



Canadian
HIV/AIDS
Legal
Network | Réseau
juridique
canadien
VIH/sida



**Respect, Protect and Fulfill:
Legislating for Women's Rights
in the Context of HIV/AIDS**

Volume One: Sexual and Domestic Violence

Module 1: Rape and Sexual Assault

Canadian HIV/AIDS Legal Network
2009



**Respect, Protect and Fulfill:
Legislating for Women's Rights in the Context of HIV/AIDS
Volume One: Sexual and Domestic Violence — Module 1: Rape and Sexual Assault**

© 2009 Canadian HIV/AIDS Legal Network

Further copies can be retrieved at www.aidslaw.ca/womensrights.

Canadian cataloguing in publication data

Pearshouse R and A Symington (2009). *Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS — Volume One: Sexual and Domestic Violence. Module 1: Rape and Sexual Assault*. Toronto: Canadian HIV/AIDS Legal Network.

ISBN 978-1-896735-98-6 (Module 1)
ISBN 978-1-896735-96-2 (Volume One)

Authorship and Acknowledgements

This volume was written by Richard Pearshouse with input from Alison Symington. Joanne Csete, Richard Elliott and Sandra Ka Hon Chu reviewed drafts of this volume and gave significant input into the overall project. David Garmaise copyedited this volume. Invaluable research and writing assistance was provided by Y.Y. Chen, Glenn Dodge, Katie Gibson, Fanny Gomez, Shaun Khullar, Angus MacLean Rennie, Anne Merminod, Julie Shugarman, Indira Stewart and Madhavi Swamy.

Many thanks also to the participants of the consultation meetings held in Nairobi (December 2006) and Johannesburg (October 2007), who provided feedback and advice on draft versions of the publication: Liesl Gertholtz, Scholastica Jullu, Irene Mulyagonja, Catherine Mumma, Sipiwe Hlope, Birte Scholz, Duma Boko, Ogone Oscar Mokoko Gaboutloeloe, Eddie Mwitwa, Elisa Slattery, Esther Kisaakye, Matrine Chuulu, Teresa Omondi, Elizabeth Maro Minde, Victor Arika, Lillian Artz, Michaela Clayton, Patrick Eba, Dianne Hubbard, Muziula Kamanga, Rafa Valente Machava, Sisonke Msimang, Uyapo Ndadi, Karen Stefiszyn, Christine Stegling, Susan Timberlake and Frans Viljoen.

The financial contributions of UNAIDS, the Stephen Lewis Foundation, and the Toronto Community Foundation towards this project are gratefully acknowledged.

The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the funders or the participants in the consultation meetings.

About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research, legal and policy analysis, education and community mobilization. The Legal Network is one of the world's leading advocacy organizations working on the legal and human rights issues raised by HIV/AIDS.

Canadian HIV/AIDS Legal Network

1240 Bay Street, Suite 600
Toronto, Ontario, Canada M6R 2A7
Telephone: +1 416 595-1666
Fax: +1 416 595-0094
E-mail: info@aidslaw.ca
Website: www.aidslaw.ca

If you are using *Respect, Protect and Fulfill* in your work for women's rights or if relevant law reforms are being considered in your country, please contact the Canadian HIV/AIDS Legal Network at: womensrights@aidslaw.ca

The Legal Network may be able to offer technical support or collaboration in undertaking national law reform advocacy to protect women's rights in the areas of sexual and domestic violence, and family and property issues. Please send inquiries to: womensrights@aidslaw.ca.

Respect, Protect and Fulfill: Legislating for Women's Rights in the Context of HIV/AIDS
is endorsed by the following partners:



About this publication

Legislation can be instrumental in impeding or promoting initiatives to address the HIV/AIDS epidemic. The widespread legal, social, economic and political ramifications of the epidemic make it necessary to review and reform a broad range of laws. Within a context of entrenched gender discrimination, the devastating impacts of HIV/AIDS, widespread poverty and increasing competition for resources such as property and land, legislative solutions to the denial of women's rights are urgently needed. Law reform is not a complete solution to the HIV epidemic among women, but it is a necessary and often neglected step.

This project draws together international human rights law and illustrative examples from various jurisdictions as the basis for a legal framework to respect, protect and promote women's rights in the context of HIV/AIDS. *Respect, Protect and Fulfill* is intended as a tool to assist advocates and policy-makers as they approach the task of reforming or developing laws to meet the legal challenges posed by the HIV epidemic. It is not intended for any one country or set of countries. The project focuses on sub-Saharan Africa, but it is designed to be adaptable to the needs of countries in other regions.

