique nature of sexual crimes, but also a distrust of women's accounts of rape.⁶⁶

Most of the jurisdictions studied have done away with these requirements, and provide that the victim's testimony can be sufficient to convict, without corroborating evidence.⁶⁷ Some countries state this explicitly in their criminal codes; for example, Canada specifies that no corroboration is required for a conviction under the sexual assault law.⁶⁸ In some jurisdictions, this is a matter of case law.⁶⁹ South African law specifies that a complainant's previous consistent statements are admissible as evidence, that delay in reporting a rape cannot be the basis of any negative inference, and warns judges against treating a complainant's testimony "with caution" simply because the complaint is of a sexual assault.⁷⁰ Of the jurisdictions studied, only Brazil requires a forensic examination for conviction, and even there, if the rape is reported at a time when it is no longer possible to perform a forensic examination, testimony of the victim and witnesses can suffice for conviction.⁷¹

Haiti Draft Law

Notably, the draft law is silent on whether the victim's testimony alone can be sufficient to convict a perpetrator. It is unclear whether the Haiti draft law follows the approach indicated by human rights norms and followed by most jurisdictions studied that no corroborating evidence, including a medical certificate, is required for a rape conviction. **The drafters should make clear that the victim's testimony can be sufficient to convict, without corroborating evidence. A suggestion for such a provision appears in the mark-up.**

⁶⁵ Additional information about policies governing prosecutors and judicial officers is found below in Part III(B).

⁶⁶ See Futter & Mebane, *supra* note 8, at 76.

⁶⁷ Of course, as with any crime, the availability of independent evidence to support a victim's account will make prosecution more likely and enhance the possibility of its success.

⁶⁸ Can. Crim. Code § 274.

⁶⁹ See, e.g., *People v. Garcia*, 89 Cal. App. 4th 1321 (2001) (California); *Commonwealth v. Hyatt*, 401 Pa. Super. 14 (1990) (Pennsylvania); Cass. Crim., 15 December 1999, No. 99-80.532 (France) (stating that the victim's testimony can be sufficient for a rape conviction, and that a victim's consistent statements over time supported her credibility).

⁷⁰ S. Afr. Amend. Act §§ 58-60.

⁷¹ Brazil Crim. Procedure Code art. 158.

2. Protecting complainants' privacy

(a) Rape shield laws

Recognizing that rape victims historically have been reluctant to press charges in part because of their often humiliating treatment during trial, many jurisdictions have enacted provisions to safeguard a complainant's privacy. Statutes that limit the introduction of evidence about a complainant's personal sexual history are known as "rape shield" statutes. Among the jurisdictions studied, rape shield statutes are present in South Africa,⁷² Canada⁷³ and in the states of California, New York and Pennsylvania.⁷⁴ In these jurisdictions, the use of evidence of past sexual conduct of the victim is generally forbidden, with some exceptions such as specific instances of the victim's prior sexual conduct with the defendant;⁷⁵ where such evidence is needed to show the defendant's good faith belief that the victim consented;⁷⁶ or where the court finds this type of evidence otherwise relevant.⁷⁷ Two states specify that evidence concerning the manner in which the victim was dressed at the time of the offense is admissible only if the court finds it suitable in the interest of justice.⁷⁸

Haiti Draft Law

The Haiti draft law includes a "rape shield" provision in that it prohibits the Judge of Violence Against Women from discussing the sexual history of the victim.⁷⁹ **This is consistent with international norms. The drafters should consider adding a provision that prohibits evidence about how the victim was dressed at the time of the offense. A suggestion for such a provision appears in the mark-up.**

(b) Protecting the victim's identity

The identity of the victim of a sex offense is protected in all jurisdictions studied, either by statutory provision,⁸⁰ upon request by the victim to the relevant authority;⁸¹ or based on specific legislation related to press freedom.⁸²

⁷² S. Afr. Crim. Procedure Act 51 of 1977, § 227(2), and Dep't of Justice, *National Guidelines for Prosecutors in Sexual Offences Cases*, ¶ 10.

⁷³ Can. Crim. Code § 276.

⁷⁴ Cal. Evidence Code § 1103(c); N.Y. Crim. Procedure Law §§ 60.42, 60.43; 18 Pa. Cons. Stat. § 3104(a).

⁷⁵ N.Y. Crim. Procedure Law §§ 60.42, 60.43; 18 Pa. Cons. Stat. § 3104(b).

⁷⁶ Cal. Evidence Code § 1103(c)(1).

⁷⁷ S. Afr. Crim. Procedure Act 51 of 1977, § 227(2).

⁷⁸ Cal. Evidence Code § 1103(c) (2); N.Y. Crim. Procedure Law § 60.48.

⁷⁹ See Art. 482..

⁸⁰ N.Y. Civil Rights Law § 50-b; Cal. Penal Code § 293.5; Braz. Crim. Code art. 234-B; Can. Crim. Code § 486.4(1); S. Afr. Amend. Act § 66(2); Sweden, Offentlighets-och Sekretesslagen (2009:400) (Public Access to Information and Secrecy Act).

⁸¹ See, e.g., Adult Sexual Assault Response Team (SART) Protocol for San Mateo County, California 16 [hereinafter San Mateo SART Protocol]; San Diego, California Sexual Assault Response Team (SART) Standards of Practice 28 [hereinafter San Diego SART Standards].

⁸² Fr. Art. 39 *quinquiès* of the Law dated 29 July 1881 on the freedom of press.

Haiti Draft Law

The Haiti draft law provides that the victim's privacy, including that of the victim's dependents, should be protected during the hearing (Art. 493). The law also provides that the authority who receives the complaint may take all appropriate measures of protection and the security for the victim (Art. 473), and that the victim may request orders of protection from the court at any stage (Art. 489). Although these provisions could result in orders to protect the victim's identity even outside of the hearing, the law is not explicit. **The drafters may wish to consider making more explicit the victim's right to request protection of her identity, or may wish to include a separate provision stating that a victim's identity shall be protected throughout all stages of the proceeding.**

(c) Special provisions for minors

All jurisdictions studied make special provisions to obtain the testimony of minors about sexual offenses perpetrated against them. These provisions reflect a general concern with the child's psychological and emotional stress, as well as a special concern in handling such cases expeditiously.⁸³

These provisions center on allowing the child to give testimony in a comfortable setting that avoids direct confrontation with the defendant in an open courtroom, while preserving the capacity of the defendant to challenge the testimony. The many approaches include allowing the child to testify by closed-circuit television or video display, or from behind a screen or a one-way mirror.⁸⁴ In Canada, when an accused is representing himself or herself, judges may appoint counsel for the sole purpose of cross-examining the child victim in order to avoid a traumatic confrontation with the accused.⁸⁵ Some courts allow testimony to be collected through interviews conducted by intermediaries (e.g., psychologists, pediatricians and child care workers);⁸⁶ or by interrogations recorded outside the court room and shown during trial.⁸⁷ Other jurisdictions provide for a special legal or psychological assistant to the minor.⁸⁸ The jurisdictions studied also protect the child's identity.⁸⁹ In Brazil, the investigation and prosecution of rape crimes is confidential,⁹⁰ and witnesses under the age of 14 are not

⁸³ Cal. Penal Code § 1048(b); San Mateo County, California Children's Sexual Abuse Protocol at 22; N.Y. Exec. Law § 642-a; 42 Pa. Cons. Stat. § 5985; Swed. Code Judicial Procedure ch. 5, §§ 1, 3; S. Afr. Crim. Procedure Act 51 of 1977, § 170A; Brazil, Law for the Protection of Children and Teenagers.

⁸⁴ N.Y. Crim. Procedure Law §§ 190.30(4) & 190.32; Cal. Penal Code §§ 1346-1347.5; S. Afr. Crim. Procedure Act §§ 158(3) & 170A; Can. Crim. Code § 486.2(1).

⁸⁵ Can. Crim. Code § 486.3(1).

⁸⁶ S. Afr. Crim. Procedure Act §§ 158(3) & 170A.

⁸⁷ Swed. Code Judicial Procedure ch. 5, §§ 1, 3; Fr. Crim. Procedure Code art. 706-52.

⁸⁸ N.Y. Exec. Law § 642-a; Swed. Code Judicial Procedure ch. 5, §§ 1, 3; Fr. Crim. Procedure Code arts. 706-51-1 & 706-53; Can. Crim. Code § 486.1(1).

⁸⁹ Can. Crim. Code § 486.4(1); S. Afr. Crim. Procedure Act § 154; N.Y. Civil Rights Law §50-b; Braz. Crim. Code art. 234-B.

⁹⁰ Braz. Crim. Code art. 234-B.

required to give sworn testimony, or to provide personal details such as name, age or home address.⁹¹

Haiti Draft Law

Unlike other jurisdictions studied, the Haiti draft law does not appear to include any special provisions to protect minors involved during a trial. **The drafters should include child-protection provisions such as those described above. Suggestions for such provisions appear in the mark-up.**

(d) Limiting public access to proceedings

Except in New York, all the jurisdictions studied enable judges in some circumstances to limit access to courtrooms during proceedings on sexual offenses. For instance, in France, judges can deny courtroom access to individuals under the age of eighteen years old, and the victim is entitled to ask for a closed hearing.⁹² Canadian law allows judges to exclude the public from proceedings including those involving sexual offenses, as well as proceedings involving child witnesses.⁹³ In Brazil, judges may also limit access to the courtroom generally if publicity may result in scandal, inconvenience, or serious danger.⁹⁴

Haiti Draft Law

As in the other jurisdictions studied, the Haiti draft law includes provisions to protect the victim during the trial process. For example, although the perpetrator is required to attend all hearings, the parties are to be heard separately in order to avoid any confrontation between the alleged perpetrator and the victim.⁹⁵ The court in Haiti, as is the case in some of the jurisdictions studied, can hold hearings behind closed doors without public access.⁹⁶ **These provisions are consistent with customary criminal law.**

⁹¹ Braz. Crim. Procedure Code art. 208.

⁹² Fr. Crim. Procedure Code art. 306.

⁹³ Can. Crim. Code § 486. A judge who refuses a prosecutor's or witness's request for exclusion of the public from proceedings on sexual offense charges must state the reasons. *Id.* § 486(3).

⁹⁴ Braz. Crim. Code art. 792 § 1. Likewise in South Africa, S. Afr. Crim. Procedure Act § 153, and Sweden, Swed. Code of Judicial Procedure ch. 5, §§ 1, 3, certain circumstances allow for closing the courtroom in criminal proceedings.

⁹⁵ Haiti Draft Law Art. 481.

⁹⁶ *Id.* Art. 482.

D. Punishment

The base level punishment for rape in the jurisdictions studied ranges from two to six years imprisonment in Sweden, to fifteen years imprisonment in France.⁹⁷

In some jurisdictions, monetary fines may be imposed in addition to imprisonment for certain sexual crimes. For example, in California, a fine not exceeding \$ 10,000 may be imposed in addition to two to four years in a state prison for sexual battery.⁹⁸ In France, a € 75,000 fine may be imposed along with a five year prison sentence for sexual aggressions other than rape.⁹⁹

The jurisdictions studied vary widely in the level of punishment imposed for an attempted sexual crime, or for aiding and abetting the commission of a sexual crime. At the most punitive end of the spectrum, South Africa imposes the same level of punishment for an attempted sexual crime that it imposes for the underlying crime itself.¹⁰⁰ South Africa and France also both punish an aider or abettor of a sexual crime at the same level as the underlying actor.¹⁰¹ At the less punitive end of the spectrum, for an attempted sexual crime, Brazil imposes one-third to two-thirds of the penalty that would have been imposed had the crime been fully committed.¹⁰²

All jurisdictions studied increase penalties for sexual crimes when certain aggravating factors are present. Such factors can significantly increase the punishment for sexual crimes. For example, in France, when a rape results in the death of the victim, the term of imprisonment increases from fifteen years to thirty years,¹⁰³ and in Canada, use of a firearm or participation in a gang rape can increase the maximum sentence to fourteen years from ten, while aggravated sexual assault can draw a sentence of life imprisonment.¹⁰⁴

Some aggravating factors concern the means used to commit the crime, for example, the use of drugs to induce a victim's compliance,¹⁰⁵ or the use of weapons.¹⁰⁶ Canada particularly targets sexual assaults involving weapons with mandatory minimum

⁹⁷ Swed. Penal Code ch. 6, § 1; Fr. Crim. Code art. 222-23. In Canada, the crime of "sexual assault," which consists of any touching of a sexual nature without consent, can be charged as a summary offense with a maximum sentence of 18 months, or as an indictable offense with a maximum penalty of 10 years. Can. Crim. Code § 271.

⁹⁸ Cal. Penal Code § 243.4.

⁹⁹ Fr. Crim. Code art. 222-27. Where aggravating circumstances are present, the penalty increases to a €100,000 fine and seven years imprisonment. *Id.* art. 222-28.

¹⁰⁰ S. Afr. Amend. Act § 55(a).

¹⁰¹ S. Afr. Amend. Act § 55(b); Fr. Crim. Code art. 121-7.

¹⁰² Braz. Crim. Code art. 14.

¹⁰³ Fr. Crim. Code art. 222-25.

¹⁰⁴ Can. Crim. Code §§ 272(2) (b) & 273(2) (b).

¹⁰⁵ See, e.g., N.Y. Penal Law § 130.90 (illegal drugs aggravate sex offenses when used without consent of victim); 18 Pa. Cons. Stat. Ann. § 3121 (if drugs are used in commission of rape, an additional term of ten years and an amount not to exceed \$100,000 can be levied against the defendant); Cal. Penal Law § 667.61(e)(6) (administering controlled substance to person while committing sexual offense results in minimum sentence of 15 years to life); Fr. Crim. Code arts. 222-24 (enhanced penalty where rape committed by a person who was intoxicated or on drugs).

¹⁰⁶ See, e.g., Can. Crim. Code § 272(1) (a); Fr. Crim. Code arts. 222-24, 222-28; N.Y. Penal Law § 70.02 (defining "violent felony" offenses, including rape and other sexual crimes) & §§ 265.08-265.09 (criminalizing use of gun to commit violent felony offense).

sentences and enhanced penalties for repeat offenders.¹⁰⁷ Other aggravating factors concern what may be thought of as the motive for committing the crime: sexual crimes committed for financial gain or as an abuse of authority over the victim may be more seriously punished.¹⁰⁸ The degree of injury to the victim is also taken into account. Canada, Brazil, France and Sweden all enhance charges when more than one person takes part in a sexual assault,¹⁰⁹ and many jurisdictions impose enhanced sentences where a sexual crime results in serious injury or death.¹¹⁰

Sexual crimes are often punished more severely when they are committed against children or against adults of limited capacity. In some jurisdictions, such as New York, age or limited capacity determine the degree of the offense, and thus the penalty applicable to the offense.¹¹¹ French law has a comprehensive list of aggravating circumstances, including young age and particular physical or mental vulnerability, which enhance the penalty for rape by five years.¹¹² In South Africa, under certain circumstances, including the victim being physically disabled or mentally ill, rape can lead to a minimum sentence of twenty-five years where a first offense otherwise would lead to a minimum sentence of ten years imprisonment.¹¹³

Finally, particularly in the U.S. jurisdictions reviewed, repeat sexual offenders are subject to increased penalties. California and Pennsylvania allow imposition of a sentence of 25 years or more upon a second conviction for a sex offense.¹¹⁴ New York

¹⁰⁷ Can. Crim. Code §§ 272-273.

¹⁰⁸ See, e.g., S. Afr. Amend. Act § 56(7) (enhancing sentence where offender intends to or in fact does gain from the commission of the offense); Fr. Crim. Code art. 222-28 (aggravated circumstance where the aggression was committed by a person having legal or de facto authority over the victim or by a person who abused the power granted by his or her position); Braz. Crim. Code art. 226 (aggravated circumstance where sexual crime is committed by someone having authority over the victim).

¹⁰⁹ Can. Crim. Code § 272(1) (d); Brazil Crim. Code art. 226; Fr. Crim. Code arts. 222-24, 222-28; Swed. Penal Code ch. 6, § 1 (requiring consideration of multiple perpetrators in determining whether crime is “gross rape” with higher punishment).

¹¹⁰ See N.Y. Penal Law § 130.96 (first degree sexual crime becomes predatory sexual assault when in the course of the crime or immediate flight there from, the defendant causes serious physical injury to the victim); Cal. Crim. Code § 667.61(d) (6)-(7) (establishing minimum sentence of 25 years to life where defendant causes great bodily injury to victim or, for victim under 14, bodily harm); Fr. Crim. Code arts. 222-24 (providing enhanced sentence when rape causes mutilation or permanent impairment), 222-25 (same, where rape leads to the death of the victim), 222-26 (same, where rape was preceded, accompanied or followed by torture or barbarity); Braz. Crim. Code art. 217-A; Can. Crim. Code § 273 (“aggravated sexual assault” where assailant also wounds, maims, disfigures or endangers the life of the complainant).

¹¹¹ N.Y. Penal Law §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.55, 130.60 and 130.65.

¹¹² Fr. Crim. Code art. 222-24; see also *id.* art. 222-29 (same factors enhance penalty for sexual aggression). California law similarly sets higher sentences for sexual offenses committed under a number of circumstances, including against minors, the elderly, or people with disabilities. Cal. Penal Code §§ 288.3(c) & 667.9(a)-(b). Offenders who commit acts including kidnapping, burglary, torture, or binding the victim during a sexual assault are subject to minimum prison terms of 15 or 25 years. *Id.* § 667.61.

¹¹³ S. Afr. Amend. Act § 105. Brazil also increases penalties when the victim is young or lacking in mental capacity. Braz. Crim. Code art. 217-A. Sweden does not enhance penalties for especially vulnerable adults, but does require consideration of a child’s young age in deciding whether a crime is subject to higher penalties as “gross rape of a child.” Swed. Penal Code ch. 6, § 4.

¹¹⁴ Cal. Crim. Code § 667.71; 42 Pa. Cons. Stat. § 9718.2. The Pennsylvania law sets the sentence at life in prison for a third conviction of a sexual offense. *Id.*

classifies many sexual offenses as “violent felonies,” and imposes lengthy mandatory minimum sentences on repeat offenders.¹¹⁵

Haiti Draft Law

Haiti’s draft law proposes a minimum ten years of hard labor for rape.¹¹⁶ In the scale of severity, Haiti’s proposed law is toward the harsher end of the spectrum. Like all the other jurisdictions studied, Haiti’s draft law also imposes increased penalties when specific aggravating factors are present. For example, a defendant can be sentenced to forced labor for life if the crime involved: (1) multiple defendants; (2) drugs or weapons; or (3) resulted in the victim’s death, mutilation or permanent disability. The Haiti draft law – as do the laws in the jurisdictions studied – imposes increased punishment for rape involving minors.

The Haiti draft law provides for civil remedies for rape available where the death of the victim results from the crime and also where the loss of real property or chattels of the victim occurs. The draft is unclear whether civil liability for other damages suffered by the victim is granted. See Arts. 57-58. Unlike some of the jurisdictions studied, the Haiti draft law does not provide for monetary fines for rape defendants. **The drafters may wish to consider imposing broader liability on perpetrators to compensate victims for damages suffered, and imposing fines on persons convicted of rape.**

¹¹⁵ N.Y. Penal Law §§ 70.02, 70.04, 70.07, 70.08 & 70.10. See also *id.* § 130.53 (defining crime of “persistent sexual abuse”).

¹¹⁶ Haiti Draft Law Art. 280.1.

Chapter III: The Law in Practice

Chapter II shows how the law of rape has been reformed to eliminate many of the barriers that impeded justice for victims of sexual assault in the past. By making the absence of consent the defining feature of unlawful sexual contact, and by broadening the types of contact that are treated as criminal offenses when imposed without consent, the law now recognizes that rape and other forms of sexual abuse violate the victim's bodily integrity. Rape shield laws and provisions for protecting victims from public exposure reduce the humiliation that has often accompanied bringing such private violations to the attention of the authorities for investigation and prosecution. Authorized punishments are often severe.