Comprehensive consultations were conducted during the drafting of this publication. Draft versions of the text were reviewed by various experts, including representatives of women's legal clinics, AIDS service organizations and organizations of people living with HIV, research and policy institutions, and human rights organizations. Three consultation meetings were held in December 2006, October 2007 and January 2008; and the draft text was circulated electronically to a number of persons and organizations for further input. The final document, therefore, has benefited from the feedback of a wide range of experts in the fields of HIV/AIDS, human rights and women's rights.

How to use this publication

Respect, Protect and Fulfill consists of eight modules in two volumes, as follows:

Volume One: Sexual and Domestic Violence

- (1) Rape and Sexual Assault
- (2) Domestic Violence

Volume Two: Family and Property Issues

- (1) Marriage
- (2) Domestic Partnerships
- (3) Property in Marriage
- (4) Divorce
- (5) Inheritance
- (6) Implementation Provisions

There is considerable overlap and intersection among all of these issues; readers are thus encouraged to consult all eight modules. In addition, each module is drafted on the

assumption that the country adopting it has implemented similar legislation on the issues set out in the other modules. Accordingly, provisions are cross-referenced to one another. In adapting the legislative provisions to a particular jurisdiction, appropriate revisions and amendments will need to be made.

The issues addressed in these modules also necessarily intersect with other issues and the rights of other groups, such as the rights of children, indigenous communities and persons with disabilities. It is beyond the scope of this project to include provisions specific to all of these issues and groups, but it is important to explicitly note their importance and interdependence. It is our hope that this work on women's rights can be used alongside other human rights-based resources in the development of a comprehensive legislative response to HIV/AIDS.

Each module features a prefatory note, proposed legislative text, and commentaries supporting the provisions in the proposed legislative text. The prefatory notes and commentaries present the rationale for reforming or enacting laws and policies in the areas covered by the modules, and discuss the relevant international and regional human rights conventions. On certain issues, two or more options for legislative texts are provided to allow countries to develop laws that are most suitable to their local contexts. As well, some of the provisions have been labelled as "optional." These provisions may or may not be applicable, depending on the situation in a particular country. Where square brackets appear in a draft article — for example, "[monetary amount]," "[relevant state ministry]" or "[period of time]" — the relevant information needs to be added in order to adapt the provision to a specific country. (This is often used for amounts of fines, time periods, the titles of government departments or officials, and the titles of other legislation, all of which vary from country to country.)

This publication is heavily footnoted. The notes provide additional information on the issues being addressed, as well as full references. If the same source is cited more than once in a module, the second and subsequent references to that source are abbreviated and contain the word "supra."

The modules included in this publication are not intended to comprise a stand-alone bill or act, but rather to be the foundation for progressive, rights-protecting laws on each issue. Some of the issues discussed in the modules have been addressed in legislation only recently or inadequately. Therefore, while all of the proposed provisions are based on the best available evidence and human rights principles, some have yet to be tested. Furthermore, depending on the legislation currently in force in a given country, provisions adapted from this publication may be most appropriately placed within various other pieces of legislation; or sets of provisions could be enacted as specific bills, or expanded to include other technical provisions necessary for the legislation to function within the jurisdiction's legal framework.

Volume One Introduction

Women and HIV/AIDS

Over 25 years into the epidemic, it is now widely recognized that laws and policies must affirm and protect women's rights in order to mount an effective response to HIV/AIDS. Governments have repeatedly declared their commitment to respect, protect and fulfill women's rights and acknowledged the linkages between HIV and gender inequality.¹ To this end, the U.N. and other international agencies have developed various programs to respond to the gender dimensions of the epidemic and work towards gender equality.² Yet, women's legal, economic and social subordination continues to catastrophically increase their risk of HIV infection and constrain their access to HIV testing, treatment, care and support.³

Violence against women is a severe manifestation of gender inequality, with devastating impacts on the lives of women and girls worldwide. The violence is often fuelled by longstanding social and cultural norms that allow it to be tolerated in society. All too often, such violence is overlooked, or its significance is diminished, by police, judges, community and religious leaders, and other authority figures. Violence against women is also a global health crisis, a human rights atrocity, and often both a cause and consequence of HIV.

Women bear a disproportionate burden of the HIV epidemic, especially in sub-Saharan Africa where women are more likely to be infected than men and more likely to be the ones caring for others who are infected with HIV. Young women are particularly affected. In South Africa, for example, women aged 15 to 24 are four times more likely

¹ See, for example, the *Declaration of Commitment on HIV/AIDS* issued by heads of state and government representatives at the U.N. General Assembly Special Session on HIV/AIDS in 2001, which stresses that "gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS."