Statutes alone, however, do not suffice to bring about true reform in the law of rape, and the jurisdictions studied recognize this.¹⁰³ The reality is that in many, if not most, societies, victims of rape and other sexual abuses continue to experience stigma and shame. Historically, these experiences often have been compounded by investigation and prosecution practices to such an extent that victims compared their experience of bringing rape charges to being "raped" for a second time.¹⁰⁴

For these reasons, the jurisdictions studied have gone beyond statutory reform to implement policies and procedures that ease the suffering of victims and that facilitate the reporting, investigation, and prosecution of sexual offenses. While there is no sharp dividing line between supporting the victim and facilitating prosecution, Part A of this chapter focuses primarily on victim support measures, and Part B focuses on police, prosecution and judicial procedures.

A. Care and Support for Victims of Sexual Assault

1. Specially trained medical personnel

Hospitals are often the first agencies that victims of rape have contact with. Most of the jurisdictions studied have established specialized rape treatment centers in at least some locations, or have specialized training for medical staff who work with rape victims.

¹⁰³ Some scholars and feminist activists caution against relying on law reform per se as a mechanism for change as it, among other things, "leaves untouched the institutions and practices that are at the root of women's subordination." Kwong-leung Tang, *Rape Law Reform in Canada: The Success and Limits of Legislation*, *Int'l Journal of Offender Therapy and Comparative Criminology*, 42(3), 1998.

¹⁰⁴ South Africa's National Policy Framework for the Management of Sexual Offence Matters (March 2011) [hereinafter S. Afr. Framework], available at http://www.ecdlc.org.za/images/stories/downloads/National_Policy_Framework_Management_Sexual_Offences_2011.pdf, describes this experience as "secondary victimization," and defines it as "an attitude, process, action and /or omission that may intentionally or unintentionally contribute to the re-victimization of a person who has experienced a traumatic incident as a victim through failure to treat the victim with respect and dignity, disbelief of the person's account, unsympathetic treatment, blaming the victim, [or] lack of (or insufficient) coordinated support services to assist the victim at interpersonal, institutional and broad social level." S. Afr. Framework 9-10. The recent report of a roundtable discussion on sexual violence sponsored by the United States Department of Justice and the White House described hostility and disbelief toward victims as major reasons that only one-fourth to one-third of rapes and other sexual assaults in the United States are ever reported to police. *Sexual Violence in the United States: Summary of the Roundtable Proceedings* 6, 11-13 (March 2011), available at <http://www.ovw.usdoj.gov/sexualviolence-report-march.pdf>.

In Ontario, Canada, for example, there are thirty-five hospital-based Sexual Assault/Domestic Violence Treatment Centers with staff available twenty-four hours a day who specialize in medical care and emotional support for victims of sexual assault.¹⁰⁵ Similarly, South Africa, Sweden, France, California, New York, and Pennsylvania all have dedicated rape crisis centers in some locations.¹⁰⁶

The staff in these centers are specially trained to conduct the medical examination of sexual assault victims, including the collection of physical evidence for possible prosecution, with sensitivity to their recent experience of violation.¹⁰⁷ Some U.S. jurisdictions certify individuals who have had such specialized training as Sexual Assault Nurse Examiners or Sexual Assault Forensic Examiners.¹⁰⁸ These examiners may also have training in interviewing mentally disabled or dependent adult victims of sexual crimes.

South Africa has developed a model of holistic and victim-centered care for adult and child victims of sexual assault that is recognized by the United Nations General Assembly as a “world best-practice model” in the field of gender-violence management and response. The Thuthuzela Care Centers, which take their name from a Xhosa word meaning “comfort,” are one-stop facilities located in public hospitals in communities where the incidence of rape is particularly high. The centers transport victims from busy police stations to a quiet and welcoming environment. Crisis counseling begins en route. The patient receives an explanation of the medical examination procedure and gives consent. After the exam, the victim has an opportunity to bathe and put on fresh clothes before meeting with a trained investigator, who takes a statement. Immediate medical treatment is provided and longer-term medical and psychological care are arranged. The victim is offered transport home or, if indicated, to another safe place.¹⁰⁹

Many communities in the U.S. have adopted the Sexual Assault Response Team, or “SART” model. A SART is an inter-disciplinary group of people representing medical, psychological, advocacy and criminal justice resources in the community who work under mutually adopted guidelines to give victims coordinated care and promote

¹⁰⁵ See http://www.satcontario.com/en/our_centres.php (describing rape crisis centers in Ontario).

¹⁰⁶ The preferred approach in California is either to take victim to a medical facility that is designed for sexual assaults or to consult with such a facility. See, e.g., San Mateo SART Protocol, *supra* note 70, at 5 (“Law Enforcement duties”). Victims who are not in a specialized facility should be seen by a Sexual Assault Nurse Examiner for a forensic examination. *Id.* New York has state-certified “SAFE Centers of Excellence.” These are hospitals that provide Sexual Assault Forensic Examiner services, which use an interdisciplinary approach, working with rape crisis centers, law enforcement, and prosecutors’ offices, while also providing psychological, social, and legal support. N.Y. Public Health Law § 2805-i(4-b). See also S. Afr. Framework, *supra* note 104, at 16-17 (recognizing need for special care, including Clinical Forensic Medical Centres to examine and treat victims of sexual assault).

¹⁰⁷ See also S. Afr. Framework, *supra* note 104, at 16 (noting victims’ need to be treated by “specially-trained personnel who are free of . . . discriminatory beliefs” such as “victim blaming”).

¹⁰⁸ See generally <http://www.health.ny.gov/nysdoh/safe/2004/safestandards2004attachment07.pdf> (setting forth standards for certification as a Sexual Assault Forensic Examiner in New York State); San Diego SART Standards, *supra* note 70, § 5.0 (Sexual Assault Forensic Examiner duties include “collecting evidence, maintaining the chain of custody, providing emotional support, treating for STD exposure and for injury, referring for follow-up care, consulting with law enforcement and prosecutors and testifying as an expert witness at trial”).

¹⁰⁹ <http://www.info.gov.za/aboutgovt/justice/npa.htm>; http://www.unicef.org/southafrica/hiv_aids_998.html.

effective prosecution of sexual assaults.¹¹⁰ For example, the SART in San Mateo County, California, includes county police, a hospital-based sexual assault treatment center, a rape victims advocacy and treatment organization, the district attorney's office, the government-run victim services agency, and a county agency that assists adults with mental disabilities and the elderly.¹¹¹ Members of the SART team have clear responsibilities for meeting the short-and long-term needs of victims of sexual violence. While collecting evidence to support an eventual prosecution is an important goal of the team, its governing protocol makes clear that victims will receive comprehensive services whether they do or do not elect to press charges.

Haiti Draft Law

See comments following next section.

2. Emergency medical care

In all of the jurisdictions studied, victims of sexual assault may obtain emergency medical care. This care generally includes emergency contraception and prophylaxis against HIV and other STDs.¹¹² South Africa, which has a high prevalence of HIV among the populace, requires the police to advise sexual assault victims of their right to get medical treatment, including prophylaxis against HIV infection and other medications that prevent sexually transmitted infections and pregnancy.¹¹³ Most jurisdictions studied also require police officers to offer victims immediate transportation to a medical facility.

Haiti Draft Law

The draft legislation details certain obligations of the government toward victims of sexual violence in Article 34, and focuses on measures to be implemented in the health sector in Articles 50-53, including the establishment of the Inter-Ministerial Commission for the Fight against Violence against Women. However, the draft does not clearly incorporate the international consensus that victims of sexual violence often experience extreme stigma and shame, and need to be treated by persons with specialized training, from the first report of a sexual assault onward. In addition, the draft Article 472 states that the authority receiving the complaint of violence must immediately refer the victim

¹¹⁰ See generally http://stopvaw.org/Sexual_Assault_Response_Teams.html (explaining SART concept and giving examples of similar approaches worldwide).

¹¹¹ See generally San Mateo SART Protocol, *supra* note 70.

¹¹² See, e.g., S. Afr. Amend. Act § 28; Sweden, *National Plan of Action for Health and Medical Services in the care of victims of sexual assault* 39; Government of Brazil, *Pacto Nacional pelo Enfrentamento à Violência contra as Mulheres* 25 (2010) [National Pact to Combat Violence Against Women] (describing plan to increase availability of prophylactic contraceptives, including "morning after pill," to rape victims), available at http://www.sepm.gov.br/publicacoes-teste/publicacoes/2010/PactoNacional_livro.pdf; Cal. Penal Code § 13823.11; N.Y. Public Health Law § 2805-p; 28 Pa. Code §§ 117.52-117.53.

¹¹³ S. Afr. Amend. Act § 28(3). In addition, alleged sex offenders in South Africa are subject to compulsory HIV testing. S. Afr. Amend. Act § 28(b). In California, victims can request that an alleged sex offender be ordered to undergo an HIV test, Cal. Health & Safety Code §§ 121050 & 121055, and in New York, a victim may request that a convicted sex offender be tested for HIV. N.Y. Crim. Procedure Law § 390.15.

to a nearby private or public medical facility for the appropriate medical exams. However, the current draft does not explicitly recognize the right of victims of sexual assault to be offered immediate care for the prevention of pregnancy, as well as sexually transmitted infections, following an attack. We concur with SOFA's comments according to which protection/prevention of sexually transmitted infections (STIs) and pregnancy should be offered following a rape. **We therefore recommend revisions to several articles to ensure appropriate training of medical and other personnel, the establishment of protocols for victim care and evidence collection, and the availability of necessary medical services. We also recommend that the Inter-Ministerial Commission consider the establishment of rape treatment centers and sexual assault response teams, to ensure coordinated care for victims and effective prosecution of perpetrators. Suggested language appears in the mark-up.**

3. Crisis advocacy and psychological support

In a number of the jurisdictions studied, victims have access to rape crisis advocates whose role is to support them in their immediate dealings with medical and police personnel. In Ontario, Canada, rape crisis counselors may be dispatched to provide immediate on-site service to victims (with the victim's consent) and may also be available for long-term assistance through community agencies.¹¹⁴ California recommends that the "first responders" to a sexual assault include a certified Sexual Assault Counselor,¹¹⁵ and Pennsylvania and New York both require hospitals that provide sexual assault emergency services to give victims an opportunity to consult with a rape crisis center or sexual assault counselor.¹¹⁶ Brazil maintains a hotline for rape victims to receive free and confidential support and advice.¹¹⁷

In addition, nearly all of the jurisdictions studied provide some form of continuing psychological care or trauma counseling for the victim. Brazil includes psychological assistance in its required emergency medical care and specifies that it continue to be provided to sexual assault victims for as long as necessary,¹¹⁸ and in France, victims may have counseling paid for through the victim indemnification commission.¹¹⁹ Local municipalities in Sweden must ensure that crime victims and their next of kin receive

¹¹⁴ See <http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp> (listing victim services provided in Ontario).

¹¹⁵ See, e.g., San Mateo SART Protocol, *supra* note 70, at 7 (requiring police officer to inform victim of the right to have Sexual Assault Counselor and other support person at the medical-legal evidentiary exam and any prior or subsequent interview with police or prosecutors). California hospitals may also have Rape Crisis Advocates available.

¹¹⁶ 28 Pa. Cons. Stat. § 117.52; N.Y. Public Health Law § 2805-i(3). See generally N.Y.S. Crime Victims Board, *The Rights of Crime Victims in New York State*,

<http://www.ovs.ny.gov/Files/Complete%20revisions%20to%20CV%20pamphlet%201%2015%2009.pdf>, 20-23 (detailing statutory rights of rape and sexual assault victims).

¹¹⁷ <http://www.sepm.gov.br/ouvidoria/central-de-atendimento-a-mulher>.

¹¹⁸ Braz. Administrative Ruling from the Ministry of Health No. 1.508, of 1 September 2005.

¹¹⁹ Fr. Crim. Procedure Code art. 706-3.

financial, practical, and psychological support.¹²⁰ South Africa similarly aspires to comprehensive services, and in one region a comprehensive protocol exists for the examination and treatment of victims to ensure that their clinical, psychological and forensic needs are addressed. However, no such protocol is implemented in other, more rural regions.¹²¹

Haiti Draft Law

The analyzed jurisdictions emphasize the availability of post-trauma assistance of the victim. The draft legislation is consistent with these best practices as it provides under Article 5 that women victims of violence are entitled to medical care and free legal assistance as well as follow-up in legal and administrative actions.

Article 5 also provides that women victims of violence are entitled to psychological support. However, we note that unlike the provision for free legal assistance, the draft does not specify that such support would be free of charge. **The drafters should consider confirming that psychological, medical, and legal assistance for victims shall be provided free of charge. Suggested language appears in the mark-up.**

4. Support through the legal process

Several of the jurisdictions studied make substantial efforts to support victims throughout the legal process. One notable example comes from Sweden, where crime victims in some locales are invited to attend a special pre-trial program at the courthouse where their case will be heard. The program includes a tour of the courthouse and talks that explain the trial process and the reactions commonly felt after being subjected to a crime.¹²² Victims who are treated in South Africa's Thuthuzela Care Centers have the opportunity to consult with prosecutors before the case goes to court, and to receive an explanation of the outcome of the trial process.¹²³

The Manhattan (New York) District Attorney's Office and Ontario (Canada) Victim Services Secretariat are examples of government agencies that provide comprehensive victim support, such as information to help victims understand the court process and

¹²⁰ Similarly, the crime victims assistance agency in New York City conducts interviews with victims, witnesses, and family members to assess social, emotional, and financial needs, and provides services that include crisis intervention, referrals to shelters and community agencies, accompaniment to court appearances, assistance for child victims, advocacy for government entitlements, and compensation assistance. The Victim Services Secretariat in the Canadian province of Ontario also provides crisis intervention and emotional support, as well as community agency referrals.

¹²¹ People Opposing Women Abuse, *Criminal Injustice: Violence against Women in South Africa* 12 (March 2010).

¹²² There is also an interactive online resource that prepares victims on what to expect when they go to court:

<http://www.courtintroduction.se> (English language version).

¹²³ http://www.unicef.org/southafrica/hiv_aids_998.html.

their role in it, and counseling to help victims deal with the emotional impact of victimization and the difficulties associated with participation in the legal process.¹²⁴

Sweden permits the prosecutor of a sexual offense to apply for appointment of a “plaintiff assistant” to provide legal and personal support to the victim throughout the investigation and trial. In New York, Pennsylvania, and California, rape crisis advocates or similar counselors can support the victim throughout the investigation, and prosecution processes.¹²⁵

Haiti Draft Law

The draft legislation does not provide for adequate support of the victim through the legal process. **The drafters should consider adding a provision to ensure that victims have adequate information and support throughout the investigation and prosecution processes. Suggested language appears in the mark-up.**

5. Financial assistance

All jurisdictions studied provide some form of financial assistance to victims of sexual assault, as part of general crime victim compensation schemes. The most limited of these is in South Africa. There, judges can enter a restitution order requiring a convicted criminal defendant to pay the costs of a victim’s medical costs, counseling, lost earnings, and vocational training, among other expenses; however, victims of impoverished defendants receive no money.¹²⁶ In France and Brazil, victims of violence are entitled to free medical and psychological care, and Brazil also provides free shelter care for victims and their children.¹²⁷ Sweden,¹²⁸ New York,¹²⁹ California,¹³⁰ and Pennsylvania¹³¹ have extensive compensation provisions. Canada’s is perhaps the most comprehensive. Funds are available for emergency counseling as well as immediate expenses such as crime scene clean-up, emergency accommodation and meals, transportation and dependent care. The Vulnerable Victims and Family Fund assists with the costs of participating in the legal process, such as travel to court, interpretation services when observing trials, and special accommodations as needed for victims with disabilities to

¹²⁴ See <http://manhattanda.org/witness-aid-services-unit> (listing services provided by Manhattan (New York) District Attorney’s Office); <http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp> (listing victim services provided by Ontario Victim Services Secretariat).

¹²⁵ In California, the victim has a statutory right to have an advocate present during follow-up interviews with law enforcement, the prosecutor, and the defense attorney. Cal. Penal Code § 679.04.

¹²⁶ The South African government is studying the feasibility of establishing a compensation fund for crime victims. Media Statement by the South African Law Reform Commission Concerning its Investigation into Sentencing – A Compensation Fund for Victims of Crime (Project 82, 2011).

¹²⁷ Braz. Administrative Ruling from the Ministry of Health No. 1.508, of 1 September 2005. See <http://www.sepm.gov.br/subsecretaria-de-enfrentamento-a-violencia-contra-as-mulheres/coordenacao-geral-defortalecimento-da-rede-de-atendimento>; http://www.campanhapontofinal.com.br/download/informativo_01.pdf; http://www.violenciamulher.org.br/index.php?option=com_content&view=category&id=17&Itemid=11.

¹²⁸ Swed. Crim. Injuries Compensation Act (1978:413).

¹²⁹ See www.ovs.ny.gov/services/VictimCompensation.aspx.

¹³⁰ See <http://www.vcgcb.ca.gov/victims/coverage.aspx>.

¹³¹ See www.pacrimevictims.org.

testify. A provincial compensation board may provide longer-term funds for medical costs, therapy, legal services, travel, pain and suffering, and loss of income.¹³²

Haiti Draft Law

The jurisdictions studied demonstrate that the assistance and compensation of a victim is often taken care of by funds provided by the government. However, the draft does not create a fund to indemnify and support victims of violence. **Ideally, the drafters should consider creating a government fund to ensure complete assistance and compensation to victims. However, we recognize that Haiti's financial condition may not permit this at this time.**

6. Protection from the alleged assailant

In most jurisdictions studied, the victim may receive a protective order from the court to prevent contact with the alleged sex offender. Brazil, Canada, Sweden, and the U.S. jurisdictions all provide that the victim of an alleged sexual attack may receive a court order protecting against contact with the alleged offender. For example, in Brazil, police may request that the judge enter a protective order prohibiting the aggressor from coming close to the victim, the witnesses or their families, prohibiting the aggressor from frequenting specific places, requiring the aggressor to move out of the home (if the aggressor shares a home with the victim), restricting visiting rights of the aggressor with his/her children, and prohibiting the aggressor from selling common property owned with the victim.¹³³ France and Brazil both permit more extreme measures to keep the complainant safe from the defendant, allowing the defendant to be temporarily jailed during the investigation or prosecution.¹³⁴ Sweden and France both allow the victim's address to be kept secret during proceedings, as well.¹³⁵

Haiti Draft Law

The draft law provides comprehensive measures to protect the victim of violence from the aggressor.¹¹⁷ In this respect, it is consistent with the best practices identified in the studied jurisdictions. The law mandates that provisional measures should be taken to

¹³² For an example from one province, see:

<http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#crisisAssistance>.

¹³³ Braz. Law No. 11.340, of 7 August 2006, arts. 22-24; *see also, e.g.*, Cal. Penal Code §§ 136.1 & 136.2 (authorizing protective order); Toronto Police, *A Guide for Sexual Assault Survivors*,

http://www.torontopolice.on.ca/publications/files/a_guide_for_sexual_assault_survivors.pdf; Swed. Restraining Orders Act § 24.

¹³⁴ Fr. Crim. Procedure Code art. 137 et seq.; Braz. Laws No. 8.072, of 25 July 1990 and No. 11.340, of 7 August 2006, art. 22-24.

¹³⁵ Swed. National Registration Act § 16; ; Fr. Civil Code art. 9.

¹¹⁷ Haiti Draft Law Arts. 9, 473, 489-498

¹¹⁸ *Id.* Art. 473.

protect the safety of the victim immediately after the report is made.¹¹⁸ However, the draft law seems to permit these measures to be taken only after an interview of the alleged perpetrator or a brief verification of the facts alleged in the complaint made by an immediate visit to the scene.¹¹⁹ This requirement is inconsistent with the practice in many jurisdictions, to allow a victim to obtain a provisional ex parte order of protection, and may unnecessarily endanger victims. **The drafters may want to consider removing these obstacles to provisional safety measures. This suggestion appears in the mark-up.**

B. Rape Reporting, Investigation and Prosecution

1. Reporting and investigation

The initial report of rape is generally made to the police, though in some jurisdictions, including France and Brazil, the initial report may be made to the Public Prosecutor or by other means. At one time, the laws in many jurisdictions provided that only rapes that had been immediately reported would be investigated, reflecting a distrustful attitude toward complainants. Such requirements generally are no longer in force.¹²⁰ South African guidelines, for example, require police to accept a report of a sexual offense without regard to when or in which jurisdiction it occurred.¹²¹ Training for New York City police specifies that it is not uncommon for victims of rape to delay in reporting to police, and advises officers to document the reason for the delay, taking care to avoid implying that the victim was wrong to delay reporting.¹²² Some jurisdictions place clear limits on when a sexual offense can be reported, for example, six months from the date on which the offender is identified in Brazil;¹²³ and ten years from a rape or three years from a sexual assault in France (corresponding to the statute of limitations for these offenses).¹²⁴

In an effort to reduce the trauma to victims and improve the likelihood that they will prosecute an offense, some jurisdictions provide detailed instructions for the initial interview of a rape victim by police officers. South Africa, for example, directs the responding officer to talk with the victim in a private area; to allow the presence of another person if requested by the victim; and to allow the victim to talk without interruption, while offering reassurances that everything possible will be done to prevent retraumatization. The officer also explains the procedures that will be followed,

¹¹⁹ *Id.*

¹²⁰ See, e.g., Can. Crim. Code § 274 (noting abrogation of former rules requiring “recent complaint”).