² For example, a U.N. Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa was established in 2003, The Global Coalition on Women and AIDS was launched by UNAIDS in 2004; see <http://womenandaids.unaids.org> and UNAIDS developed the *UNAIDS Action Framework: Addressing Women, Girls, Gender Equality and HIV* in 2009.

³ See, for example, Committee on the Elimination of Discrimination against Women (CEDAW Committee), "Concluding Observations: Namibia," U.N. Doc. A/52/38/Rev.1, 1997, para. 79, where the Committee provides, "HIV and AIDS [a]re increasing at an alarming rate, especially among women, as a result of their low social and economic status." According to UNAIDS and the World Health Organization (WHO), in sub-Saharan Africa almost 61 percent of adults living with HIV in 2007 were women: UNAIDS and WHO, *AIDS Epidemic Update*, December 2007, p. 8. Furthermore, young women and girls aged 15–24 who have only recently become sexually active are more than twice as likely to be infected than males in the same age group. The gap is larger still in Southern Africa where, in Zambia and Zimbabwe, girls and young women make up close to 80 percent of all young people aged 15–24 who are living with HIV: UNAIDS, *Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa*, July 2004, p. 9, online: <http://womenandaids.unaids.org/regional/docs/Report%20of%20SG%27s%20Task%20Force.pdf>.

to be HIV-infected than are young men, and one in three women aged 30 to 34 were living with HIV in 2005.⁴

A combination of factors heighten women's vulnerability to HIV. Women's physiology renders them more likely to become infected if exposed to the virus; and social and cultural factors exacerbate that vulnerability. Violence against women increases their risk of HIV infection which, in turn, elevates the risk that they will face further violence.⁵ Unless these connections between violence and HIV are understood and addressed, the epidemic will continue to escalate among women.

While rape, sexual assault and domestic violence are crimes experienced by people of all ages, statistics show that sexual violence and other forms of domestic violence are experienced primarily by women and girls. Worldwide, one in five women are estimated to experience rape or attempted rape in their lifetime and one in three women will be beaten, coerced into sex or otherwise abused, most commonly by a family member or an acquaintance.⁶ A 2005 study of 10 countries by the World Health Organization (WHO) reported that between six and 59 percent of women had experienced sexual violence by an intimate partner.⁷ The primary targets of sexual violence are often young women and girls.⁸ In South Africa, for example, police statistics show that more than 40 percent of rape survivors who reported their assaults to the police in 2002–2003 were girls under 18 years of age, and 14 percent of those who reported were 12 years old or younger.⁹

The same WHO study reported that between 13 percent (in Japan) and 61 percent (in Peru) of women have been physically abused by a male partner at some point in their

⁴ UNAIDS/WHO, *AIDS Epidemic Update: December 2006*, p. 11, online: www.unaids.org/en/HIV_data/epi2006/default.asp.

⁵ See U.N. Commission on Human Rights, "Elimination of Violence Against Women," Resolution 2004/46, Fifty-Sixth Meeting (20 April 2004), which states that

... violence against women and girls, including rape, female genital mutilation, incest, early and forced marriage, violence related to commercial sexual exploitation, including trafficking, as well as economic exploitation and other forms of sexual violence, increases their vulnerability to HIV/AIDS, that HIV infection further increases women's vulnerability to violence, and that violence against women contributes to the conditions fostering the spread of HIV/AIDS. (para. 9)

⁶ United Nations Population Fund (UNFPA), *State of World Population 2005 — The Promise of Equality: Gender Equity, Reproductive Health & MDGs*, c. 7, online: www.unfpa.org/swp/2005/english/ch7/index.htm.

⁷ WHO, *WHO Multi-Country Study on Women's Health and Domestic Violence Against Women*, Summary Report, 2005, p. 6, online: www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf.

⁸ The UNFPA reports that nearly 50 percent of all sexual assaults worldwide are against girls 15 years old or younger: *UNFPA State of World Population 2005* (supra).

⁹ Human Rights Watch (HRW), *Deadly Delay: South Africa's Efforts To Prevent HIV in Survivors of Sexual Violence*, 2004, c. 4, online: <http://hrw.org/reports/2004/southafrica0304/>.

lives.¹⁰ It further reported that between six percent (in Japan) and 59 percent (in Ethiopia) of women had experienced sexual violence by an intimate partner.¹¹ Instead of the home being a “safe haven” for women, in many countries women are more likely to experience violence in their domestic relationships than in other aspects of their lives.