¹²¹ This guidance appears in the “National Instruction” for investigation of sexual offenses, published in the South African *Government Gazette* 31330 of Aug. 15, 2008 (hereinafter “S. Afr. National Instruction”).

¹²² New York State Coalition Against Sexual Assault, *Pocket Guide for Police Response to Sexual Assault 4* (2011), available at <http://nyscasa.org/information/manuals> (download “Police Pocket Guide”).

¹²³ Braz. Crim. Code art. 38.

¹²⁴ Fr. Crim. Procedure Code arts. 7- 8.

encourages the victim to have a medical examination, and must advise the victim of the availability of free treatment to prevent HIV and other infections.¹²⁵

The jurisdictions studied do not require that the report of rape come directly from the victim; rather, most allow any individual who has information about a rape to report it. Recognizing that child victims and those with severe mental disabilities are unlikely to report sexual attacks, many jurisdictions mandate that others report such crimes to the police. In South Africa, anyone with knowledge that a sexual offense has been committed against a child or a person who is mentally disabled is required to immediately report it to the police.¹²⁶ In other jurisdictions, various people with responsibility toward children, such as social workers, doctors, or school officials are legally obligated to report such offenses.¹²⁷

Haiti Draft Law

While in most jurisdictions studied, the initial report of rape is made to the police, the Haiti draft law contemplates that the initial report should be filed either with the police or with various ministries, including the Ministry of Women's Affairs and Rights, the Ministry of Public Health and Population, or the Ministry of Justice and Public Security.¹²⁸ In Haiti, as is the case in the jurisdictions studied, the report can be made by others than the victim. The Haiti draft law appears to be silent on the issue of timing of the report and whether a report will be accepted even when not made immediately after the offense occurred. **The drafters should consider requiring police or other designated officials to accept a report of a sexual offense without regard to where it occurred, so long as the report is made within four years of the alleged offense. Suggested language appears in the mark-up.**

2. Initial evidence collection

The jurisdictions studied universally recommended that victims have a medical examination as promptly as possible after a sexual attack, so that any available biological evidence can be collected before it is compromised or gone.¹²⁹ Because victims may not decide immediately whether they want to press charges, some jurisdictions have established procedures for evidence to be collected within the first several days after the attack, and then stored while the victim decides whether to proceed. For example, in California, if evidence is collected from a victim who has not

¹²⁵ S. Afr. National Instruction at 5(3). New York law requires that victims of sexual offenses be interviewed in private, and that the only persons present be the victim, persons conducting the interview, a professional providing support to the victim, if desired by the victim, and for child victims, parents if desired. Police officers are also required to tell victims in writing how to contact the nearest rape crisis center. N.Y. Exec. Law § 642(2-a).

¹²⁶ S. Afr. Amend. Act § 54.

¹²⁷ See, e.g., Swed. Social Services Act ch. 14, § 1; N.Y. Social Services Law § 413.

¹²⁸ See Art. 471.

¹²⁹ The recommended maximum time for collection of viable evidence after an assault ranges from 48 hours in Brazil to 10 days in New York.

filed a police report, it is numbered for reference and kept for three months, in case the victim decides to report the crime.¹³⁰

Several jurisdictions have a rape kit protocol for evidence collection. For example, New York has put together two kits, a standard rape kit, and a kit to search for drugs where officials suspect drugs were used to facilitate the assault.¹³¹ In Canada, rape kits contain instructions and receptacles for physical evidence collection. These rape kits are stored until the end of the appeal period of the case, or for 6 months if the victim does not report the rape to the police. If no suspect is found, the Centre of Forensic Sciences holds the evidence for one year, though this period may be extended upon a request by the investigating officer.¹³²

With respect to the collection of evidence from the suspect, investigators should take fingerprints as well as samples of blood and saliva, clothing, and hair. In California, Brazil, and South Africa, the police are given special instructions on how to inspect, photograph, and preserve the crime scene, and to identify all persons having knowledge of the offense using a checklist to create sexual offense statements.¹³³

Haiti Draft Law

We suggest that the Inter-Ministerial Commission for the Fight against Violence against Women be charged with creating “an evidence collection protocol that safeguards the reliability of evidence while also ensuring that victims of violence are treated with sensitivity to avoid further trauma.” Consistent with the jurisdictions studied, the Haiti draft law recommends that victims have a medical examination as promptly as possible after a sexual attack. The Haiti draft law requires that the authority that receives the complaint must immediately refer the victim to a nearby private or public medical facility.¹³⁴ The law further requires that if no public hospital is available within twenty miles of the victim, the private medical facility or hospital is obligated to provide treatment for free.¹³⁵ However, the law is silent on creating a protocol for the sensitive collection of physical evidence needed for prosecution. **The drafters should consider adding a provision regarding creation of a protocol for collecting evidence of sexual crimes. Suggested language appears in the mark-up.**

3. Investigation by police

All of the jurisdictions studied with the exception of France have a special police unit dedicated to sex crimes. In Brazil, police units staffed by officers with specialized

¹³⁰ See San Mateo SART Protocol, *supra* note 81, Part F(4).

¹³¹ <http://criminaljustice.state.ny.us/ofpa/evidencekit.htm>. In Pennsylvania, medical examiners search for drug use if the offense is reported within 72 hours. Beaver County (Pa.) Sexual Assault Guidelines, 4.

¹³² www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Wendy_Leaver/pdf/14_05-05_2002.pdf.

¹³³ See, e.g., California Guidelines for Sexual Assault Investigation (1999), <http://lib.post.ca.gov/publications/42653792.pdf> 16; Braz. Crim. Proc. Code art. 6; S. Afr. National Instruction.

¹³⁴ See Art. 472.

¹³⁵ See Art. 55.

training are open 24 hours a day to investigate violence against women and children, including sexual offenses.¹³⁶ Police officers may be instructed to follow detailed protocols for interviewing victims of sexual offenses and conducting investigations.¹³⁷ In Canada, police must be specially accredited to deal with sex offenses. After an initial, brief interview with a victim, further interviews are conducted only by these sexual assault investigators.¹³⁸

In France, investigations of sex crimes are carried out by usual police investigators who may be assisted by a special unit (the central office for the repression of violence against persons) if the offenses appear to have been perpetrated in several places on the French territory.¹³⁹ There is also a special unit to investigate sexual offenses against minors, known as the Brigade des mineurs, or “Minors brigade.”

Haiti Draft Law

As with the other jurisdictions studied, the Haiti draft law proposes that the National Police have specialized units to be set up for the prevention of violence against women and to monitor the enforcement of orders of protection.¹⁴⁰ **This is consistent with contemporary criminal laws. The drafters may want to consider adding a provision that interviews of victims of sexual violence be conducted by persons with specialized training, whenever possible. Suggested language appears in the mark-up.**

4. Special services for child victims

Special provisions are in place in many jurisdictions to ensure that child victims of sexual attacks are cared for and protected. In South Africa and California, authorities must determine whether the child victim needs to be placed in protective custody.¹⁴¹ In these jurisdictions, as well as in Sweden, special facilities and resources may be placed at the disposal of the child.¹⁴²

Some of the jurisdictions studied also have specialized units to investigate offenses against children. South Africa’s guidelines on taking statements from child victims require that police officers take all necessary steps to ensure the safety and protection of the child.¹⁴³ Pennsylvania requires that police interviewing child victims use

¹³⁶ <http://190.152.119.247/AccesoJusticia/insegundoindex.html>. Ordinary police units must also have specialized personnel to investigate violence against women. <http://www.sepm.gov.br/search?SearchableText=delegacia>.

¹³⁷ See, e.g., California Guidelines for Sexual Assault Investigation (1999), <http://lib.post.ca.gov/publications/42653792.pdf> 13; Pennsylvania Coalition Against Rape, Manual on Police Response to Crimes of Sexual Violence, <http://www.pcar.org/sites/default/files/file/PoliceResponsetoCrimesofSV.pdf>.

¹³⁸ See, e.g., <http://www.torontopolice.on.ca/sexcrimes/sas/faq.php> (describing sex crimes investigation procedures in Toronto, Ontario).

¹³⁹ Fr. Criminal Procedure Code art. D8-1.

¹⁴⁰ See Art. 498.

¹⁴¹ San Mateo County Children’s Sexual Abuse Protocol

¹⁴² An evaluation of the child houses in Sweden may be found in the report Barnahusetredningen 2010.

¹⁴³ S. Afr. National Instruction.

vocabulary that is appropriate for the development of the child and avoid multiple interviews to reduce trauma.¹⁴⁴

During interviews and testimony, children may be assisted by a third party: a counselor, a psychologist, a doctor, or a family member. In Brazil, the legal representative of the child must accompany him or her during the interview. If there is a conflict of interest between the minor and his or her parents or tutors, a special curator will be nominated by the judge to represent or assist the minor.¹⁴⁵

Haiti Draft Law

The Haiti draft law does not discuss specialized units to investigate offenses against children. The drafters may wish to consider adding provisions to create such units. A suggestion for such a provision appears in the mark-up.

5. Specialized prosecution units

Most of the jurisdictions studied have a special unit of prosecutors trained to handle sexual assault offenses.¹⁴⁶ Where a special unit for sex crimes does not exist (France), or is in the process of being implemented (Brazil),¹⁴⁷ sex crimes may be handled within the scope of other specialized units, such as units for cases concerning child victims.

Prosecutors generally must undergo special training to prosecute sex crimes. For instance, in Sweden, the Office of the Public Prosecutor has a development center for sex crimes.¹⁴⁸ In Brazil, prosecutors, public defenders, and police officers are trained to investigate violence against women and minors, including sex offenses.¹⁴⁹ In South Africa, directives provide guidelines to prosecutors dealing with sex offense cases, indicating when a charge may be withdrawn and the manner in which prosecutors shall deal with victims and witnesses.¹⁵⁰

¹⁴⁴ 23 Penn. Cons. Stat. § 6365(c)

¹⁴⁵ Braz. Law for the Protection of Children and Teenagers, art. 142.

¹⁴⁶ Specialized prosecution units were identified in California, New York, Pennsylvania, South Africa and Sweden.

¹⁴⁷ The first sex crimes unit was created in August 2011 in the State of Rio de Janeiro, to investigate crimes involving sexual violence against children and teenagers. Resolution GPGJ No 1674, of 8 August 2011, from the Prosecutor's Office of the Rio de Janeiro State, available at http://www.cnpq.org.br/html/index.php?id_texto=18612; see also http://www.mp.rj.gov.br/portal/page/portal/Internet/Consulta_Juridica/Resolucoes/Resolucoes_2011/Resolucao_1674.pdf

¹⁴⁸ The development center, Sw. Åklagarmyndighetens Utvecklingscentrum, is located in Göteborg, Sweden.

Additional information is available at <http://www.aklagare.se/Sok-aklagare/Utvecklingscentrum/Utvecklingscentrum-Goteborg>.

¹⁴⁹ See Brazil, National Pact to Combat Violence Against Women, *supra* note 112, at 47-50 (describing training for prosecutors, judges, police officers, doctors, and others coming into contact with victims on responding to sexual violence), and this site, describing a seminar organized in 2006 by the Brazilian Government to train prosecutors, judges, lawyers and police chiefs to handle crimes involving violence against women: http://midia.pgr.mpf.gov.br/hotsites/diadamulher/docs/cartilha_violencia_domestica.pdf.

¹⁵⁰ S. Afr. Amendment of Prosecuting Policy to Provide for Directives Relating to Criminal Matters, March 2006; Parliament, Republic of South Africa, *Fulfilling its Mandate? The National Policy Framework (Management of Sexual Offences Matters)* (17 June 2011).

Haiti Draft Law

The draft law establishes special violence against women sections in each office of the prosecutor (Art. 478). **The drafters might consider expanding the language to include all victims of sexual violence regardless of gender.**

6. Judicial training

In several of the jurisdictions studied, the judiciary receives special training for the administration of rape trials. In Sweden, this training is mandatory for judicial authorities and employees of the judicial system,¹⁵¹ and in California, it is required for judicial authorities involved with victims of child sexual abuse.¹⁵² South Africa also recognizes judicial training as an important element in effectively addressing sexual offenses.¹⁵³ Both governmental and non-governmental agencies offer judicial training on sexual assault.¹⁵⁴

7. Sex offense courts

In addition to specialized police and prosecution units for sex offenses, at least two jurisdictions studied, South Africa and New York State, have established specialized courts for sex offenses in some jurisdictions.

South Africa has led in the development of this concept. Its first Sexual Offense Courts were established in the early 1990s. These courts, which exist in limited jurisdictions, hear only sexual offenses against adults and children, and some work in tandem with the Thuthuzela Care Centers for victims described above.¹⁵⁵ Prosecutors receive in-depth training on sexual offenses, which includes common obstacles in bringing successful cases as well as techniques to avoid further trauma to victims. The courts have facilities such as waiting rooms to ensure that victims do not have to unnecessarily confront offenders and accredited health care professionals and other victim support services on hand if and when required by the victim. The courts are equipped with audio-visual equipment so that, for child cases and upon application in adult cases,

¹⁵¹ "Utbildningsprogram för bättre bemötande av sexualbrottsoffer i rättsväsendet - redovisning av ett regeringsuppdrag" ("Training programs for better treatment of sex crime victims in the justice system - accounting of a government commission"), Regeringsuppdrag Ju2007/4690/KRIM, Ju2005/9830/KRIM (2009), <http://www.brottsoffermyndigheten.se/Sidor/EPT/Bestallningar/PDF/Utbildningsprogram%20f%C3%B6r%20b%C3%A4ttre%20bem%C3%B6tande%20av%20sexualbrottsoffer%20i%20r%C3%A4ttsv%C3%A4sendet.pdf>

¹⁵² Cal. Penal Code §§ 13828-13828.1.

¹⁵³ S. Afr. Framework, *supra* note 104, at 13-14.

¹⁵⁴ Violence Against Women Education Project, <http://www.courts.ca.gov/documents/vawep.pdf>; Pennsylvania Coalition Against Domestic Violence, <http://www.pcadv.org/About-Contact/State-Projects/PA-Stop-Violence-Against-Women-Judicial-Training.asp>; Pennsylvania Coalition Against Rape, <http://www.pcar.org/judiciary>. Also, the Administrative Office of Pennsylvania Courts includes a Judicial Education Department that is responsible for continuing education for Pennsylvania judges. <http://www.courts.state.pa.us/T/AOPC/JudicialEducation.htm>; <http://education.pacourts.us/DesktopDefault.aspx>. Extensive judicial training materials on sexual assault and related issues are available from the U.S.-based National Judicial Education Project, <http://www.legalmomentum.org/our-work/vaw/njep.html>.

¹⁵⁵ *Supra* Part III (A)(1).

testimony may be given from outside the courtroom. While not flawless, the courts have been credited with improving participation of victims in prosecutions and increasing conviction rates of sex offenders.¹⁵⁶

New York State opened the first Sex Offense Court in the United States in 2005.¹⁵⁷ The stated mission of these courts is “to promote justice by providing a comprehensive approach to case resolution, increasing sex offender accountability, enhancing community safety and ensuring victim safety while protecting the rights of all litigants.”¹⁵⁸ The courts emphasize frequent contact with offenders who are not in prison, but instead are living in the community and getting sex offender treatment that is intended to prevent them from repeating their crimes. This emphasis is important because, “[p]ublic perception to the contrary, many sex offenders spend little time in prison. Instead, cases are pled to lower charges and the majority of sex offenders across the United States are on probation or other community supervision, rather than serving substantial prison sentences.”¹⁵⁹

In New York jurisdictions that are covered by these courts, all cases involving serious sex offense charges are referred at the earliest possible stage to the Sex Offense Court, which is staffed by a designated judge or judges who have special training in the dynamics of sex offenses as well as effective interventions that can enhance victim safety and reduce the likelihood of subsequent offenses. The concentration of these cases in one courtroom helps victims get early access to advocacy and counseling services, which can increase their willingness to participate in the prosecution. Offenders who are released on bail pending trial can be required to attend preventive services as a condition of bail. Those who are convicted, whether they are sentenced to probation or to incarceration, regularly report back to the court to assess compliance with court-ordered conditions as well as with any applicable sex offender registration requirements, and violations can be punished quickly.

Haiti Draft Law

The Haiti draft law proposes the establishment of a Court of Violence Against Women.¹⁶⁰ The specialized court contemplates that the public prosecutor’s office will have a section specialized in violence against women.¹⁶¹ The Haiti draft law – as is the case in most of the jurisdictions studied – also provides the aspirational provision that

¹⁵⁶ *Sexual Offences Courts: Do More Courts Mean Better Justice?*, Nedbank ISS Crime Index 4:2 (2000), <http://www.iss.co.za/pubs/CRIMEINDEX/00Vol4No2/SexualOffences.html>; *Efficient Management of Sexual Offences Cases*, <http://www.innovations.harvard.edu/awards.html?id=6035>.

¹⁵⁷ Similar courts are now operating in Ohio and a first sex offender court opened in 2011 in Pittsburgh, Pennsylvania. *Commonwealth’s First Sex Offender Court Opens in Pittsburgh*, 13 *Lawyers Journal* 9 (2011).

¹⁵⁸ For a full description of the development and operation of the New York Sex Offense Courts, see articles collected at <http://www.courtinnovation.org/topic/sex-offending>; see also http://www.nycourts.gov/courts/problem_solving/so/home.shtml.

¹⁵⁹ Center for Court Innovation, *Sex Offense Courts: Supporting Victim and Community Safety through Collaboration* 1-2 (2010).

¹⁶⁰ See Art. 476.

¹⁶¹ See Art. 478.

members of “civil society,” including lawyers, judges, police and court staff, will receive initial and ongoing training on the prevention, punishment and eradication of violence against women.¹⁶² The proposed language is similar to experiments underway in several jurisdictions to have specialized courts for sex offenses.

¹⁶² See Art. 45.

Conclusion

Universally in the jurisdictions that were studied, significant progress was made over three decades, both in reforming the laws of sexual violence and establishing effective programs such as sexual assault response teams¹⁶³ to respond to victims of sexual violence. In the United States these efforts have been described as a “revolution [that] began in the 1970’s.”¹⁶⁴ U.S. changes came in several waves of reform and evaluation and further reform efforts continue. Parallel efforts and changes can be found throughout the jurisdictions analyzed. See, e.g., Swedish Commission on Sexual Offences of 1982, Commission on Violence Against Women (1993), Swedish Action Plan for Combatting Men’s Violence against Women, Honor-Related Violence and Repression and Violence in Same-Sex Relationships (2007) and South African Law Reform Commission, Project 107 Sexual Offenses Report (December 2002). The political process that produced the reforms varies from country to country but both the direction of reform and the momentum behind it are unmistakable.

International human rights standards concerning sexual violence are not simply aspirational. To the contrary, jurisdictions from widely varying locales offer an abundance of examples for how rape statutes, services for rape victims, and police, prosecution and judicial practices regarding rape can implement the human right to be free from sexual violence. Indeed, according to one study looking at the effects of rape law reforms and practices in the United States from 1970-1992, “[t]he effects of reform have not been limited to the symbolic ones achieved through changes in legal doctrine.”¹⁶⁵ Rather, “changes in rape law have had real, instrumental effects.”¹⁶⁶ Progress has and can be made in satisfying international human rights standards and in protecting victims of sexual violence. Haiti is no exception and the comprehensive legal reform efforts currently underway there, in conjunction with the recommendations provided in this report and persistent follow-up regarding implementation, will hopefully achieve similar results.