With violence against women being as pervasive and as global as these statistics suggest, the imperative to take action is clear. It is noteworthy, however, that such statistics do not represent the full extent of violence against women; it has long been established that only a small percentage of sexual assaults are reported to police or reflected in surveys.¹² In other words, reporting rates do not necessarily reflect crime rates.¹³

Women, violence and human rights

Admittedly, there remains much to be done in order to adequately address the issue of violence against women, but the international community has increasingly recognized that violence against women is a human rights violation which intersects with HIV/AIDS, and that combatting sexual and domestic violence requires the empowerment of women.¹⁴ For example, the U.N. Commission on Human Rights has stressed that the advancement of women and girls is the key to reversing the HIV/AIDS epidemic.¹⁵ Moreover, the Commission emphasized that violence against women and girls increases their vulnerability to HIV, that HIV infection further increases women’s vulnerability to violence, and that violence against women contributes to the conditions fostering the spread of HIV.¹⁶ Similarly, both the 2001 U.N. General Assembly Special Session

¹⁰ WHO, *WHO Multi-Country Study on Women’s Health and Domestic Violence Against Women* (supra), p. 6. The ten countries were: Bangladesh, Brazil, Ethiopia, Japan, Namibia, Peru, Samoa, Serbia and Montenegro, Thailand and Tanzania.

¹¹ *Ibid.*, p. 7.

¹² U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (R. Coomarasamy): Integration of The Human Rights of Women and the Gender Perspective: Violence Against Women*, Addendum 1: “International, regional and national developments in the area of violence against women 1994–2003,” 2003, Fifty-Ninth Session, U.N. Doc. E/CN.4/2003/75, para. 13, online: [www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2003.75.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2003.75.Add.1.En?Opendocument).

¹³ According to the Eighth Survey of the *United Nations Survey of Crime and Criminal Justice Systems* (UNCJS) (covering the period 2000–2001), out of 53 countries that provided data on the rate of reported rapes per 100 000 people, South Africa ranked first (with 121), Canada second (with 77), Namibia third (with 46–49), and the U.S. fourth (with about 32). The Legal Assistance Centre (LAC) in Namibia noted that high levels of reporting could be a result of positive factors such as higher official sensitivity to rape; well established bureaucratic recording practices; increased awareness of the crime on the part of both police and members of the public; and progressive empowerment of women. See LAC, *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, 2006, c. 2.

¹⁴ See U.N. General Assembly, “Intensification of Efforts to Eliminate All Forms of Violence Against Women,” Resolution 63/155, 30 January 2009.

¹⁵ U.N. Commission on Human Rights, “The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,” Resolution 2004/27, 16 April 2004.

¹⁶ U.N. Commission on Human Rights, “Elimination of Violence Against Women” (supra), para. 9.

(UNGASS) *Declaration of Commitment on HIV/AIDS* and the 2006 U.N. General Assembly Resolution, *Political Declaration on HIV/AIDS*, emphasize the need to integrate the rights of women and girls into the global struggle against HIV/AIDS.¹⁷ The *International Guidelines on HIV/AIDS and Human Rights* further highlight the need for legislation addressing discrimination and violence against women.¹⁸

In legislating in the area of sexual violence, countries must necessarily have regard to their obligations under applicable international law. Of particular relevance with respect to legislating against sexual and domestic violence are the following human rights:

- the right to the highest attainable standard of health;¹⁹
- the right to life;²⁰
- the right to freedom from cruel, inhuman or degrading treatment or punishment;²¹
- the right to be free from slavery and servitude;²²
- the right to liberty and security of the person;²³
- the right to non-discrimination and equal protection of the law;²⁴ and
- the right to be protected from violence.²⁵

¹⁷ U.N. General Assembly, *Declaration of Commitment on HIV/AIDS*, (Twenty-Sixth Special Session), U.N. Doc A/RES/S-26-2, 2 August 2001, para. 61; U.N. General Assembly, *Political Declaration on HIV/AIDS*, 87th plenary meeting, 2 June 2006, U.N. Doc A/RES/60/262, paras. 30–31.

¹⁸ UNAIDS and Office of the High Commissioner for Human Rights (OHCHR), *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, 2006, guideline 8. Online: www.ohchr.org/english/issues/hiv/guidelines.htm.

¹⁹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR], art. 12; Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [CEDAW], art. 12; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 13 September 2000, O.A.U. Doc. CAB/LEG/66.6 (entered into force 25 November 2005) [Protocol on the Rights of Women in Africa], art. 14.

²⁰ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR], art. 6; Protocol on the Rights of Women in Africa, art. 4.

²¹ ICCPR, art. 7; Protocol on the Rights of Women in Africa, art. 4.

²² ICCPR, art. 8.

²³ ICCPR, art. 9 and 10; Protocol on the Rights of Women in Africa, art. 4.

²⁴ ICCPR, art. 26; Protocol on the Rights of Women in Africa, art. 8.

²⁵ Women's right to be free from sexual violence is explained in General Recommendation No. 19 of the CEDAW Committee, para. 24(b): "States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers is essential for the effective implementation of the Convention [on the Elimination of All Forms of Discrimination Against Women]": CEDAW Committee, "General Recommendation No. 19: Violence Against Women," (Eleventh Session, 1992), U.N. Doc A/47/38, 1993, paras. 24(b) and (k), online: www1.umn.edu/humanrts/gencomm/genr19.htm.

The right to health:

Violence violates bodily integrity and the security of the person, and poses serious threats to physical and psychological health. The normative content of the right to the highest attainable standard of physical and mental health — Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) — contains the right of every person to control one’s health and body, which includes the right to make autonomous decisions over one’s sexuality without interference.²⁶

The right to life:

The right to life has been characterized as “the supreme right,” from which no derogation is permitted.²⁷ The right to life is put at risk directly through sexual assault, rape and physical attacks, as injuries sustained can be life-threatening and can cause severe emotional distress. HIV transmission occurring as a result of sexual violence poses a further risk to the right to life. As with other rights, the right to life requires that states adopt positive measures to fulfil their obligations. In addition to preventing and punishing crimes of sexual and domestic violence, the provision of HIV post-exposure prophylaxis and appropriate reproductive health services to survivors of sexual violence may be required.²⁸

The right to be free from torture and other cruel, inhuman or degrading treatment or punishment:

Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR), which prohibits torture or other forms of cruel, inhuman or degrading treatment or punishment, is aimed at protecting the dignity and integrity of the individual. It covers not only acts that cause physical pain, but also those that cause mental suffering to the survivor.²⁹ Ensuring the right to be free from torture and cruel, inhuman or degrading treatment, therefore, includes protection from sexual violence and its consequences. For example, the U.N. Special Rapporteur on torture looked at questions concerning torture directed disproportionately or primarily against women, and found that rape and other forms of sexual assault could constitute torture. He commented that when sexual abuse occurred in the context of custodial detention, interrogators were said to have used rape to extract

²⁶ U.N. Committee on Economic, Social and Cultural Rights, “General Comment No. 14: The Right to the Highest Attainable Standard of Health,” 8 November 2000, U.N. Doc. E/C.12/2000/4, Twenty-Second Session, para. 8. The Committee on Economic, Social and Cultural Rights is the U.N. body responsible for monitoring compliance with the ICESCR. Online: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument).

²⁷ U.N. Human Rights Committee, “General Comment No. 6: The Right to Life (Article 6),” 1982, Sixteenth Session, para. 1, online: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument).

²⁸ The term “survivor” is used throughout this volume to refer to a person who has experienced rape, sexual assault or violence. Many anti-violence advocates prefer the term “survivor” to “victim” as it is felt to be more empowering and connotes the holistic life experience of the person following her or his experience or experiences of violence.

²⁹ U.N. Human Rights Committee, “General Comment No. 20: Article 7,” 1992, Forty-Seventh Session, paras. 2 and 5, online: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

confessions or information, to punish detainees or to humiliate them. He found that rape was an especially traumatic form of torture for the survivor, with insidious correlative consequences.³⁰

The right to non-discrimination and equal protection under the law:

States are obligated to take measures to eliminate violence against girls and women, to ensure the law protects them equally, and to provide them with access to health and social services without discrimination.³¹ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which oversees the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), has recommended that these obligations extend beyond the justice system and encompass violence prevention and protection measures, including counselling and support services for survivors of rape and sexual assault.³² International human rights organizations have reaffirmed this point, arguing that protective measures ought to “include provision of medical and psychological assistance to girls who are survivors of violence.”³³

The right to be protected from violence:

Under international human rights law, governments are responsible for preventing, eradicating and punishing sexual violence whether it occurs in the public or private sphere.³⁴ Article 2 of CEDAW requires that states parties pursue a policy of eliminating discrimination against women and, to that end, “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”³⁵ General Recommendation 19 of the CEDAW Committee states that violence against women, including violence against the

³⁰ U.N. Commission on Human Rights, *Report of the Special Rapporteur on Torture (N.S. Rodley): Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc E/CN.4/1995/34, 1995.