¹⁶³ California SART Report, California Clinical Forensic Medical Training Center (April 2009). “Sexual assault response teams (SARTs) were created several decades ago in reaction to the serious problem of sexual assault victimization. Following the initial creation of SARTs in California. . . the field of sexual assault response, investigation, prosecution, and advocacy has advanced substantially. SART initiators have seen their revolutionary ideas become mainstream, from a mere handful of SARTs operational in the early days to established practice in many California counties by 2007.” Many legal and institutional advances in the field of forensic medicine and SARTs have occurred during the past two decades, and SARTs have become widely accepted as the optimal way of responding to sexual assault in California.

¹⁶⁴ The Advocates for Human Rights, *Sexual Assault in the United States*, <http://www.stopvaw.org/a6200a22-49cf-4680-a01b-e862d23ccfb6.html>. The Advocates for Human Rights offers an exceptional, international on-line collection of in-depth materials on sexual assault from a human rights perspective: http://www.stopvaw.org/Sexual_Assault.html.

¹⁶⁵ Futter & Mebane, *supra* note 8, at 111.

¹⁶⁶ *Id.*

Internet Sources for Statutes

Internet sources for statutes cited (in English except as noted).

- Brazilian Criminal Code available at: http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm (in Portuguese)
- Brazilian Criminal Procedure Code available at: http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del3689.htm (in Portuguese)
- Canadian Criminal Code available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html>
- French Criminal Code available at: <http://195.83.177.9/code/liste.phtml?lang=uk&c=33>
- South African Sexual Law (Sexual Offences and Related Matters) Amendment Act available at: <http://www.justice.gov.za/legislation/acts/2007-032.pdf>
- Swedish Penal Code available at: <http://www.sweden.gov.se/sb/d/3926/a/27777>
- California statutes available at: <http://www.leginfo.ca.gov/calaw.html> (choose Penal Code or other relevant code and click on Search)
- New York statutes available at: <http://public.leginfo.state.ny.us/menuegetf.cgi?COMMONQUERY=LAWS> (select Penal Law or Criminal Procedure Law from menu)
- Pennsylvania statutes available at: http://www.legis.state.pa.us/cfdocs/legis/li/public/cons_index.cfm

Appendix A

Summary of Recommendations and Proposed Statutory Revisions to the Haiti Draft Law on the Prevention, Punishment and Eradication of Violence Against Women

For this report, *Achieving Justice for Victims of Rape and Advancing Women’s Rights: A Comparative Study of Legal Reform – Haiti Edition*, the Thomson Reuters Foundation assembled a legal team at the request of MADRE and its sister organization KOFAVIV to review the Haiti Draft Law on the Prevention, Punishment and Eradication of Violence Against Women.¹⁶⁷ The body of the report includes an in depth analysis of international best practices in this area as well as suggested amendments and modifications to the latest version of the draft law.

The following appendix is a summary of the recommendations and proposed statutory revisions to the draft law, extracted from the main body of the report. The intent here is to assemble the recommendations for the convenience of the drafters of the Haiti law as they work on finalizing the draft legislation. In addition, a mark-up of the entire draft law with the revisions proposed herein follows as Appendix B.

Each recommendation below includes a reference to the relevant article (if any) of the current version of the draft law, the pages of the above report that contain the context and background, and, where appropriate, the page of the mark-up where the proposed change appears.

Summary of Recommendations:

Definition of Sexual Offenses	
Art. 280-280.1	The draft law is in accordance with international norms in that it criminalizes sexual contact achieved without consent, whether or not force is used.
Report <i>supra</i> at 15-17	While the articles dealing with rape and sexual assault are gender-neutral, also in accordance with international norms, we suggest that the drafters clarify that sexual violence, specifically rape, sexual assault, and the suggested new crimes of unlawful sexual contact and incest, can be committed by both men and women, and that victims may be both male and female.
Mistaken Belief in Consent	
Art. N/A	The draft law is silent on the circumstances in which an alleged perpetrator of a sexual offense may offer the defense of a mistaken belief in the victim’s consent.
Report <i>supra</i> at 17	We recommend addressing this issue, because defendants in rape and sexual assault cases often claim that they thought the victim consented to the acts.
Mark-up at 33, new Article	We suggest the following language as a new Article: “It shall not be a defense that the alleged perpetrator mistakenly believed the victim consented, when that belief arose from the perpetrator’s self-induced

¹⁶⁷ Draft Law on the Prevention, Punishment and Eradication of Violence Against Women, Art. 280.1 (Haiti working group draft, revised after July 12, 2011 meeting) (hereinafter “Haiti Draft Law”).

	intoxication, recklessness or willful blindness; or where a reasonable person would have understood the victim's words and actions as showing a lack of consent; or where the victim, having initially given consent, expressly revokes it."
Marital Rape	
Art. 280 Report <i>supra</i> at 18	The draft law recognizes that a person can commit the crimes of rape and sexual assault against a spouse or ex-spouse, common-law spouse or ex-common-law spouse, or romantic partner or ex-romantic partner, whether or not the perpetrator and victim are co-habiting at the time of the offense. Likewise, the general definition of "violence against women" in Article 2 includes "marital rape." This is in accordance with international norms.
Lack of Capacity to Consent, in Adults and in Children	
Art. 280.2 Report <i>supra</i> at 18-20 Mark-up at 20, new Article	<p>The drafters should add provisions that criminalize sexual contact with persons who are incapable of consent: children under a particular age, as well as adults who are temporarily or permanently incapable of consent. One approach would be to add a new paragraph that defines the crime of unlawful sexual contact.</p> <p>We suggest the following language as a new Article: "Unlawful sexual contact is defined as any sexual contact, with or without penetration, with (a) person who is mentally disabled, meaning that the person is unable to appreciate the nature or consequences of sexual acts, unable to resist, or unable to communicate unwillingness to participate in the act; or (b) a person who is unable to consent or express a lack of consent due to being unconscious, asleep, intoxicated by alcohol or other drugs, or because of any physical or mental disability, whether temporary or permanent; or (c) a minor. Unlawful sexual contact shall be punished the same as rape."</p> <p>The reference to forced labor for life raises a separate issue. A number of contemporary jurisdictions have moved away from extremely harsh punishments because in practice they may have the unintended consequences of making juries and judges reluctant to convict because of the severity of the sentence that would result. The drafters should consider whether the punishment would act as an effective deterrent or not.</p>
Definition of Sexual Crime	
Art. 280, 279 Report <i>supra</i> at 21	The draft law includes expansive language regarding activities that may constitute a sexual crime. The proposed language is consistent with customary criminal law.
Limited Capacity to Consent	
Art. N/A Report <i>supra</i> at 21-22	The draft law does not expand upon prohibited acts involving persons with limited capacity to consent. There is no clear international norm in this area, but the drafters may want to consider expanding the acts that are prohibited when they involve persons with limited capacity to consent.
Prohibiting Additional Acts against Children	
Art. 280.2 (par. 2), 281.4 Report <i>supra</i> at 22-	The draft law does not give children any additional protection against sexual crimes. However, it is in accordance with the general practice in that, as previously noted, the penalty for rape is increased when the victim is a child under the age of fifteen. In addition, prostituting a child under the age of sixteen triggers harsher sentencing. These provisions are consistent with customary criminal law but the basis for making a distinction between 15 and 16 year old

23	victims in the penalties is not clear. The drafters may wish to consider adopting the practice of many jurisdictions, of enacting an increased penalty for sexual crimes against any minor, with penalties that are further augmented when the victim is of a very young age, e.g. under 15.
Incest as Defined Crime	
<p>Art. N/A</p> <p>Report <i>supra</i> at 23</p> <p>Mark-up at 21, new Article</p>	<p>The draft law fails to comply with international norms, in that it does not define incest as a specific crime. Rape by a parent or guardian carries an increased penalty and results in cessation of parental rights, but this is too narrow a provision. The statute should criminalize sexual contact among family members. Addressing this gap in the law is critical to protecting children. The drafters should consider providing a definition for incest, as is often found in customary criminal law, and including it as a separate and distinct crime.</p> <p>We suggest the following language as a new Article: “A person commits incest if he or she marries, purports to marry, or engages in sexual contact, with or without penetration, with a minor who he or she knows to be, without regard to legitimacy: (1) A descendant by blood or adoption; or (2) A brother or sister of the whole or half-blood or by adoption; or (3) A stepchild; or (4) A nephew or niece of the whole or half-blood; or (5) Any other person within the family (whether whole or half-blood or by adoption or by marriage) over whom the person has authority either by law or de facto. Incest committed on a minor shall be punished the same as rape.”</p>
Internet-related Sexual Crimes	
<p>Art. N/A</p> <p>Report <i>supra</i> at 24</p>	<p>There is no mention of Internet-related sexual crimes in the draft law. Although the problem of adults using the Internet to find targets for sexual crimes might not currently be an issue in Haiti, it may become a concern in the future. Thus, the drafters may want to consider including language prohibiting online communications with a child for a sexual purpose.</p>
Aiding and Abetting	
<p>Art. 280, 281.1</p> <p>Report <i>supra</i> at 24</p> <p>Mark-up at 20, new Article</p>	<p>The draft law criminalizes attempted sexual assault and attempted rape. However, no mention is made of those who aid or abet a sexual crime. Especially in light of the high incidence of group assaults in the encampments, the drafters should impose criminal liability upon persons who aid or assist the perpetrator of sexual crimes.</p> <p>We suggest the following language as a new Article: “(1) – Whoever commits the offense of rape, sexual assault, or unlawful sexual contact, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (2) – Whoever willfully causes an act to be done which if directly performed by him or another would constitute the offense of rape, sexual assault, or unlawful sexual contact, is punishable as a principal. (3) – Whoever, knowing that the offense of rape, sexual assault, or unlawful sexual contact, has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an</p>

	accessory after the fact. An accessory after the fact shall be sentenced to not more than one half the maximum penalty for the underlying offense.”
Corroborating Evidence Requirements	
Art. N/A Report <i>supra</i> at 25 Mark-up at 32-33, Art. 481	Notably, the draft law is silent on whether the victim’s testimony alone can be sufficient to convict a perpetrator. It is unclear whether the draft law follows the approach followed by most jurisdictions studied that no corroborating evidence, including a medical certificate, is required for a rape conviction. The drafters should make clear that the victim’s testimony can be sufficient to convict, without corroborating evidence. A suggestion for such a provision appears in the mark-up.
Rape Shield Provision	
Art. 482 Report <i>supra</i> at 26 Mark-up at 33, Art. 482	The draft law includes a “rape shield” statute in that it prohibits the Judge of Violence Against Women from discussing the sexual history of the victim. This is consistent with international norms. The drafters should consider adding a provision that prohibits evidence about how the victim was dressed at the time of the offense. A suggestion for such a provision appears in the mark-up.
Victim’s Identity	
Art. 473, 489, 493 Report <i>supra</i> at 26-27	The draft law provides that the victim’s privacy, including that of the victim’s dependents, should be protected during the hearing. The law also provides that the authority who receives the complaint may take all appropriate measures of protection and the security for the victim, and that the victim may request orders of protection from the court at any stage. Although these provisions could result in orders to protect the victim’s identity even outside of the hearing, the law is not explicit. The drafters may wish to consider making more explicit the victim’s right to request protection of her identity, or may wish to include a separate provision stating that a victim’s identity shall be protected throughout all stages of the proceeding.
Special Protections for Minors	
Art. N/A Report <i>supra</i> at 27-28 Mark-up at 34	Unlike other jurisdictions studied, the draft law does not appear to include any special provisions to protect minors involved during a trial. The drafters should include special child-protection provisions such as those described above. Detailed suggestions for such provisions appear in the mark-up.
Protection of Victim During Trial	
Art. 481, 482 Report <i>supra</i> at 28	As in the other jurisdictions studied, the draft law includes provisions to protect the victims during the trial process. These provisions are consistent with customary criminal law.
Punishment for Rape	
Art. 280.1 Report <i>supra</i> at 29-	The Haiti draft law provides for civil remedies for rape available where the death of the victim results from the crime and also where the loss of real property or chattels of the victim occurs. The draft is unclear whether civil liability for other damages suffered by the victim is granted. See Arts. 57-58. Unlike some of the

31	<p>jurisdictions studied, the draft law does not provide for monetary fines for persons convicted of rape.</p> <p>The drafters may wish to consider imposing broader liability on perpetrators to compensate victims for damages suffered, and imposing fines on rape defendants.</p>
Medical Personnel, Care and Services	
<p>Art. 34, 50-53, 472</p> <p>Report <i>supra</i> at 33-36, 41-42</p> <p>Mark-up at 9-10, Art. 34(d)</p> <p>Mark-up at 14, Art. 50</p> <p>Mark-up at 15, Art. 52</p> <p>Mark-up at 15, Art. 52</p>	<p>The draft law does not clearly incorporate the international consensus that victims of sexual violence often experience extreme stigma and shame, and need to be treated by persons with specialized training, from the first report of a sexual assault onward. Nor does it explicitly recognize the right of victims of sexual assault to be offered immediate care for the prevention of pregnancy, as well as sexually transmitted infections, following an attack, or make adequate provisions for collecting physical evidence to be used for prosecution. We therefore recommend revisions to several articles to ensure appropriate training of medical and other personnel, the establishment of protocols for victim care and evidence collection, and the availability of necessary medical services. We also recommend that the Inter-Ministerial Commission for the Fight against Violence against Women consider the establishment of rape treatment centers and sexual assault response teams, to ensure coordinated care for victims and effective prosecution of perpetrators.</p> <p>We suggest the following changes to the draft:</p> <p>Add a provision that the State is responsible for “ensuring that medical, police, prosecutorial and judicial personnel receive specific training in providing sensitive, coordinated and respectful care to women victims of violence that avoids retraumatizing them.”</p> <p>Specify that the training to be developed by the Inter-Ministerial Commission shall include “modules for health care workers on the medical examination of victims of sexual violence, including the collection of physical evidence for potential prosecution; the administration of emergency contraception and prophylaxis against HIV and other sexually transmitted infections; and the ongoing care of individuals who have experienced sexual violence.”</p> <p>Specify that the procedures for legal proceedings to be developed by the Inter-Ministerial Commission shall include “minimum training requirements for police, prosecutorial and judicial personnel to ensure that victims of violence are treated with respect and sensitivity to avoid further trauma, from their initial report of violence onward.”</p> <p>Specify that the protocols to be developed by the Inter-Ministerial Commission shall include “requirements for the emergency care of victims of sexual assault, to include, at minimum, the immediate availability of emergency contraception and prophylaxis against HIV and other sexually transmitted infections; an evidence collection protocol that safeguards the reliability of evidence while also ensuring that victims of violence are treated with sensitivity to avoid further trauma; and minimum training requirements for health personnel who provide emergency and ongoing treatment to victims of sexual violence.”</p>

Mark-up at 15, Art. 51	Direct the Inter-Ministerial Commission to “consider the establishment of rape treatment centers and sexual assault response teams, to ensure coordinated care for victims and effective prosecution of perpetrators. Urban areas and other areas with a high incidence of rape will receive priority consideration for establishing such centers and/or teams.”
Mark-up at 30, Art. 472	Add to the listed responsibilities of the authority that receives a complaint of violence against women: “Victims of rape or other sexual assaults shall be promptly offered emergency contraception to prevent pregnancy, as well as testing and prophylaxis against HIV and other sexually transmitted infections. They shall also be offered the opportunity for specially trained medical personnel to conduct an examination to collect physical evidence of the assault, to be used in any potential prosecution.”
Post-trauma Assistance of the Victim	
Art. 5 Report <i>supra</i> at 36-37	The draft law is consistent with international norms in that it recognizes in Article 5 that women victims of violence are entitled to medical care, psychological support, legal assistance and follow-up in legal and administrative actions. However, the draft explicitly provides only that legal assistance shall be free of charge. The drafters should consider confirming that psychological, medical, and legal assistance for victims shall be provided free of charge.
Mark-up at 3, Art. 5	We suggest adding the word “free” before the relevant provisions.
Victim Support Through Legal Process	
Art. N/A Report <i>supra</i> at 37-38	The draft legislation does not provide for adequate support of the victim through the legal process. The drafters should consider adding a provision to ensure that victims have adequate information and support throughout the investigation and prosecution processes.
Mark-up at 3, Art. 5	We suggest the following language: “Women victims of violence are entitled . . . to receive comprehensive information on the court process as well as support and assistance throughout the investigation and prosecution processes.”
Financial Assistance for Victims	
Art. 8, 9, 11, 23 Report <i>supra</i> at 38-39	The draft legislation provides that victims of violence should receive financial assistance. However, the draft does not create a fund to indemnify and support victims of violence. Ideally, the drafters should consider creating a government fund to ensure complete assistance and compensation to victims. However, we recognize that Haiti’s financial condition may not permit this at this time.
Protection of Victim and Victim’s Family	
Art. 9, 14, 472, 473, 278-4, 280 Report <i>supra</i> at 39-40	The draft law provides comprehensive measures to protect the victim of violence from the aggressor. In this respect, it is consistent with the best practices identified in the studied jurisdictions. However, the draft law seems to permit provisional measures to protect the safety of the victim only after the interview of the alleged perpetrator or a brief verification of the facts alleged in the complaint. This requirement is inconsistent with the practice in many jurisdictions, to allow a victim to obtain a provisional ex parte order of protection, and may unnecessarily endanger victims. The drafters may want to consider removing this obstacle to provisional safety measures.

Mark-up at 31, Art. 473	A suggestion for this change appears in the mark-up.
Initial Report of Rape	
Art. 471, 473 Report <i>supra</i> at 40-41 Mark-up at 30, Art. 471	The draft law appears to be silent on the issue of timing of the report and whether a report will be accepted even when not made immediately after the offense occurred. The drafters should consider requiring police or other designated officials to accept a report of a sexual offense without regard to where it occurred, so long as the report is made within four years of the alleged offense. We suggest the following language: “The complaint shall be accepted and processed without regard to where the alleged violation occurred, so long as the complaint is made within four years of when the alleged violation occurred.”
Prompt Medical Examination	
Art. 472, 55, 474, 475 Report <i>supra</i> at 41-42 Mark-up at 15, Art. 52 Mark-up at 15, Art. 52; 30, Art. 472	Consistent with the jurisdictions studied, the Haiti draft law recommends that victims have a medical examination as promptly as possible after a sexual attack. However, the law is silent on creating a protocol for the sensitive collection of physical evidence needed for prosecution. The drafters should consider adding a provision regarding creation of a protocol for collecting evidence of sexual crimes, and ensuring that victims are examined by persons trained in this protocol. We suggest that the Inter-Ministerial Commission for the Fight against Violence against Women be charged with creating “an evidence collection protocol that safeguards the reliability of evidence while also ensuring that victims of violence are treated with sensitivity to avoid further trauma.” As noted above under Medical Personnel, Care and Services, we also suggest adding a provision that victims are entitled to appropriate emergency medical care.
Specialized Police Units	
Art. 498 Report <i>supra</i> at 42-43 Mark-up at 29, Art. 471	As with the other jurisdictions studied, the Haiti draft law proposes that the National Police have specialized units to be set up for the prevention of violence against women and to monitor the enforcement of orders of protection. This is consistent with contemporary criminal law. The drafters may want to consider adding a provision that interviews of victims of sexual violence be conducted by persons with specialized training, whenever possible. We suggest the following language: “The initial and subsequent interviews with the victim of rape or other sexual assault shall, whenever possible, be conducted by a person with specialized training in this area, and every effort shall be made throughout the investigation and prosecution to avoid additional trauma to the victim.”
Specialized Units for Crimes Against Children	
Art. N/A Report <i>supra</i> at 40	The draft law does not discuss specialized units to investigate offenses against children. The drafters may wish to consider adding provisions to create such units.

Mark-up at 43-44	A suggestion for such a provision appears in the mark-up.
Specialized Prosecution Units	
Art. 478, 45 Report <i>supra</i> at 44-45	The draft law establishes special violence against women sections in each office of the prosecutor. The drafters might consider expanding the language to include all victims of sexual violence regardless of gender.
Specialized Court	
Art. 476, 45; Report <i>supra</i> at 45	The draft law proposes the establishment of a Court of Violence Against Women. The proposed language is similar to experiments underway in several jurisdictions to have specialized courts for sex offenses.