³¹ See art. 26 of the ICCPR. The *Declaration on the Elimination of Violence Against Women* urges states, in art. 4(c), to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”: *Declaration on the Elimination of Violence Against Women*, 20 December 1993, U.N. G.A. res. 48/104, UN Doc. A/48/49 (1993) [DEVAW]; CEDAW, art. 12; Protocol on the Rights of Women in Africa, art. 14.

³² See CEDAW Committee, “General Recommendation No. 19 (supra), paras. 24(b) and (k).

³³ HRW, *Deadly Delay* (supra).

³⁴ The 2006 report (E/CN.4/2006/61) of the Special Rapporteur on Violence Against Women, Its Causes and Consequences to the U.N. Commission on Human Rights focuses on the due diligence standard as established in the *Declaration on the Elimination of Violence Against Women*. Article 4(c) of that instrument provides that states shall “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” The CEDAW Committee has stated that the obligation of eradicating discrimination against women, including rape and sexual assault, is not restricted to those actions carried out by or on behalf of governments. See CEDAW Committee, “General Recommendation No. 19” (supra).

³⁵ CEDAW, art. 2(f).

family, is discrimination within the terms of CEDAW.³⁶

Some regional treaties set out specific obligations with respect to protecting women from violence. For example, Article 4 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Protocol on the Rights of Women in Africa) sets out that, amongst other things, states parties

shall take appropriate and effective measures to: a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women, and; c) identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence.

Article 5(d) of the Protocol on the Rights of Women in Africa mandates that states parties must protect women who are at risk of being subjected to harmful practices, including all forms of violence, abuse and intolerance.

Due diligence

Under international human rights law, states have an obligation to act with due diligence to protect human rights. Whether or not the violation is committed by a state or non-state actor, they must take action to prevent and redress human rights violations. In 2003, the U.N. Human Rights Commission reiterated the obligation of states to exercise due diligence to prevent, investigate and punish acts of violence against women and girls.³⁷ Consistent with this, the U.N. Special Rapporteur on Violence Against Women, Its Causes and Consequences noted that

if we continue to push the boundaries of due diligence in demanding the full compliance of States with international law, including to address the root causes of violence against women and to hold non-State actors accountable for their acts of violence, then we will move towards a conception of human rights that meets our aspirations for a just world free of violence.³⁸

³⁶ Para. 31, A/47/38.

³⁷ U.N. Human Rights Commission, *Resolution on the Elimination of Violence Against Women*, 2003/45, para. 14, online: www.unhcr.ch/Huridocda/Huridoca.nsf/0/92369a7e29927af3c1256d1f004196ce?Opendocument. See also, U.N., *Report of the Ad-hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly*, Twenty-Third Special Session, Supplement No. 3, U.N. Doc. A/S-23/10/Rev.1, 2000, para. 13, online: www.un.org/womenwatch/daw/followup/as2310rev1.pdf.

³⁸ U.N. Human Rights Commission, *Report of the Special Rapporteur on Violence, Its Causes and Consequences (Y. Ertürk): Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women — The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, 2006, U.N. Doc. E/CN.4/2006/21, Sixty-Second Session.

International jurisprudence has also underscored the importance of demonstrating due diligence in the context of preventing sexual violence. The European Court of Human Rights, upon reviewing several national and international laws, has recognized that, under Article 3 (prohibition of degrading treatment) and Article 8 (right to respect for private life) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, member states have a positive obligation both to enact criminal legislation to effectively punish rape, and to apply this legislation through effective investigation and prosecution.³⁹ Domestically, certain high courts have also recognized that the right to be free from violence is indicative of a legal duty resting on the state to act positively to prevent violent crime, including sexual assault and rape.⁴⁰

In 2001, the Inter-American Commission on Human Rights explicitly applied the due diligence doctrine to the issue of domestic violence, concluding that Brazil had failed to exercise due diligence to prevent and respond to domestic violence.⁴¹ As well, in 2005, the CEDAW Committee made a decision under the *Optional Protocol to CEDAW* on a case concerning domestic violence (*A.T. v. Hungary*, 2005) and found that the state party had failed to fulfil its obligations to prevent violence and protect the complainant against its consequences. The due diligence standard informed its analysis.⁴²

³⁹ See *M.C. v. Bulgaria* (application no. 39272/98), 2003 (European Court of Human Rights).