Appendix B

MADRE and KOFIV Mark-up of the Haiti Draft Law on the Prevention, Punishment and Eradication of Violence Against Women with Recommendations and Proposed Statutory Revisions

January 2012

All recommendations by MADRE and KOFIV appear in blue and are italicized; proposed statutory revisions appear in blue and are italicized and underlined

Revised text after the meeting of July 12, 2011

Draft Law on the Prevention, Punishment and Eradication of Violence against Women

***Proposals for SOFA:** 1.- To speak of the violence instead of violence; 2.- replace the word "repression" to "sanction" 3.- Consultation with women's organizations including those involved in supporting women / girls abused*

***Proposal Group I.** - For the title and any other reference, write "Violence against women and girls" 2.- There should be a definition of woman to understand what transgender means ; 3.- There should be added references in the document (other codes / laws recitals - CEDAW Geneva Convention of 1951, Inter-American Convention on Human Rights, the reasons and references)*

Chapter I

Purpose of this Act

Definition of violence

Protected rights recognized for Women

Article 1.- This Act is aimed at the Prevention, Punishment and Eradication of Violence against Women.

***Comment Group I:** - should be added protection, punishment, prevention, elimination and suppression of violence against women and girls.*

Article 2.- Violence against women, physical, sexual, psychological, economic, means any act or conduct based on the female gender, which causes death, damage, or physical, sexual or psychological harm to women, in public as well as in private life.

Violence against women, regardless of the perpetrator, may be committed in the family, in the household, in educational or health establishments, in sports or recreational centers, in places of public meeting or public entertainment, *in the IDP camps*, or any other place.

***Comment Group I:** para 1 must add "any other place".*

It includes abuse, even verbal abuse, mistreatment, threats of all kinds, physical or mental pressure, psychological violence, sexual abuse, rape, marital rape, **transactional sex**, sexual harassment, soliciting, lesbophobia, forced marriage, pimping, sexual exploitation, sexual

exhibitionism, indecent exposure, forced prostitution, forced abortion, trafficking in women, obstetric violence, forced sterilization of women, economic violence.

Comment Group I "forced abortion or illegal" and "forced sterilization"

Violence against women also means that perpetrated or condoned by the State or its agents / officers, wherever it occurs.

Proposal for SOFA and UN WOMEN: forced abortion, forced sterilization.

Proposal for SOFA: 1) Add an economic violence, 2) Do not treat abortion as a crime even when we make articles supporting forced abortion (see coercion), 3) Indecent exposure: definition needed to avoid any ambiguity if other terminology can be found to replace it, 4) Female sexual practice no or very rarely in Haiti - no need to consider the number of attacks.

Article 3 .- The rights granted to women and protected are the following:

- a) The right to life;
- b) The right to equality and non-discrimination;
- c) The right to equality before the law;
- d) The right to live in an environment free of physical, psychological, sexual, economic and legal violence, in her private life as in her public life;
- e) The right to escape torture and inhuman and degrading treatment;
- f) The right to safety and freedom of the individual;
- g) The right to equality in the family;
- h) The right to accommodation and to simple and prompt access to the courts and competent bodies;
- i) The right to enjoy all civil, political, economic, social and cultural rights enshrined in the Constitution, the Convention on the Elimination of All Forms of Discrimination against Women, the American Convention on the Prevention, Punishment and Eradication of Violence Against Women and other international instruments ratified by the Republic of Haiti.

This list of international treaty instruments is purely indicative.

SOFA proposal: consider abortion in the chapter on women's rights - the right to an abortion if her life is in danger and / or the rape

Comments from the Group I: There should be a set priorities among the recognized rights

- Add "equality before the law enforcement"

- He must return to the rights already in the Penal Code

Chapter II Rights of Female Victims of Violence

Section 1 Right to Information, Social Assistance and the Free Legal Assistance

Article 4.- Female victims of violence exercise the rights and privileges granted to them by this Act, regardless of their ethnic origin, religion, nationality, sexual orientation, personal status, their situation with regards to immigration law.

Article 5.- Women victims of violence are entitled:

1 °) to be informed of the **services, resources and options available to them, (Proposal of UN WOMEN) and to receive comprehensive information on the court process as well as support and assistance throughout the investigation and prosecution processes (Proposal of MADRE/KOFAVIV).**

2 °) to free psychological support;

3 °) to social support, educational support for children of women victims, training and socio-professional integration support; housing assistance;

4 °) to free medical care;

5 °) follow-up in legal and administrative actions;

6 °) to free legal assistance;

7 °) to educational support for children of women victims;

8 °) to training and socio-professional integration support;

9 °) to housing assistance;

SOFA Proposal: *Include 7 °, 8 ° and 9 °) in paragraph 3 °) [reflected in 3 °, above]*

10 °) the right to protection in a safe shelter while in a critical situation.

SOFA Commentary: *We must be cautious: 1 °) for safe that this support is subject to misinterpretation, the aid should not be automatic, 2 °) What role will the MAS in the allocation of allowances?)*

Comment Group I:

1) remove "support"

6) to free legal assistance for reparations

10 °) Protection and safety

• We must adapt this article to apply to minors. For example:

o 1) Eliminate keep "ownership"

o 7) eliminate "the woman victim"

o 6) A support / mentor in the legal process

o 8 °) Eliminate the provision

MADRE/KOFAVIV Comment: *Insert the word "free" in subparts 2 and 4; include additional language in the first subpart.*

Article 6.- Women victims of violence are entitled to social services support, protection, care and full recovery.

Minors are also entitled, during the same period, to social assistance through the above-mentioned services.

Comment group I: *replace "Boys ... nursing" with "minors"[change already incorporated]*

Article 7.- Women victims of violence will be, depending on their physical and psychological condition, integrated into programs, missions and training projects.

In case of officially recognized incapacity, they will receive special assistance to help them fit into a job, according to their capabilities, in programs, projects and missions.

Comment Group I: *definition of work - we must consider women working at home who are not paid, and those working in the informal sector.*

Article 8.- Women victims of violence are given priority in receiving help and assistance provided by the public administration or municipal authority competent to do so.

Comment Group I: *you have to decentralize the institutions that provide public services.*

Article 9.- Women victims of violence who intend to file a complaint with the competent authority, civil or police, shall receive all the security measures considered immediately necessary, such as

- 1 °) physical distance from the aggressor;
- 2 °) excluding the aggressor from the joint home;
- 2 °) temporary detention of the aggressor;
- 3 °) an order restraining the aggressor from getting into contact with the victim;
- 4 °) the restriction of parental rights, such as custody or visitation rights;
- 5 °) the seizure of weapons;
- 6 °) orders, including restraining orders prohibiting communication with the victim, or prohibiting of acts of intimidation, pursuit or harassment
- 7 °) an order to pay maintenance or temporary economic assistance;
- 8 °) the ability to return home safely or to temporary safe housing.

Comment Group I: *You have to write "who complain" instead of "who hear ..."*

2) It should be noted in the warning to the offender in case of imminent danger.

Article 10.- Women with disabilities, girls and domestic workers--even if they are facing a major challenge for full access to information--enjoy the rights set forth in this Section.

The relevant agencies and institutions must ensure, in this case, that information is provided to them in an accessible and understandable format, using options or means of communications including alternative or augmentative systems.

Comment Group I: *You have to replace "Women with a disability ... if" with "women with special needs."*

Section 2

Right of Female Victims of Violence to Financial and Housing Assistance

Article 11.- Women victims of violence are entitled to a one-time grant of financial assistance.

This support is based on the presumption that the victims **may have** difficulty in finding employment or carrying on their daily activities.

The amount of this aid is to be calculated by the Ministry of Women and Women's Rights in accordance with the needs of the abused woman in order to lead a decent life with her children and dependents. (**Question of UN Women: What is the magnitude of these amounts?**)

If the woman victim has been recognized as having a disability equal to or greater than 33% incapacity, the amount will be doubled and paid in two semiannual installments.

If the disability is permanent, the financial aid set out in the third paragraph [above] shall be paid for life.

In case of death of the woman victim, the financial aid shall be paid to minor children until they reach the age of majority.

These benefits, charged to the general budget of the State, shall be paid by the Ministry of Economy and Finances.

Comment Group I: *you have to pay the financial assistance as required of women. This will include working women in the informal sector who do not receive the benefits of an employer under Section 3 of "Rights of Women Victims of Violence in Labor and Social Security"*

- Add 'daily activities or income-generating '

- The amount must be calculated by MCFDF with the Ministry of Social Affairs

- This article should be reformulated in a specified period

Article 12.- Women victims of violence, when they are employed, are entitled, *if necessary*, to a flexible work schedule, to a change of environment, or to be transferred to another place of work. If their condition requires a reduction in hours or suspension of work, this will be granted under a protection order, issued by the judge upon request of the public prosecutor, supported by sufficient evidence.

SOFA proposal: *Transfer (... to the reduction of working time in the second paragraph that will (if their state requires a reduction or suspension of the working time ...)*

Proposal of the Group I: *- you have, perhaps submit an article for women working in the informal sector.*

Article 13.- Women and girl victims who are threatened with forced or arranged marriage, may have access to social housing.

To avoid threats of reprisal, women and girl victims of gang rape shall be relocated as soon as possible.

Question from UN WOMEN: *Is there a housing program or public pension houses in Haiti?)*

SOFA Commentary: *Including prostitutes to remove. This group could be other considerations.)*

Comment Group I: *-*

- After "Women who ..." add "especially those in vulnerable situations or in housing accommodation"

- After "relocated" add "in all relevant institutions"

Article 14.- Women victims of violence shall keep the family home, at the expense of the spouse or former spouse, partner or former partner, the boyfriend or former boyfriend, who was paying for the housing, until their relocation.

The same applies when spouses, partners or boyfriends and girlfriends are joint owners of the home.

The perpetrator of violence, upon simple request of the police, the Commissioner of the Government or the magistrate, shall leave the house, which will be recorded [formally] in a report by the magistrate, free of charge.

Observation of UN WOMEN: *It seems that this could lead to re-victimization and that, most often from the family of the perpetrator. Beware ! and if the guy is in jail, how will he pay?*

Section 3

The Labor and Social Security Rights of Women Victims of Violence

Article 15.- Women victims of violence at their place of work are entitled, as needed and at their request if they are victims of rape, to a reduced or flexible work schedule, to be transferred to another facility, to the suspension of their contract of employment or to resign without notice. Following the suspension of their employment, they shall be reemployed in their previous position.

In case of transfer, measures of support shall be adopted by the new employer.

Observation of UN WOMEN: *Be careful that this does not become a reason not to hire women (risk too high for employers).*

SOFA Commentary: *Seems limited to sexual assault, violence perpetrated in the workplace - already we can add: if they are victims of rape after application or removal of paragraph (and after consulting the Medical ... Medical certificate) [request to remove reference to occupational physician and producing a medical certificate was already implemented in this section]*

Comment Group I: *it is mainly women who work in the formal sector. Discrimination issues are already included in the labor code.*

- Remove "in the workplace"

- Remove "on the advice of the occupational physician or" [change implemented in the above]

- Add "or service" after "other institution"

- Replace "their contract" with "time" in the phrase "suspension of their contract of employment" (in the first paragraph and second paragraph on page 5)

- Add "according to the medical certificate" after "the suspension of their contract of employment"

Article 16.- During the suspension of their employment contract, women victims of violence are entitled to their salary.

During such period, contributions to Social Security shall be paid regularly by the employer.

SOFA Commentary: *Social Security - see the transitional provisions (we have a system or equivalent?)*

Comment group I: *replace "contract" with "time" work.*

- Add "within the period provided by the medical certificate" after regular

Article 17.- Absence from work and noncompliance with work schedules, duly justified by the physical or psychological condition of the abused woman, shall not lead to penalties.

The employer shall be informed promptly of these absences, the duration of which will depend on the severity of the case.

Employed women are also guaranteed an income for the duration of these absences.

Comment Group I: *change the second paragraph to "the duration of which is established by the medical certificate"*

Article 18.- Abused women who are registered as jobseekers **will be** included, **if possible**, in specific programs of the Ministry for Women's Affairs and Women's Rights and the Ministry of Social Affairs and Labor or any other public or private institution.

Group I Comments: “*jobseeker*” - *an unemployed woman*

- remove “*registered as*”
- remove “*or any other...*”

Article 19.- To benefit from the rights contained in this Section, abused women must obtain a protective order as provided in this Act.

In exceptional cases, prior to obtaining such an order, the woman’s situation may be established by a report of the public prosecutor or of the magistrate indicating the existence of evidence that the petitioner appears subject to violence.

Group I Comments: *remove the entire article.*

Article 20.- The following are strictly prohibited in all workplaces: All remarks, words, actions or behavior (verbal or nonverbal) of a sexual or sexist nature, all conduct based on a person’s sex, or on a person’s actual or perceived sexual orientation, having the purpose or effect of prejudicing the rights and dignity of a person or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Group I Comments: *we must define "perceived sexuality" - it is not clear in this article.*

Article 21.- The director of the company or business shall take all necessary measures to prevent, terminate and / or sanction the discrimination, sexual or sexist violence, as well as the acts listed in article 20, bullying, or sexual harassment, in particular through communications with the employees on the launch of an investigation and preventive measures.

Article 22.- Occupational physicians and labor inspectors must receive specialized training enabling them to care for women victims of violence.

A Presidential application order based **on the report of the Minister for Women's Affairs and Women's Rights** shall determine the content of the training.

Observation of UN WOMEN: *Are their occupational physicians in Haiti? Are there occupational inspectors and supervisors in Haiti?*

Group I Comments: *remove the entire article.*

Section 4

The Rights of Female Civil Servants Who Are Victims of Violence

SOFA Comments: *Perhaps this section should be limited to Article 27?)*

Article 23.- When female civil servants who are the victims of violence are obliged to seek a transfer, they shall be assigned to another position which guarantees the maintenance their status and the privileges attached thereto.

Women who work on fixed-term contracts or as interns, who decide to terminate the contract, shall receive financial assistance equivalent to the amount due for the remaining duration of their contract.

Group I Comments: *remove "equivalent to the amount due for the remaining time" after "assistance."*

Article 24.- In view of the operational requirements of the public Administration, flexible working or reduced hours shall be granted, upon request, to female civil servant victims of violence, even when the act was committed at home or elsewhere.

Group I Comments: *add "with production of the medical certificate" after "upon request."*

- *Add "for a period defined by the medical certificate" at the end of the sentence.*

Article 25.- Female civil servants who are victims of violence who request a leave of absence, for the purpose of protecting themselves or to exercise their right to social assistance, are entitled to keep their job position for the first six months.

In this case, the leave of absence does not affect the right to promotion and retirement.

Group I Comments: *change "first six months" to "six months."*

Article 26.- Influence peddling that could lead to a leave of absence with or without pay, or to the transfer or the dismissal of a female civil servant, is considered an act of violence and is treated as such.

Observation of UN WOMEN: *Is influence peddling defined anywhere?*

Group I Comments: *we must define "influence peddling" – include reference to Article 174 of Chapter III of the Decree on Public Service*

- *Move and put it in Article 2 - definition of violence*

Section 5

Rights of Foreign Women Victims of Violence

Article 27.- Foreign women victims of violence benefit from the rights, privileges and prerogatives set forth in this Act.

Article 28.- Expulsion measures shall not apply to foreign women who are engaged in civil or criminal proceedings filed as a result of violence against them.

Article 29.- The following are eligible for refugee status pursuant to the Geneva Convention: women who are persecuted or threatened with persecution in their home countries because of their individual or collective action for the rights of women, their membership in a particular social group, sexual orientation, or their refusal to comply with discriminatory traditions, social norms, or practices in their country.

Group I Comments: *It should be more precisely noted that it is the Geneva Convention of 1951 which applies to this provision.*

Article 30.- When a couple whether married or not stops living together because of the violence inflicted on the foreign spouse or partner by the Haitian spouse or partner, the administrative authority shall not be able to withdraw the residence permit [of the foreign spouse or partner], and shall grant its renewal.

If the foreign spouse is subjected to violence after her arrival in Haiti but before the issuance of her residence permit, the competent authority shall issue the residence permit. The same applies in cases of domestic violence perpetrated after the marriage, but before the issuance of a residence permit.

SOFA Comments: *Do we grant a residence permit to foreigners?*

Article 31.- In accordance with the laws governing the matter, Haitian consulates abroad shall provide assistance to Haitian women who are victims of violence.

This assistance includes without limitation, legal advice, local emergency aid, and the cost of return to the home country.

A **presidential decree** will set the terms of the action of consulates in this area.

SOFA Comments: *1.- Is dual citizenship not yet recognized in Haiti? 2.- A presidential decree? Is it within the procedure in Haiti?*

Group I Comments: *This should explain the role of the consulate for a woman who is married to a foreigner. This must be considered in Art 27*

Article 32.- When a woman of foreign nationality or dual citizenship who resides in Haiti is the subject of a judicial decision in the country of her nationality, which violates fundamental human rights and disregards the equality between men and women, the Haitian judge shall refuse to give effect to this decision in the name of the Haitian public interest.

When the woman has a residence permit through marriage, marital breakdown caused by a divorce under these conditions requires the appropriate authority to renew her residence permit.

SOFA Comments: *Has dual citizenship been recognized yet in Haiti?*

Chapter III **Obligations of the State and Civil Society** **Towards Women Victims of Violence**

Article 33.- In cases of violence against women, the State shall take the necessary measures to protect and support victims, **particularly** in the fields of education, communication, health **and social assistance**.

Civil society shall contribute to the success of the adopted measures in harmony with the **competent institutions** of the State.

Section 1 **Obligations of the State**

Article 34.- Upon publication of this Act, the State, **through the Ministry for Women's Affairs and Women's Rights, as a body of guidance, coordination and monitoring, and the appropriate public institutions**, shall take measures necessary for the purpose of:

- a)* ensuring that all abused women have expedient, transparent and efficient access **to the courts and appropriate agencies** of the State;
- b)* Developing public policy for the prevention of violence against women, elimination of discrimination, and establishing the appropriate systems in the areas of education, communication, social assistance and justice; ***Observation of UN WOMEN: There is currently no public policy to prevent violence and eliminate discrimination. There is a***

public policy framework for gender equality, which has not been adopted. The National Plan for Combating Violence serves as public policy for the time being, but it is not a public policy as such. Isn't there a need to develop and adopt such policies, before thinking about making them more effective?

- c) strengthening criminal law and procedures in force in order to ensure proper protection for abused women;
- d) ensuring that medical, police, prosecutorial and judicial personnel receive specific training in providing sensitive, coordinated and respectful care to women victims of violence that avoids retraumatizing them.
- e) coordinating the actions and measures taken by the appropriate bodies for the detection, prevention, repression and elimination of violence against women, supporting and implementing social and educational measures in order to prevent recidivism; *Observation of UN WOMEN: (What kind of socio-educational measures are able to prevent recidivism? Is there therapy for violent men, if so, who will conduct it?)*
- f) promoting the participation and collaboration of groups, associations and organizations working for the elimination of violence against women;
- g) ensuring the implementation and monitoring of the effectiveness of provisions and programs promoting awareness, prevention, screening, security and protection introduced by the various ministries and agencies concerned;
- h) developing academic programs about the detection and protection of abused women for the continuing development of the agents / officers involved in the process; UN WOMEN Comments: Why not refer to the development of academic programs on violence?
- i) establishing and strengthening measures of security, protection and prevention that ensure the rights protected by this Act, personal protection, physical, emotional, work-related and asset protection of women victims of violence; UN WOMEN Comments: What safeguards system?[refers to language already removed]
- j) providing women victims of violence the necessary protection to enable them to exercise the rights granted by this Act;
- k) creating awareness among abused women, reassuring them by taking the appropriate legal measures to help them free themselves from fear and stress, helping them assume responsibility for their situation, and personally use judicial institutions to enforce legal consequences.

The assistance to be provided by state agencies, at the expense of the State, is permanent, urgent, specialized and professionally multidisciplinary.

The State shall grant tax exemptions to businesses, cooperatives and other entities that promote employment, integration and reintegration of abused women in the labor market.

MADRE/KOFAVIV Comment: language inserted above as a new sub-section (d) establishing the State's obligation to ensure training in the appropriate treatment of victims of sexual violence.

Article 35.- Municipal agencies, community organizations and other associations who fight for the promotion and protection of human rights in general and women's rights in particular must participate, with the public institutions responsible for public policy in the development, orientation and evaluation of plans, projects and ongoing programs and make recommendations for their improvement and increased efficiency.

Article 36.- The Ministry of Women and Women's Rights, jointly with the Ministry of Justice and Public Security, shall provide the protection needed by abused women and their assignees to pursue appropriate prosecutions. ***UN WOMEN Comments:** It would be sufficient to simply protect the women who are victims of violence. Why protect the husbands and give them the means for repressive action? [refers to language already deleted]*

Article 37.- For the full implementation of the provisions of this Act, specialized services will be created as the budget becomes available, in the departmental and regional offices of the Ministry for Women's Affairs and Women's Rights, Ministry of Public Health and Population, Ministry of Justice and Public Security, Ministry of Education and Vocational Training, as well as in local administrations.

The services listed above shall be carried out in coordination and collaboration with social security bodies, judges, and representatives of the public prosecutor.

**Paragraph 1 [Consider renaming as Subpart 1]
Preventive measures in the field of Education**

Article 38.- The struggle for equality between men and women and between young girls and boys is a national priority.

Article 39.- Schools, colleges, high schools, institutions of higher education, vocational training centers and adult education centers are required to provide a quality education that takes account of social relations between people of different genders and the real equality between men and women, girls and boys.

***Ministers Workshop :** Remove girls and boys.*

Article 40.- Education programs relating to violence against women are developed at all levels by experts selected according to criteria established jointly by the Ministry of National Education and Vocational Training, the Ministry of Women's Affairs and Women's Rights, and the Rector of the National University of Haiti.

Article 41.- In accordance with the respect for human rights, the Ministry of National Education and Vocational Training, the Rector of the State University of Haiti will ensure that all educational materials promote equality between men and women and eliminate gender and discriminatory stereotypes.

***Ministerial departments:** The Ministry of National Education and Vocational Training, the Rector of the State University of Haiti, as well as teaching assistants ensure respect for human rights, ensure that the educational materials contributes to the elimination of gender stereotypes and discrimination, promote equality between men and women.*

Article 42.- The Ministry of National Education and Vocational Training has an obligation to ensure the immediate re-schooling of children affected by changes of residence as a result of violence, in similar or connected sections.

Ministerial departments: *The Ministry of National Education and Vocational Training has an obligation to ensure the immediate reintegration in sections similar or related to children affected by a change in their housing situation as a result of violence.*

Article 43.- The Ministry of National Education and Vocational Training includes, in terms of initial teacher training, specific training for human rights, the prevention and peaceful resolution of conflicts within the family and society, the detection of violence within the family, especially towards women and children, the promotion of the principle of gender equity both in public sphere and in private sphere.

Ministerial departments: *The Ministry of National Education and Vocational Training includes, in the training curriculum of all levels of the faculty, training on human rights:*
o the principle of gender equity;
o the prevention and peaceful resolution of familial and social conflicts
o detection of violence, especially towards women and children, both in the public and in the private spheres.

Article 44.- The Ministry of National Education and Vocational Training is responsible for the strict observance of the provisions of this Act within the educational community.

It oversees the implementation of measures aimed at promoting gender equality and the prevention of violence against women.

Ministerial departments: *The Ministry for Women's Affairs and Women's Rights, in its cross-cutting role with respect to the rights of women, ensures that the Ministry of National Education and Vocational Training is responsible for the strict observance of the provisions of this Act within the educational sector.*

Article 45.- The program of initial and ongoing training for judges, clerks, court staff, the police, coroners includes lectures on the prevention, punishment and eradication of violence against Women, as well as support for victims.

UN Women does not like the term "support".

Ministerial departments: *The program of basic training and continuing education for judges, clerks, court staff, the police, forensic doctors and other professionals in the medico-legal sector, includes courses on prevention, punishment and eradication of violence against women, as well as support for victims.*

§ 2.- Preventive measures in the communication sector
[Consider renaming as Subpart 2]

Article 46.- Advertising which uses degrading representations of women and men, the relationship between them and sexist stereotypes are considered illegal.

Sexist stereotypes are defined as all misconceptions, beliefs, caricatures, or rigid, simplifying generalized representations that depict women and / or men negatively, based on an oversimplification of characteristics, real or imagined, shared by different groups or society as a whole.

The [local/municipal] Council shall prohibit the display of such billboards or commercial posters. Such billboards shall be immediately removed and destroyed upon request of the [local/municipal] Council or other competent authorities, in the presence of / the magistrate.

Ministerial departments: Advertising that uses degrading representations of women and men, the relationship between them and sexist stereotypes shall be deemed unlawful.
Sexist stereotypes are considered those misconceptions, beliefs, caricatures, or generalized representations that depict women negatively and / or men, based on an oversimplification of characteristics, real or imagined, or shared by different groups or society as a whole.
The City Council forbids the display of such placards or commercial posters.
There shall be, upon request of the City Council or other competent authorities, in the presence of / the justice of the peace, the immediate removal and destruction of these billboards.

Article 47.- The broadcasting of audio and video programs including any incitement to hatred or violence for reasons of race, sex, sexual orientation, religion is hereby prohibited.
Promoting through the press racism, sexism, violence against women, discrimination based on religion, sex, disability, age, sexual orientation is equally prohibited.
The License conditions must include mandatorily the legal prohibitions set forth in this Article and Article 46.

Any medium [breaching these provisions] will be immediately confiscated according to the provisions established in the preceding article.

Ministerial departments: *The following are prohibited:*

The distribution of audio and video programs consisting of material which incites hatred or violence for reasons of race, sex, sexual orientation, religion;

The promotion through the use of media of racism, sexism, discrimination based on religion, sex, disability, age, sexual orientation and any other audio-visual materials affecting the dignity of women ;

The use of media tools used to incite violence particularly that against women;

The specifications must include the legal prohibitions set forth in this article and the previous article (46).

Upon hearing from the Ministry of Culture and Communication (MCC), where applicable, the Ministry for Women's Affairs and Women's Rights, the competent authorities of the State shall make the immediate confiscation of the media used, according to the provisions established in the preceding article.

Article 48.- The Ministry for Women's Affairs and Women's Rights, the Ministry of Culture and Communications shall ensure that audiovisual media scrupulously respect the prohibitions in Articles 46 and 47 above.

They shall jointly adopt the necessary measures to ensure women are treated in accordance with the constitutional principles and values, without prejudice to any other measures imposed by other competent administrative authorities.

The Ministry of Culture and Communications may exercise its powers of sanction upon the renewal of a permit.

Article 49.- In order to implement the provisions of this Section, an administrative entity called "**Audit authority for sexist content**" is hereby established, under the supervision of the Ministry of Women and Women's Rights, whose mission is to monitor, before and after their publication, audio and video programs (videocassettes, DVD, Internet broadcasting, and any media to disseminate pornographic scenes) to ensure that they do not contain pornographic scenes or gender stereotypes.

It will examine, in particular, the representation of violence, pimping, trafficking, and incitement to commit the same as well as incitement to prostitution.

It will take particular account of the recommendations and proposals for improvements from international conventions on human rights, the elimination of all form of discrimination against women, the prevention, punishment and eradication of violence against women.

The **Audit Authority for sexist content** may suspend the marketing of illegal content, prohibit such broadcasts, and even confiscate the materials, in the presence of / the magistrate. It shall in such event inform the Ministry of Justice and Public Security and can refer the matter to the public Commissioner responsible for criminal prosecutions.

The **Audit Authority for sexist content** will be composed of three representatives of the public sector; one of which shall be the Mayor or his delegate as well as two representatives of [civil society]/[the private sector] as an observer / observers.

The Ministry for Women's Affairs and Women's Rights will determine its composition and the procedural rules of the Authority created by this article.

§ 3.- Preventive measures in the health sector – The role of workers/social workers [Consider renaming as Subpart 3]

Article 50.- The Ministry of Public Health and Population, in partnership with the Ministry for Women's Affairs and Women's Rights, the Ministry of Justice and Public Security and the Ministry of Social Affairs and Labour is required to promote, through existing structures, the role of professional / occupational health workers / social workers / and for support of female victims of violence.

It will propose, in consultation with the Ministries named above, the measures which are indispensable to maximize the contribution of the health sector and social sector in the fight against violence against women.

It will promote the development of awareness programs, initial and continuing development training and further initiatives to benefit health personnel and personnel working in the social sector in order to promote assistance and support for abused women. Multidisciplinary training sessions should be held regularly. *The training shall include modules for health care workers on the medical examination of victims of sexual violence, including the collection of physical evidence for potential prosecution; the administration of emergency contraception and prophylaxis against HIV and other sexually transmitted infections; and the ongoing care of individuals who have experienced sexual violence.*

MADRE/KOFAVIV Comment: Suggested language on training inserted above.

Comment Group I: *Include in the training of health professionals a module on the issue of support for women and girls victims of violence (Article 50) [Note: refers to text before insertion of MADRE/KOFAVIV suggestion, above.]*

Article 51.- An "**Inter-Ministerial Commission for the Fight against Violence against Women**" will be established, within the Ministry of Public Health and Population, by Presidential decree, within twelve months after the entry into force of this Act, The Commission will be responsible for directing the planning of sanitary and social measures provided for in this Section, monitoring of the measures implemented, proposing those that

appear to be necessary, and all those that will enable the health and social sector to contribute to the eradication this form of violence.

The Commission will consider the establishment of rape treatment centers and sexual assault response teams, to ensure coordinated care for victims and effective prosecution of perpetrators. Urban areas and other areas with a high incidence of rape will receive priority consideration for establishing such centers and/or teams.

MADRE/KOFAVIV Comment: Suggested language on victim services inserted above.

Article 52.- The "**Inter-Ministerial Commission for the Fight against Violence against Women**" must promote the development, implementation, continuous updating and dissemination of protocols that include uniform standards for health action in the public domain as in the private, with regard to the activities of support of abused women or women at risk of experiencing violence.

The protocols will determine the procedures for initiating legal proceedings, with the written consent of the victim, where there is a finding or justified suspicion of the existence of physical or psychological harm caused by these aggressions.

These procedures will include minimum training requirements for police, prosecutorial and judicial personnel to ensure that victims of violence are treated with respect and sensitivity to avoid further trauma, from their initial report of violence onward.

The protocols will include requirements for the emergency care of victims of sexual assault, to include, at minimum, the immediate availability of emergency contraception and prophylaxis against HIV and other sexually transmitted infections; an evidence collection protocol that safeguards the reliability of evidence while also ensuring that victims of violence are treated with sensitivity to avoid further trauma; and minimum training requirements for health personnel who provide emergency and ongoing treatment to victims of sexual violence.

With regard to the measures provided for in this article, particular attention will be given to women who, because of personal and social circumstances, or because of social exclusion or disability, may be at higher risk of experiencing violence or experiencing greater difficulties in accessing services under this Act.

MADRE/KOFAVIV Comment: Suggested language on requirements and protocols to ensure appropriate care and treatment of victims, as well as effective collection of evidence, inserted above.

Article 53.- The "**Inter-Ministerial Commission for the Fight against Violence against Women**" will be composed of representatives of the Minister for the Status of Women and Women's Rights, the Minister of Public Health and Population, the Minister of Justice and Public Security, the Minister of Social Affairs and Labour.

The Commission may, as required, consult with representatives of human rights organizations, women's or feminist organizations or associations fighting against violence against women.

The Minister for the Status of Women and Women's Rights will be the its Chair. The Minister of Public Health and Population will be its President.

Rules of organization and operation of the "Inter-Ministerial Commission against Violence against Women" will be determined by presidential decree.

Comments by SOFA: the Commission should be chaired by the MCFDF instead of the judicial

Secretary of State for the Elimination of Violence?? = NO - already too much structure and too few resources - preferably prioritize service delivery to women / girls victims of violence and other practical responses to their needs.

Section 2 Obligations of Civil Society

Article 54.- Organizations working in the field of human rights, women's organizations, lawyers, lawyers, doctors, psychologists of both sexes, and nurses working in public health providing health services must give free specialized assistance to abused women.

Members of [civil society]/[the private sector] working in the field of health will provide support to abused women based on their particular expertise. They will work as part of an interdisciplinary team set up under the supervision of the competent authority. They should receive appropriate training under the supervision of experts involved in the fight against violence against women.

The Presidents of Bar Associations are responsible for appointing a legal representative in authorized proceedings in cases of violence against women.

Comment Group I: *In Chapter III, Section 2, on the responsibilities of civil society, it is necessary to integrate the organizations specializing in the care and support for abused women.*

Article 55.- Hospitals and other private health centers are required to establish a free minimum service for the benefit of abused women. The conditions, the nature and quality of such a service will be defined in cooperation with the Ministry of Public Health and the Ministry of Population. In cases where an abused woman requires further treatment and if there is no public hospital within a radius of twenty miles (30 km) the private hospital or the private health center is obliged to provide appropriate treatment to that person free of charge.

In both cases mentioned above, the expenditure incurred will be deductible from the taxes due by such private hospitals and other private health centers.

Chapter IV Violence against women and its punishment

Article 56.- Sections IV "sexual assault" and IV "indecent assault" First Chapter "Crimes and Offences against the Person" of Title II of the Penal Code entitled "Crimes and Crimes Against Individuals" are from now combined into one single Section IV under the title "Violence Against women and its punishment." Articles that form these two sections are replaced by the following provisions.

Chapter IV

Violent Acts against Women, and Punishment for such Acts

New

Article 278. –The following are considered acts of violence committed against women: 1) any aggression, defined as any unsolicited and undesired bodily contact by another, whether or not involving injury; 2) any sexist act that results or could result in physical, psychological, or emotional damage or suffering; 3) any act that undermines freedom; 4) threats of any kind; 5) physical or mental coercion, torture or acts of barbarism; 6) rape; 7) sexual harassment; 8) administration of harmful substances to a woman without her knowledge, with the intention of

committing rape, sexual exploitation, or acts of pimping or prostitution, human trafficking; 9) acts of pimping or prostitution; 10) kidnapping or confinement with the aim of sexual exploitation or human trading; 11) acts of human trafficking, whether public or private.

New **Article 278.1.-**Acts of **psychological violence** are punishable, and are defined as exposing a spouse or ex-spouse, common-law spouse or ex-common-law spouse, partner or ex-partner, or any living person living in a free union, whether or not cohabitating, **or any other woman**, to repeated actions or [words]/[comments], humiliating treatment, or constant surveillance even by third parties, or acts of negligence or abandonment, or threats made with the objective or effect of causing a degradation of living conditions likely to undermine her rights and dignity, affect her physical or mental health, cause depression or impair her expectations and her future.

Whoever uses psychological violence towards women will be punished by **one to three years imprisonment and a fine of 150,000 to 200,000 gourdes.**

Non-payment of the fine will result in three years of physical detention.

SOFA Comment: *Ask for clarification about the disposition relative to non-payment of the fine. Is imprisonment the sanction, or does the fine equate with imprisonment?*

New **Article 278.2.-** A punishment of **three years to five years imprisonment plus fine of 350,000 to 650,000 gourdes** is imposed on any person who, by use of physical force, intimidation, blows or other **mistreatment** that undermine physical integrity, causes bodily harm or any other physical suffering to a woman, internal or external lesions, wounds, bruises, or burns.

The gravity of the damage, taking into account the vulnerability of the victim, will lead to, in addition to a fine, the punishment of **imprisonment.**

If the above acts of violence are committed in the domestic environment by the spouse or ex-spouse, the common-law spouse or ex-common-law spouse, the partner with whom the victim has or has had a romantic relation, with or without cohabitation, the ancestor, descendent, step-parent, parent related by blood or marriage, the penalty will be **three to five years imprisonment.**

SOFA Commentary: *Considering the gravity of the act committed, the punishment should be greater than 5 years imprisonment. Paragraph 3 needs to be clarified. Does the clarification correspond to the aggravated circumstances or otherwise?*

Article 278-3.-Whoever **intentionally hits a woman** or commits other acts of **aggression** that do not result in **bodily injury** is liable to **six (6) months to one (1) year imprisonment.**

If the blows or aggressive acts involve minor **bodily injury**, the perpetrator is liable to **one (1) to three (3) years imprisonment.**

In the case of **serious injury**, the penalty will be **four (4) to seven (7) years.**

If the aggression or violence results in **death**, with an absence of intent to cause death, the penalty will be imprisonment for **seven (7) to ten (10) years.**

If the offense is committed against a person suffering from a handicap, or a woman who is pregnant or nursing, or a child under the age of 15 years; *Suggestion of ONU FEMMES: to replace "of a child under the age of 15 years" with "of a minor".*

If committed with premeditation or in ambush;

If committed by a person having authority over the victim;

If committed with the help of one or more persons of either gender;

If committed with the use of a or firearm, or with the threat of using such a weapon;

If the blows are made to the face of the victim in any of the above-mentioned circumstances;
The penalty will be imprisonment.

***SOFA Comment:** The second and third paragraphs have previously been covered; for the fourth paragraph: it is suggested that the penalty be more significant.*

Article 278-4.-When the offenses described in the preceding article are carried out against a spouse or partner, whether living under the same roof or not, and not involving bodily injury, the perpetrator is liable for **three (3) months to one (1) year imprisonment.**

In the case of **serious injury**, the penalty will be **one (1) year to three (3) years imprisonment.**

In these two instances, the perpetrator may be prohibited from having contact with the victim or from residing under the same roof. The perpetrator will be, in addition, made to provide reasonable maintenance to the spouse or partner, and to children living with their mother.

If the perpetrator **refuses to comply with the protective measures ordered and to pay support**, he will be liable to **one (1) to three (3) years imprisonment.**

Assault on a spouse or partner that results in unintentional **death of the victim** is punishable by solitary **confinement at hard labor.** The sentence is the same in the case of premeditation, use of an unloaded or loaded firearm, or threat of using such a weapon.

***SOFA Comment:** The same suggestion as 278.3 in preserving the measures relative to the support.*

New

Article 279.-**Sexual harassment** is defined as any [comment]/[spoken word], act, gesture or behavior, verbal or not, with a connotation that is sexual, sexist or lesbo/homophobe, or any other behavior based on sex or sexual orientation, actual or perceived, any written or e-mail communication aimed at persecuting, intimidating, annoying, coercing, or monitoring a woman for the purpose of undermining her emotional stability, dignity, prestige, or physical or psychological integrity, or to jeopardize her job, promotion or reputation in or outside her workplace.

The perpetrator of acts of sexual harassment against a woman will be punished by **two to three years imprisonment** and a **fine of one hundred and fifty thousand gourdes (Gdes 150,000) to two hundred thousand gourdes (Gdes 200,000)**.

Non-payment of the fine will result in three years of physical detention.

SOFA Comment: *Non-payment of fine. Ask for clarification about the disposition relative to non-payment of the fine. Is imprisonment the sanction, or does the fine equate with imprisonment? Also, need to include and determine the civil reparation.*

New **Article 279.1.-** Sexual harassment is punishable by **five years imprisonment or by a fine of five hundred thousand gourdes:**

- 1) if the harassing person is abusing the authority of his position;
- 2) if the offence is committed by several persons acting as perpetrators or accomplices;
- 3) if the offense is committed using the threat of a weapon or an animal; ***Observation of***

ONU FEMMES: *Where does the term "animal" come from here?*

4) if the perpetrator or perpetrators have taken advantage of the economic vulnerability or the physical or mental disability of the victim.

SOFA comment: *Fine not paid: Clarify with regards to the relative disposition of non-payment of the fine. Is imprisonment the sanction, or does the fine equate with imprisonment? Also, need to include and determine the civil reparation.*

New **Article 279.2.-**The act of harassing a woman by repeated actions, words, written or electronic messages, which lead to a worsening of her working conditions or which undermine her rights and her dignity, alters her physical or mental health, or compromises her professional future, is punishable by **imprisonment of two (2) years to three (3) years and a fine of two hundred fifty thousand gourdes (250,000) to five hundred thousand gourdes (500,000)**.

If the threat or act of violence takes place in the living quarters or residence of the woman, the sentence shall be doubled.

If the perpetrator of the acts is a public official, or member of a political body or the police, the sentence and the fine shall be tripled, as well as the fine.