⁴⁰ See *Ghia Van Eeden (Formerly Nadel) v. Minister of Safety and Security*, 2001(4) SA 646 (T), para. 18 (South African Supreme Court of Appeal); *Carmichele v. Minister of Safety and Security* [2001] ZACC 22, (South African Constitutional Court): A man who was free on bail after being charged with rape attacked and injured another woman. The police and prosecutor were held liable for damages to this second survivor, because they failed to exercise their duties with respect to the bail matter in a reasonable fashion. They were found to have neglected to put relevant information before the court which would have alerted the court to the danger of future violence by the man freed on bail. In Canada, the civil liability of public authorities in the context of sexual assault was significantly broadened by *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*, (1998), 39 O.R. (3d) 487 (Ontario Court, General Division), where police were held liable for breaching their duty of care by failing to warn Jane Doe and other affected women of the danger that the police knew they might face as potential victims of a serial rapist who was targeting women with a particular profile in a particular neighbourhood. The Court also found that the actions of the police constituted gender discrimination and, therefore, violated Jane Doe's rights to equal protection of the law and to security of the person. For further discussion of positive obligations, see H. Combrinck and Z. Skepu, *Bail in Sexual Assault Cases: Complainants' Experiences — Second Research Report: 2002–2003*, 2003, c. 6 (based on research conducted by The Consortium on Violence Against Women: Gender Project, Community Law Centre, University of the Western Cape; the Institute of Criminology, University of Cape Town; and the Rape Crisis, Cape Town), online: www.communitylawcentre.org.za.

⁴¹ Inter-American Commission on Human Rights, Report No. 54/01, Case 12.051, Maria da Penha Maia Fernandes (Brazil), 16 April 2001.

⁴² CEDAW Committee, "Views of the Committee on the Elimination of Discrimination Against Women under Article 7, Paragraph 3, of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*," Communication No. 2/2003, *Ms. A.T. v. Hungary*, (adopted on 26 January 2005, Thirty-Second Session), online: www.un.org/womenwatch/daw/cedaw/cedaw32/views/A.T.-v-Hungary-2-2003.pdf.

The need for law reform

In order to fully protect women’s rights and stem the spread of HIV, preventing crimes of violence against women and responding appropriately when they do occur are important priorities for governments to adopt. Reforming existing laws that address sexual and domestic violence, or adopting new laws where laws are lacking, is one important aspect of governments’ response. To be most effective, national legislation should reflect progress in human rights jurisprudence and policy guidance at national, regional and international levels.

There are many challenges to progressive legal reform with respect to issues of violence against women — including a lack of political will, resistance to legislating on matters characterized as “private,” the multifaceted needs of survivors, and limitations to evidence and witness testimony for criminal trials — as well as a widespread recognition amongst anti-violence advocates that legal solutions on their own are insufficient to change the pervasive culture of violence. Despite these challenges, law reform remains an essential component in the struggle to end violence against women, and appropriate legislation can contribute to an enabling environment for the realization of gender equality. With the commitment and advocacy of women, civil society groups, traditional leaders, parliamentarians and others, legislating for women’s human rights holds promise for women’s empowerment and can stem the harms caused by the HIV/AIDS pandemic.

Module 1: Rape and Sexual Assault

Table of Contents

Prefatory Note	1
Women, sexual violence and HIV	1
A. Statutory Offences	5
Article 1. Rape.....	5
Article 2. Sexual assault.....	8
Article 3. Definition of the offence of aggravated rape or sexual assault	12
Article 4. Defining “consent” or “coercive circumstances”	13
Article 5. Marital rape	15
B. Evidence and Procedure	18
Article 6. Abolition of cautionary rules	18
Article 7. No requirement for corroboration	18
Article 8. Evidence of previous consistent statements	20
Article 9. Evidence of period of delay between offence and complaint	21
Article 10. Similar fact evidence	21
Article 11. Evidence of complainant’s previous sexual conduct or experience	22
Article 12. Production of personal records	27
Article 13. Expert evidence of psychological effects of sexual offences	32
Article 14. Competence of children to testify	32
Article 15. Protection of complainants and witnesses	33
Article 16. Presumption of proceedings to be held <i>in camera</i>	33
Article 17. Restrictions on publication of information revealing the complainant and other evidence.....	34
Article 18. Alternative arrangements for giving evidence by the complainant.....	35
Article 19. Complainant and witness entitled to have support person(s) present when giving evidence.....	36
Article 20. Arrangements for complainant and witnesses giving evidence when accused person is unrepresented	38
Article 21. Instructions to the jury	39
Article 22. Rights of complainant during pre-trial, trial and post-trial processes.....	39
C. Sentencing Reform	40
Article 23. Presumed minimum sentencing.....	40
Article 24. Increased penalties for aggravated offences of rape or sexual assault	41
Article 25. Substantial and compelling circumstances	41
Article 26. Sentencing guidelines	42
D. Other Provisions	44
Article 27. Police “first contact” duties	45
Article 28. Special duties of prosecutor	45
Article 29. National instructions and training for police and prosecutors with respect to rape or sexual assault	46
Article 30. National instructions and training for health care practitioners with respect to rape and sexual assault	49
Article 31. Judicial training	51