The sentence and the fine shall be quadrupled if the perpetrator of the threat makes use of a cold weapon or firearm.

Observation of ONU FEMMES: *is there a chance that parliament will vote for this article?*

Sofa comment: *Clarify 'worsening' and where to replace it. More precisely define 'political body'.*

Article 280.-The provisions of article 278 are hereby replaced by the following:

«**Article 280.-**A **sexual assault** consists of any sexual relation that is unsolicited and unwanted, or any contact committed with the use of force, coercion, threat, surprise or psychological pressure, whether or not injuries result.

Whoever commits or attempts to commit an act of sexual assault is liable to **three to five years imprisonment**.

If the sexual assault is committed against a spouse, common-law spouse, or partner, the maximum penalty will apply. The judge may prohibit the perpetrator from having access to the victim's home.

SOFA Comment: *Move this article and place before the Chapter dealing with sexual harassment.*

Article 280.1. A rape is defined as any act of sexual penetration or attempted sexual penetration, whether genital, anal or oral, even by the introduction of any object into the genitals, anally or orally, committed on another person by violence, coercion, threat, surprise or psychological pressure.

Rape is punishable by a minimum of **ten years hard labor**.

SOFA comment: *Need to add civil reparation.*

Proposed New Article on Unlawful Sexual Contact

Article _____: *Unlawful sexual contact is defined as any sexual contact, with or without penetration, with (a) a person who is mentally disabled, meaning that the person is unable to appreciate the nature or consequences of sexual acts, unable to resist, or unable to communicate unwillingness to participate in the act; or (b) a person who is unable to consent or express a lack of consent due to being unconscious, asleep, intoxicated by alcohol or other drugs, or because of any physical or mental disability, whether temporary or permanent; or (c) a minor. Unlawful sexual contact shall be punished the same as rape.*

MADRE/KOFAVIV Comment: New Article inserted to criminalize sexual contact in circumstances where there can be no consent.

Proposed New Article on Aiding and Abetting

Article _____: *(1) – Whoever commits the offense of rape, sexual assault, or unlawful sexual contact, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.*

(2) – Whoever willfully causes an act to be done which if directly performed by him or another would constitute the offense of rape, sexual assault, or unlawful sexual contact, is punishable as a principal.

(3) – Whoever, knowing that the offense of rape, sexual assault, or unlawful sexual contact, has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. An accessory after the fact shall be sentenced to not more than one half the maximum penalty for the underlying offense.

MADRE/KOFAVIV Comment: New Article inserted to criminalize aiding or abetting sexual crimes.

Anc art 280 **Article 280.2.-** The penalty will be forced labor for life :

- 1) if the rape results in mutilation or permanent disability;
- 2) if the rape is committed on a child under the age of fifteen;

Suggestion of ONU FEMMES: replace 'a child under the age of fifteen' with 'a minor'.

SOFA Comment: Replace '16 years old' by 'minors' (under age 18) Ref: Convention on the Rights of the Child.

- 3) if the rape is committed on a person whose particular vulnerability by reason of her age, handicap, illness, infirmity, physical or psychological disability or pregnancy, is apparent or known by the perpetrator;
- 4) if the rape is committed by a legitimate ascendant of the victim, whether natural or adoptive, or by any other person having authority over the victim;
- 5) if committed by a person who abuses his official authority;
- 6) if committed by several persons acting as perpetrators or accomplices;
- 7) if committed with use or threat of a firearm;
- 8) if the victim was put into contact with the perpetrator through use of a communications network for broadcasting messages to an undetermined audience;
- 9) if committed because of the sexual orientation of the victim;
- 10) if preceded, accompanied, or followed by torture or other barbaric acts;
- 11) if committed following the forced or unforced taking by the victim of aphrodisiacs, pharmaceutical substances or psychotropic substances;
- 12) if the perpetrator, whoever that is, was aided in commission of the crime by one or more persons;
- 13) if death of the victim results.

If the crime was committed by the father or the mother, the guilty person shall also be deprived of the rights and benefits granted to him or her over the person and the property of the child, by the civil Code and by the Decree of 8 October 1892 providing a new status to the married woman. If a guardian is the perpetrator of the offense, he will be stripped of his rights and benefits.

SOFA Comment: Gender violence = delete and replace by 'rape'; then move to article 280.2 and becomes paragraph 14 of the same article.

Proposed New Article on Incest

A person commits incest if he or she marries, purports to marry, or engages in sexual contact, with or without penetration, with a minor who he or she knows to be, without regard to legitimacy:

(1) A descendant by blood or adoption; or

(2) A brother or sister of the whole or half-blood or by adoption; or

(3) A stepchild; or

(4) A nephew or niece of the whole or half-blood; or

(5) Any other person within the family (whether whole or half-blood or by adoption or by marriage) over whom the person has authority either by law or de facto.

Incest committed on a minor shall be punished the same as rape.

MADRE/KOFAVIV Comment: New Article inserted to criminalize incest.

- New **Article 280.3.-** If in consequence of acts of gender violence, the perpetrator has transmitted an incurable sexual disease to the woman victim, the sentence will be that of **forced labor for life**.
- New **Article 280.4.-** The attempt of the offences in articles 279, 279.1, 279.2, 279.3, 280 inclusive is **punished by the same penalties**.
- New **Article 280.5.-** It is considered justifiable self-defense if a death or injury is caused by defending against a sexual assault or rape.

SOFA Comment: Clarify and if necessary rewrite this.

- New **Article 281.-** Whoever, by force or threat of force, or by coercion caused by the fear of violence, intimidation, psychological pressure or abuse of power, or through the promise of material gain, compels a woman to engage in one or more sexual acts, will be punished for commission of **forced prostitution**, with a punishment of **6 to 15 years forced labor and reparation of 100,000 to 200,000 gourdes**.
- New **Article 281.1.-** Whoever, for the purpose of sexual exploitation, through purchase, sale, loan, exchange or other similar business, illegally deprives a woman of her freedom in order to force her to perform one or more sexual acts, shall be punished by a penalty of ten (10) to fifteen (15) years of forced labor.
- New **Article 281.2.-**The offense of pimping is committed by anyone who, in any way whatsoever:
 - 1) aids, assists, or protects the prostitution of others;
 - 2) profits from the prostitution of another, or shares in the profits or receives money from a person habitually engaged in prostitution;
 - 3) hires, entices, corrupts, or turns another person to prostitution, or exerts pressure on her to prostitute herself or continue to prostitute herself;
 - 4) encourages a woman to enter into a house of prostitution or to become a lodger there.
Pimping is punishable by solitary confinement **and by a fine of one million (1,000,000) gourdes**.
Whether prostitution is forced or consensual, the prostitute is never regarded as an accomplice in pimping.

SOFA Comment: An explanation is needed for the logic in determining why penalties are, for this offense, harsher than those for rape; and in some cases (Article 281.2 a lesser offence than one in the same category without the severity).

- New **Article 281.3.-** Included in pimping and punished by the same penalties are the acts of one who, any manner whatsoever:
 - 1) acts as intermediary between two persons of whom one engages in prostitution and the other exploits or pays for the prostitution of the other;
 - 2) provides a pimp with a fictitious justification for his resources;
 - 3) cannot explain his resources corresponding to his lifestyle while living with a person who habitually engages in prostitution or by habitually having relations with one or more persons engaged in prostitution;

4) hinders the prevention, control, assistance or re-education undertaken by qualified agencies for persons in danger of prostitution or engaging in prostitution.

New **Article 281.4.-Pimping** is punishable by **hard labor and a fine of two million (2,000,000) gourdes**, if it is committed:

1) With regard to a child aged less than 16 years;

***Suggestion of ONU FEMMES:** instead of "a child aged less than sixteen years", say "a minor child";*

***Suggestion of SOFA:** Replace "16 years" by "minors" (less than 18 years). Ref: Convention on the Rights of the Child.*

2) with regard to a person who is particularly vulnerable due to her age, illness, physical or psychological deficiency or pregnancy, which is apparent or known to the perpetrator;

3) With regard to several women;

4) With regard to a person who was incited to enter into prostitution outside the territory of the Republic, or upon her arrival into the territory of the Republic;

4) By a legitimate ascendant, natural or adoptive, of the person who is prostituting herself, or by a guardian or any other person who has authority over her or abuses the authority that gives him those powers;

5) By a person called to participate, by his duties, in the control of prostitution, the promotion of health, or maintenance of the public order;

6) By a person carrying a firearm;

7) With employment of constraint, violence, or fraud;

8) By several persons acting as perpetrators or accomplices, though not in an organized group;

9) Through the use of a telecommunications system for the dissemination of anonymous messages.

Article 281.5.- Pimping committed by an organized group or through torture or barbarous acts is punishable by hard labor with **life imprisonment and a fine of three million (3,000,000) gourdes to five million (5,000,000) gourdes**.

Article 281.6.- Punishable by hard labor for life are acts by any person, acting directly or indirectly by way of a proxy, that:

(1) hold, manage, operate, initiate, support, or help finance a prostitution establishment or such establishment open to the public, to accept or tolerate that one or more persons habitually engage in prostitution within the institution or annexes, or who are seeking clients for purposes of prostitution;

(2) sell or make available to one or several persons premises or locations not used by the public, knowing that they are engaged in prostitution;

(3) sell, rent or make available, in any manner whatsoever, to one or several persons, vehicles of any kind knowing that they are engaged in prostitution.

***Comment by SOFA:** Sentences (criminal and civil remedies) in our view are excessive in view of the degree of involvement of people in "pimping". Request for clarification and rewriting.*

(new) Article 281.7.- He who solicits from a woman, for himself or a third person, **an act or conduct of a sexual nature or makes unwanted sexual advances**, by taking advantage of their

higher rank in employment or the authority conferred function by his function or status, or taking advantage of circumstances derived from the exercise of a profession, under the threat of harm in relation to the legitimate expectations within the relationship, shall be punished by **imprisonment**.
SOFA Commentary: Articles 281 to 281.7 dealing with pimping could be a section ... because we want to fight prostitution or pimping?? to clarify and modify. Art 281.5 to .7?? What arrangements (not appeared in the transitional provisions) to close the brothels / bars ...?

(new) Article 281.8 .- **Sexual exhibition** imposed on others in a place accessible to the public gaze is punishable by **one to three years imprisonment and a fine of fifty thousand gourdes (Gdes 150,000.00) to two hundred thousand gourdes (Gdes 200,000.00)**.

Comment Group I: Article 281.8 - Add "sexual organs" after "of others." Need to define what is meant by "sexual exhibition" - that is not clear in this article.

(new) Article 281.9- The former Article 283 becomes 281.9 as follows:

"Section 281.9 .- Any person who commits an **outrage to public decency** by any act, physical contact or other similar act that may injure the dignity of a person of one or the other sex, shall be punished by **three months to one year imprisonment**.

SOFA Comments: It is important to define the term "outrage public decency" to avoid misinterpretation and is it touching in its place?? For being a sexual assault; issue to avoid confusion.

Comment Group I: - must add the phrase "If it is a public event organized by the organizers / organizations are facing the same punishment (this means imprisonment of three months to one year."

(new) Section 281.10 .- Anyone who **conditions access to employment, promotion in employment and stability of employment for women to issues relating to gender**, sexual orientation, age, physical appearance, civil status, the status of motherhood or not, the submission to the laboratory or any other nature, shall be punished by **a fine of seventy-five thousand gourdes (Gdes 75.000.00) to one hundred fifty thousand gourdes (Gdes 150,000.00)**. If it is an employment policy of a public institution, a state business, the penalty of revocation will be applied against the highest administrative authority of the institution or company. In a private company, the maximum fine will be applied against the highest administrative authority of the company.

The same penalties apply where, under the guise of administrative practices deceptive and fraudulent, the worker's right to just and lawful pay is not respected, as well as the rule of "equal work, equal pay."

Comment Group I: you have to rephrase the sentence: "the examination or laboratory findings to reproductive health (pregnancy tests and reviews of HIV / AIDS)."

(new) Article 281.11 .- A legally separated spouse or domestic partner in a situation of de facto separation duly noted, who withholds, defaces, destroys, distracts, keeps, orders **the blocking of bank accounts** or performs acts capable of affecting the community property or inheritance of a woman, is punishable by **imprisonment of one to three years**.

When the above acts are committed intentionally to deprive women of economic resources

necessary for subsistence, or to prevent her from meeting her needs and those of her family, the penalty shall be **imprisonment of three (3) to five (5) years.**

If the offender under this section, without a spouse or partner, maintains or has maintained relations with the wife of affection, the punishment shall be **imprisonment of one to two years.**

Comment Group I:

- You have to delete the phrase "legally separated" and "situation found ..."
- You have to remove the second paragraph "... When four years."
- In the first paragraph, add the following phrase "to deprive the economic means necessary for their livelihood or to prevent her from meeting her needs and those of her family" after "women". The penalty shall be the same.

Section 281.12 .- Section 262 of the Penal Code is amended as follows:

"Section 281.12 .- The termination of pregnancy without the consent of the pregnant woman is punishable by imprisonment.

Comment Group I: Section 281.12 remains as it is.

Section 281.13 .- When an abortion takes place under conditions that endanger the life of the pregnant woman by an unqualified person in a place other than a public or private hospital or beyond the period of twelve weeks, the penalty is that of hard labor.

Nevertheless, abortion is still allowed when the mother's life is in danger or when pregnancy results from rape.

Comment Group I: This article begins as follows "The interruption of pregnancy with the free and informed consent, and practiced in a good condition, will always be allowed."

- Must be added after private "recognized by the Ministry of Public Health and Population."
- There was no consensus whether to add a paragraph that recites: "Whoever, for sale of food made ... or not, shall be punished by imprisonment." If we accept the add, it could be reformulated as follows: "Whoever, for sale of food, beverages, drugs or violence, will procure the miscarriage of a pregnant woman without her consent shall be punished by imprisonment."
- We must eliminate the word "However"
- Instead of saying "the life of the mother," it must be said "when the physical and / or mental health of the mother is in danger or when pregnancy results from rape or incest."

(new) Article 282 .- The following constitute acts of **obstetric violence** made by health workers 1) failing to deal adequately and effectively with obstetric emergencies; 2) creating barriers to the early attachment of the boy or girl to the mother without medical justification, by stopping her from holding and breastfeeding the child at birth, 3) for low risk births, altering the natural process by the use of acceleration techniques, without informing the woman and without obtaining her express consent; 4) performing a caesarean section without informing the woman and without obtaining her express consent; 5) performing a caesarean section necessitated by [specific] medical techniques.

Authors / writers obstetric violence are condemned to a **fine of three hundred thousand gourdes (Gdes 300.000.00) to five hundred thousand gourdes (Gdes 500.000.00).**

In addition, the physician's license is suspended for a period of three years.

Notice of such suspension will be published in the press by the Government Commissioner.

Comment Group I: For line 4, it must be said "to perform a caesarean section without the prior consent of the woman and without obtaining the consent"

- It was proposed to define these concepts in the section will be devoted to definitions: the free and informed consent, the obstetric emergency.
- Some participants thought that the sentence was too high
- Replace "is given" with "should be given"

(new) Article 282.1 .- Any person who intentionally practices **sterilization of women without their knowledge**, without medical or surgical justification duly established, shall be punished by imprisonment of **two to five years**.

The physician's license will be withdrawn.

Comment Group I: It was suggested to require judges to take courses on women's rights. These courses will be set up by the MCFDF, and the course must be 45 hours . The physician's license will be suspended until it can prove by a certificate / formal document he actually followed the course of 45 hours.

Instead of jail, it would require a fine.

(new) Article 283 .- **Human trafficking** means, in exchange for remuneration or other benefit or promise of remuneration or any benefit, recruiting a person to transport, transfer, host or accommodate her in order to provide her to a third party, even if not identified, either to enable the commission against that person of the offences of pimping, sexual assault or abuse , exploitation of begging, working or living conditions affecting her dignity, or to compel that person to commit any crime.

Trafficking is punishable **by three to nine years in prison**.

Comment Group I: Article 283-283.3 - remain as they are.

Immediately following these articles, add articles 285.2 and 285.3 (as adjusted below), which become, respectively, 283.4 and 283.5.

(new) Article 283.1 .- Human trafficking is punished by **five to ten years hard labor where:**

- 1) the victim is a minor;
- 2) the victim is a person whose particular vulnerability due to age, illness, a physical or mental disability or state of pregnancy, is apparent or known to the perpetrator;
- 3) in the case of multiple victims;
- 4) the victim was in contact with the perpetrator through the use of a telecommunication network for broadcasting public messages;
- 5) there are circumstances that expose the victim to an immediate risk of death, or injury likely to cause mutilation or permanent disability;
- 6) the offence involves the use of threats, coercion, violence or fraudulent tactics towards the victim, her family or any other person in a regular relationship with her;
- 7) the offence is committed by a parent, natural or by adoption, of the victim of trafficking, or a person who has authority over her, or abuses the authority conferred to him/her by his/her functions;
- 8) the office is committed by a person who participates, through his/her duties, in the fight against trafficking in human beings or in maintaining public order.

(new) Article 283.2 .- **Human trafficking committed by organized gangs or by the use of torture or acts of barbarity** is punished the maximum sentence of **hard labor**.

(new) Article 283.3 .- The attempt to commit any of the offences set out in Articles 283, 283-1, 283-2 above, is punishable by the same sentence as the offence itself.

Comment SOFA: art 285... explains it.

(new) Article 284 .- Any Health professional who, in the exercise of his/her functions, performs degrading acts or makes offensive comments to a female victim of violence related to her condition is punished with **a fine of up to 100,000.00 gourdes (Gdes 100,000.00)** and will have their license suspended for a period of three to six months.

Comment Group I: Article 284 - remove "an abused woman" and substitute "a patient"

- For the trouble, you must write "the suspension of the license depending on the severity of the case which shall not exceed six months."

(new) Article 285 .- Any Communications professional, or one who, without being a communications professional, performs a function related to this discipline, who has, via any means of communication, **offended, insulted, denigrated a woman for reasons of gender**, in the exercise of his/her function or occupation, will be ordered to retract the insults and denigration and to compensate the female victim of violence by paying her a compensation of **seventy-five thousand gourdes (Gdes 75.000.00) to one hundred thousand gourdes (Gdes 100,000.00)**.

The victim may exercise her right of reply as provided by law.

Comment Group I: Article 285 - Rest as it is.

(new) Article 285.1 .- Any person who, in the exercise of a public service, regardless of rank, creates hindrances against a woman exercising her rights [hereunder], shall be punished with **a fine of Fifty thousand gourdes (Gdes 50,000.00) one hundred thousand gourdes (Gdes 100,000.00)**.

Comment Group I: Article 285.1 (which becomes 285 all)

- It must be said "the woman victim of violence and / or discrimination."

(new) Article 285.2 .- Any person who **promotes, encourages, facilitates or carries out the illegal entry or exit in the country of women, female children or adolescents**, under false promises, coercion or force to obtain an unlawful benefit for himself or a third person, shall be condemned to repay the amounts earned through trafficking and sentenced to **three to ten years imprisonment**.

Comment SOFA: 285.2 in point 3 may be covered in Chapter addressing trafficking and human trafficking.

Comment Group I: Article 285.2 (which becomes Article 283.4) - replace "women, children, adolescents ..." with "human beings."

(new) Article 285.3 .- Any person promotes, encourages, facilitates or carries out the capture, transport, hosting or reception of women, female children or adolescents, by means of violence, threats, false promises, abduction, duress or other fraudulent means, for the purpose of their **sexual exploitation, prostitution, forced labor, slavery, illegal adoption, or the extraction of organs**, will be sentenced to fifteen to twenty years imprisonment.

Comment Group I: Article 285.3 (which becomes Article 283.5) - replace "women, children,

adolescents ..." with "human beings."
- It should be added after "extraction" "or sale"

(new) Article 286 .- Health personnel in charge of female victims of acts of violence, are **obligated to immediately notify the appropriate government commissioner**, the dean of the court of first instance having jurisdiction, a justice of the peace of the commune, the "Interministerial Commission against Violence against Women", all competent magistrates, the competent bodies of the National Police of Haiti. Failure to do so is punished by a **fine of Twenty-Five Thousand Gourdes (Gdes 25,000. 00) to fifty thousand gourdes (Gdes 50 million).**

Civil servants who do not, within 48 hours, initiate legal steps based on the received [report]/[accusation] or who [pay little attention]/[give little priority/importance] to the case submitted, are subject to the same fine.

Comment Group I: It was discussed that has not reached consensus because it takes away the freedom of the female victim to choose if she wants to choose to file a complaint or not. And this can have an effect against-productive because women who may not come to health centers because they know that the health staff is required to notify the Commissioner of Government, or other actors in the judicial system. But we still stressed the need to maintain the principle in the case of minors.

(new) Section 286.1 In institutions of work, education or teaching institutions or other types of institutions, **managers who are aware of acts of sexual harassment by** persons under their responsibility, and who do not take adequate measures to correct the situation and prevent its recurrence **are sentenced to the fine set out in the preceding article.**

(new) **Article 287 .- Recidivism** occurs where the aggressor, after a conviction for violence, or after having served his sentence, commits, three months later, a new act of violence under this Act. [Translator's note, intended meaning is probably "commits within three months," but this is not correctly written in French draft.]

Commentary SOFA: Recidivism is it necessary to allow time for three months ... if the person commits another assault would not be considered recidivism??

Comment Group I: Article 287

- Remove "three months"

- In case of recidivism, the penalty should be doubled

- Here we must add a clause that requires the police and judicial authorities to establish and constantly maintain a register of the attackers. This register must be available for organizations that specialize in the care of women and girls victims of violence, and have legal recognition. It should be clear who is entitled to access this register.

(new) Article 287.1 .- The **accessory sentences** established under the Penal Code, such as the prohibition to exercise parental authority, guardianship, custody, including a ban from attending the residence, place of work of the female victim and any other places where she may be, shall be applicable as the judge for gender violence sees fit.

Comment Group I: Article 287.1 - after "Judge" remove "to gender violence" and add "or justice".

(new) Article 288 .- With respect to violence against women, mitigating circumstances are never

admitted in evidence.

Comment Group I: Article 288 – Keep it as it is.

Chapter V Liability

Article 57.- The damages suffered by a female victim of violence must be compensated by the perpetrator. Civil compensation is due to the female victim or, if she dies as a result of the offense, to her heirs, without prejudice to the obligation of the perpetrator to pay for medical or psychological treatment rendered necessary by the offense.

Article 58.- When the violence caused the loss of real property or chattels belonging to the female victim, the perpetrator shall bear the cost of the damage, and if repairs are not possible, he will pay the amount of the market value of the damaged property.

Article 59.- When criminal proceedings are instituted for acts of violence against women performed by one parent against the other or by a parent against the children, the Domestic Violence Court Judge shall automatically grant custody of the child to the parent who is not being charged.

This decision is always provisional ; it is executed without interruption at the behest of the Government’s Commissioner assisted by the magistrate who draws up the minutes.

Chapter VI Prosecution in cases of Violence against Women

Article 60.- Chapter VI entitled “Prosecution of Violence against Women” shall be added to “**Law No. 8 of the Code of Criminal Procedure concerning matters of public interest and of General Security.**” Article 470 will henceforth be Article 498.

Chapter VI The Prosecution of Violence against Women

Section 1 The Complaint and Accusation

Article 470.- Violence against women is reported by the woman who is assaulted, her family related by blood or through marriage, and even neighbors and friends.

It can also be reported by medical personnel at public and private institutions which may have knowledge of the offences, [local]/[municipal] Councils, organizations for women’s rights, human rights and other social organizations, women acting to defend the rights of women, and any other persons or institution which may have knowledge of the above-mentioned offenses.

Article 471.- An accusation or complaint may be lodged before the Ministry of Women’s Affairs and Rights, the Ministry of Public Health and Population, the Ministry of Justice and Public Security, members of the Government Commissioner, magistrates, police officers, either verbally or in writing, and with or without the assistance of an attorney.

MADRE/KOFAVIV Comment: We suggest adding the following language to this Article: The complaint shall be accepted and processed without regard to where the alleged violation occurred, so long as the complaint is made within four years of when the alleged violation occurred.

MADRE/KOFAVIV Comment: We also suggest adding the following language to this Article: The initial and subsequent interviews with the victim of rape or other sexual assault shall, whenever possible, be conducted by a person with specialized training in this area, and every effort shall be made throughout the investigation and prosecution to avoid additional trauma to the victim.

Article 472.- The authority which receives the complaint must, immediately,

1°) Refer the victim to a nearby private or public medical facility for the appropriate medical examinations. Victims of rape or other sexual assaults shall be promptly offered emergency contraception to prevent pregnancy, as well as testing and prophylaxis against HIV and other sexually transmitted infections. They shall also be offered the opportunity for specially trained medical personnel to conduct an examination to collect physical evidence of the assault, to be used in any potential prosecution.

MADRE/KOFAVIV comment: Language ensuring appropriate medical care and evidence collection is inserted above.

SOFA’s Commentary : *Is this prescribed or referred ? Will police be provided with the means to do this ? What about medication for protection/prevention of STIs and pregnancy following a rape? [Note: refers to text before insertion of MADRE/KOFAVIV suggestion, above.]*

- 2°) Give the female victim appropriate guidance;
- 3°) Order the compulsory appearance of the alleged perpetrator in order to obtain clarification on the allegations;
- 4°) Take appropriate measures of protection and security as provided for under this Act;
- 5°) Create the parties’ respective files;
- 6°) Draft a report of the circumstances clarifying the facts, which will be annexed to the [complaint]/[accusation], in addition to any other information or documents necessary to facilitate the understanding of the authority who receives the [complaint]/[accusation] ;
- 7°) Transmit the file to the public prosecutor.

Article 473.- The authority that receives the complaint may take all appropriate [interim]/[provisional] measures of protection and safety for the victim, as the case may be, after

the interview of the alleged perpetrator or a brief verification of the facts alleged in the complaint made by an immediate visit to the scene.

MADRE/KOFAVIV Comment: We suggest removing the above language suggesting that provisional safety measures for the victim should be taken only after an interview of the alleged perpetrator or a brief verification of the facts alleged in the complaint. This provision runs counter to the concept accepted in most jurisdictions that a victim may obtain an ex parte order of protection.

The written decision shall include, without limitation, the following measures:

1°) injunction requiring the alleged perpetrator, if he shares a home with the victim, to immediately leave the home;

2°) prohibition against contacting the victim wherever she is, under penalty of deprivation of liberty;

3°) obligation to supply food to the victim and her children;

4°) suspension or restriction of visitation rights with the children;

5°) suspension of the aggressor's permit to carry a weapon;

[Interim]/[Provisional] measures of protection and safety may be confirmed or overturned by the dean of the court of first instance or the Judge of violence against women, under a protection order.

Article 474.- As soon as the formalities prescribed by article 472 above have been fulfilled, the file is transmitted simultaneously to the dean of the court of first instance and to the Government Commissioner of the place where the offense occurred.

The file shall include the following:

1°) The complaint or the accusation which outlines the acts of gender-based violence, the time, place, and all other relevant circumstances surrounding the facts in question, as well as the month, year, day and time of the complaint or accusation ;

2°) Information about the identity of the person reported as the perpetrator, and the nature of the relationship between the perpetrator and the victim;

3°) The existence, if any, of a previous complaint or accusation, the day, month, and year in which it was made, as well as the administrative body that received it;

4°) Evidence of the condition of real property and chattel belonging to the victim, if the act pertains to violence against her property;

5°) The summons addressed to the alleged perpetrator;

6°) The statements made by the alleged perpetrator, which must be duly signed by him and by the authority to which the statements were made;

7°) The results of medical examinations, expert opinions, and evaluations of the victim;

8°) A report on the provisional measures of protection and security taken for the victim and their implementation.

Article 475.- The civil servant responsible for the transmission of the file shall be liable for any omission or negligence under civil, criminal or administrative law, as appropriate, and cannot invoke as an excuse the fact that he or she was following orders from his/her superiors.

Section 2 The Investigation and Trial

***Comments of SOFA:** The case of the perpetrators on the run, the escape/questions of pursuit and the search by the justice/police is not addressed.*

***Comments of Group I:** Is it necessary to have a special court for violence against women/girls ? constraints of resources and lack of training.*

Article 476.- A **Court of Violence against Women** shall be created within the Courts of first instance of the Republic.

Meanwhile, the dean of the court of first instance, in each jurisdiction, will serve as the judge of Violence against Women; the dean will designate two magistrates to fulfill these duties by delegation. At least two Chambers will be designated to hold hearings for the **Court of Violence against Women**.

Article 477.- The court with jurisdiction is that of the place of residence of the woman who was victimized or in danger, or the place where the alleged perpetrator may be found.

Article 478.- The **Court of Violence against Women** is presided over by the **Judge of Violence against Women**, and includes a public prosecutor, a court bailiff, and a clerk.

A section specialized in violence against women shall be established within each public prosecution office,.

In order to ensure proper enforcement of the provisions of the Law on the Prevention, Punishment and Eradication of Violence against Women, the judges and public prosecutors, court clerks, bailiffs, and employees of the Court of Violence against Women, must receive appropriate training, under the direction of the ministries of Women and Women's Rights, National Education, and of Professional Training.

Article 479.- The **Court of Violence against Women** has misdemeanor and criminal jurisdiction to investigate and prosecute offenses defined in this Act.

Article 480.- The rules of procedure in misdemeanor and non-jury criminal matters shall apply to the **Court of Violence against Women**.

Article 481.- Hearings shall be held without interruption until the decision on the merits ; there will not be, for any reason, any adjournment or postponement.

The alleged perpetrator must attend all hearings; if he refuses, he will be forced to do so.

However, if it is impossible to get the alleged perpetrator to attend the hearing, he will be prosecuted for obstruction of justice, resulting in an order for his arrest for later trial on the new offense. Obstruction of justice, in this case, is punishable with ten to fifteen years imprisonment.

If the alleged perpetrator does not appear before the court at the hearing of a misdemeanor matter, the case is judged in absentia.

The parties shall be heard separately, in order to avoid any confrontation between the alleged perpetrator, the victim, the children, and other family members.

The judge will take all measures necessary to ensure that the woman is protected from any emotional trauma, and that the privacy of the parties [is preserved].

A decision rendered in absentia shall be served at the request of the prosecution.

The appeal period is one clear day.

The appeal is governed by the rules of the Code of Criminal Procedure, to the extent not [contrary to]/[inconsistent with] the provisions of this Act.

The decision shall be rendered immediately.

Hearings will take place behind closed doors (*in camera*), in the presence of the victim, her lawyer, the perpetrator and his lawyer only.

MADRE/KOFAVIV comment: We suggest adding language to the above Article stating that corroborating evidence is not necessary to obtain a conviction—the testimony of the victim may be sufficient.

Article 482.- When conducting the inquiry, the Judge of Violence against Women shall be prohibited from actions that deepen the trauma of the complainants: investigations of morality, psychiatric evaluations, multiple confrontations, reconstructions of events.

The Judge of Violence against Women is prohibited from discussing the sexual history of the victim.

MADRE/KOFAVIV comment: In addition to prohibiting evidence of the complainant's sexual history, we suggest prohibiting evidence concerning the manner in which the complainant was dressed at the time of the offense.

The inquiry will take place at the hearing.

In addition to her lawyer, if the victim of violence has brought a civil claim, she may also be accompanied by a person of her choice throughout the proceedings.

***Comments of SOFA:** Reconstitution of the facts, details among the prohibited ??? Will that not affect the investigation and the establishment of the truth ?*

Proposed New Article Limiting Defense of Mistaken Consent

Article ____ : It shall not be a defense that the alleged perpetrator mistakenly believed the victim consented, when that belief arose from the perpetrator's self-induced intoxication, recklessness or willful blindness; or where a reasonable person would have understood the victim's words and actions as showing a lack of consent; or where the victim, having initially given consent, expressly revokes it.

MADRE/KOFAVIV Comment: New Article inserted to limit a defense of mistaken belief in the victim's consent.

Article 483.- During the inquiry, if the complainant requests it, a sound or video recording of the depositions shall be made.

Article 484.- Formal pleadings/documents as part of the misdemeanor or criminal proceedings are exempt from registration fee and stamp duty.

The abused woman has the right to free legal representation, even if not automatically appointed [by the court].

The conviction will be recorded in deficit, even with respect to convictions for damages and other civil judgments.

Article 485.- The Judge of **Violence against Women** also has civil jurisdiction .

A civil action may be brought before the Judge of Violence against Women. The rules specific to civil actions shall apply.

Article 486.- The right of appeal provided by the Criminal Procedure Code and the Civil Procedure Code shall apply to decisions of the **Court of Violence against Women** and the **Section of Violence against Women** of the Court of Appeal.

An appeal [on points of law to the court de cassation] does not suspend the effects of the decision, except where there has been a criminal conviction.

Article 487.- The President of the Court of Appeals shall create a **Section of Violence against Women**, with the same composition as the other sections and operating in the same manner as the criminal section, subject to any inconsistent provisions set out in this Act [which shall prevail].

Article 488.- An appeal [to the court of cassation] against a Court of Appeal decision shall follow the same procedures as an emergency appeal.

MADRE/KOFAVIV Comments: We suggest adding language in this section of the statute to establish specialized units in the police and prosecutor's offices to investigate offenses against children. We also suggest adding further procedures to protect minors involved during trial, for example: (1) allowing child witnesses to testify by closed-circuit television or video display, or from behind a screen or two-way mirror; (2) allow child testimony to be collected through interviews conducted by intermediaries (e.g., psychologists, pediatricians, or child-care workers), or by interrogations recorded outside the court room and shown during trial; (3) provide for a special legal or psychological assistant to the minor; (4) require the child's identity to be kept confidential.

Section 3

Advance judicial measures of protection and safety

Article 489.- A woman who, because of a situation that is objectively threatening or dangerous, requires protective measures, may make a simple application for them to the Judge of Violence against Women.

Article 490.- Protection measures may be requested by the female victim or her legal representative, by persons usually residing with her, by those in her custody, by the children of the threatened or victimized woman, even by the public prosecutor when there are legally incapacitated children , or by victim support or social services.

When, in the course of criminal proceedings, the situation becomes dangerous for the woman, the judge or the court has jurisdiction to render the protection order set forth in this Section.

Article 491.- If the judge's territorial jurisdiction is in doubt, the judge before whom the protection order was sought must complete the procedure for issuing the order, provided he/she forwards the file to the judge who is later found to have jurisdiction, as the case may be. Social services and other institutions mentioned above shall assist victims in applying for such

protective orders, by providing information, forms, and, as needed, means of communication with the public prosecutor and justice administration.

Article 492.- Upon receiving an application for a protective order, the dean or the deputy judge shall convene an urgent hearing to be attended by the complainant or her legal representative, the alleged perpetrator, his lawyer, if any, and the public prosecutor. The judge may travel if needed to conduct the hearing where relevant people are located. The hearing should take place within a maximum of 24 hours after the submission of the application.

At the end of this urgent hearing, the Judge of Violence against Women renders, if he/she deems it necessary, a protective order.

Article 493.- During the hearing, the judge shall adopt appropriate measures to avoid confrontation between the alleged aggressor and the complainant, her children and other family members.

For this reason, the hearings shall be held separately.

He may order the alleged perpetrator of violence against women to leave the family home and prohibit him from returning to the home.

In the context of actions and proceedings related to violence against women, the privacy of the victim shall be protected and, in particular, the victim's personal data, that her descendants and those of any other person who is in her custody.

After the hearing, the judge shall, where appropriate, issue the protective order which will specify the content and [conditions] of the measures he has ordered.

Comments of SOFA: Details needed on mandatory evacuation.

Article 494.- The protection order gives the victim of the offence covered in the general sections [of the Act] full protection status, which includes the measures set out in this article as well as other measures of assistance and social protection established in the judicial system.

The judge of Violence against Women may order the following measures, either separately or cumulatively :

- 1º) Give the victim the right to use the family housing and to enjoy all the property and chattels in the family home;
- 2º) Grant the victim provisional custody of the joint children ;
- 3º) Schedule the alleged perpetrator's visitation rights with the children (dates and time);
- 4º) Fix the maintenance to be granted to the victim and children;
- 5º) Prohibit the alleged perpetrator from approaching the protected person, her domicile, place of work or any other place which she frequents, under penalty of provisional detention;
- 6º) Prohibit the alleged perpetrator from communicating with the victim or any other designated persons;
- 7º) Set a minimum distance that the alleged perpetrator must maintain between him and the protected person under penalty of criminal liability;
- 8º) Prohibit the alleged perpetrator from carrying weapons;
- 9º) and any other appropriate measures for the effective protection of the victim, her children, and all other members of the family's household.

The protective order may be invoked before any public authority or administration.

Article 495.- The protection measures contained in the protective order shall be in effect for a period of thirty days. At the end of this term, they shall either be confirmed for a further period of thirty days, amended or withdrawn by the judge.

Article 496.- The protective order involves an ongoing obligation to inform the victim of the status of the proceedings against the alleged perpetrator as well as the scope and conditions of preventive measures taken. In particular, the victim shall be kept informed at all times of the incarceration status of the perpetrator. To this end, the protective order is reported to prison administrators.

Article 497.- The protective order is served on the parties and immediately communicated by the judge to the victim and to the relevant government authorities for the purpose of implementing protective measures, whether they are security measures or measures pertaining to social assistance, legal, health, psychological or any other concerns. For this purpose, an integrated system of administrative coordination shall be established by regulation, to guarantee efficient cross-communication.

Article 498.- Within the National Police, specialized units will be set up for the prevention of violence against women, and to monitor the enforcement of legal measures ordered, particularly the protection order.

These specialized units will work in coordination with government agencies responsible for prevention and protection against violence against women.

Chapter VII Establishing a budget

Article 61.- The ministries responsible for the implementation of this Act are required to include in their next budget a chapter on funding for its implementation.

Until the next budget, budgetary credits will be allocated for this purpose and for any training program for civil servants in the fields of Education, Health, Communication, Culture, National Police Officers, officials of the Judiciary, as well as for awareness campaigns which must be launched at the national level, in school and university centers, workplaces, and prisons.

Chapter VIII Transitional Provisions

Article 62.- Before the Court of Violence against Women is set up, the criminal courts [for misdemeanors and crimes] will handle the offenses provided for in this Act.

They will continue to handle all pending cases through final decision, even when the Court of Violence against Women has been set up.

Case files discharged permanently will be placed in archive at the Registry of the Court of Violence against Women.

Article 63.- Pending the establishment of the "Authority of the Verification of Sexist Content", the Ministry for Women's Affairs and Women's Rights will establish a Commission composed of three representatives of the public Section which must include the Mayor or his delegate and, as observers, two representatives of civil society, to carry out the responsibilities of the Auditing Authority of Sexist Content.

Article 64.- Pending the establishment of the Inter-ministerial Commission for the Fight against Violence against Women, the ministries concerned will take all coordinated measures for the application of provisions of this Act in respect to areas of intervention of the said Commission.

Article 65.- Pending the establishment of specialized units in the prevention of violence against women, the National Police of Haiti will form special intervention brigades for the prevention of violence against women and the implementation of the protective measures ordered by the court.

Chapter IX Abrogation Provision

Article 66.- This Act repeals all laws or provisions of law, all decrees or provisions of decree, all other provisions which are inconsistent therewith; and will be printed, published and enforced by the Minister for Women's Affairs and Rights, the Minister of Public Health and Population, the Minister of Justice and Public Security, the Minister of Education and Vocational Training, the Minister of Culture and Communication, the Minister of Social Affairs and Labor, with regard to their respective remit hereunder.

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***General Observations of Group I:** Does this law consider that a woman, once abused, is always a victim ? Maybe it is necessary to clarify a period to help her reintegrate and become autonomous in society.*

- 1. It is necessary to have the opinions, reactions of judges and lawyers who are experts (so as not to modify the criminal code, for example)*
- 2. In terms of strategy, the different institutions concerned must be involved*
- 3. The document must be separated into 2 parts : The law and the investigation*
- 4. One part must be dedicated to violence against minors (girls)*
- 5. Incest must be considered*
- 6. A definition of « employment » and « work » must include women who work in informal sectors and those working at home without pay*



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Front cover photo: A girl walks hand-in-hand with a woman on their way to church in the Fort National neighborhood of Port-au-Prince.
Allison Shelley / Reuters