E. Courts and Survivor Care Centres.....	51
Optional: Article 32. Dedicated courts.....	51
Optional: Article 33. Survivor Care Centres	55

Prefatory Note

Women, sexual violence and HIV

“Sexual violence” includes rape and all other forms of sexual assault perpetrated against another person, regardless of whether that person is a stranger, an acquaintance or an intimate partner.¹ Sexual violence involves an intrusion into the most personal and intimate parts of an individual’s body.² It is a gross violation of human rights. While boys and men can be targets, sexual violence is primarily committed by men against women and girls.

In addition to being a blatant assault on a woman’s human rights, rape and other forms of sexual assault are also directly and causally connected to the HIV pandemic. Sexual violence in which bodily fluids are exchanged contribute to a heightened vulnerability to HIV infection.³ Sexual violence can increase the risk of HIV infection both directly, through forced sex, and indirectly, by constraining the ability of a survivor to negotiate the circumstances and ways in which sex takes place, including negotiating the use of condoms.⁴

Physiologically, women and girls are more vulnerable than men and boys to HIV infection during unprotected heterosexual vaginal sex.⁵ The sensitive mucosa of the vagina provides a large surface area for HIV transmission from semen. Coerced or non-consensual sex increases the risk of HIV transmission because of abrasions and tearing occurring when the vagina or anus is dry or when force is used. This is particularly true

¹ In this publication, “intimate partner” refers to spouses as well as non-married people in sexual relationships.

² U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (R. Coomarasamy): Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and the Methods of Work of the Commission*, 1997, Fifty-Third Session, U.N. Doc. E/CN/4/1997/47.

³ World Health Organization (WHO), *Violence Against Women and HIV/AIDS: Setting the Research Agenda*, 2000.

⁴ U.N. Secretary General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa, *Facing the Future Together: Report of the Secretary-General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa*, 2004, online: www.ungei.org/resources/1612_1023.html.

⁵ Human Rights Watch (HRW), *Deadly Delay: South Africa’s Efforts To Prevent HIV in Survivors of Sexual Violence*, 2004, online via: <http://hrw.org/reports/2004/southafrica0304/>. The report notes the following factors as contributing to increased risk: the larger surface area of the vagina and cervix; the high concentration of HIV in the semen of an infected man; and the fact that many of the other sexually transmitted infections (STIs) that increase HIV risk are often left untreated (because they are asymptomatic or because health care is inaccessible). T. Quinn and J. Overbaugh note that women are at higher risk than men for other STIs such as herpes simplex infection, because STIs decrease mucosal integrity. Therefore, the presence of another STI increases susceptibility to infection with HIV: T. Quinn and J. Overbaugh, “HIV/AIDS in women: an expanding epidemic,” *Science* 308: 1582–1583.

for younger women and girls, whose genital tracts are still immature.⁶ The risks of transmission are higher still if the survivor is subjected to gang rape, given the exposure to multiple assailants.⁷

People who experience forced sex in their intimate relationships often find it difficult to negotiate condom use — because using a condom could be interpreted as mistrust of their partner, or as an admission of promiscuity, or because they fear experiencing violence from their partner.⁸ Where violent sexual contact is between strangers, negotiating condom use is rarely an option.

Additionally, several reports document a correlation between sexual violence and behaviours in later stages of life on the part of survivors of sexual violence that may increase the risk of HIV.⁹ Forced sex in childhood or adolescence has been linked with increases in the likelihood of engaging in unprotected sex, having multiple partners, participating in sex work, and using illegal substances later in life. Each of these activities can present heightened risks of HIV transmission.¹⁰

While rape and sexual assault are commonplace in peaceful settings, sexual violence is also a well-documented weapon of war.¹¹ International jurisprudence on rape has arisen largely out of the prosecution of war crimes and other crimes against humanity in conflict environments. Underscoring the relationship between sexual violence, HIV/AIDS and human rights, human rights organizations have reported that as a result of rape in war and conflict zones, women and girls have been increasingly vulnerable to HIV transmission.¹²

⁶ HRW, *Deadly Delay* (supra); T. Quinn and J. Overbaugh, “HIV/AIDS in women” (supra); Physicians for Human Rights, *HIV/AIDS in Southern Africa*, 2007; WHO, *World Report on Violence and Health*, 2002, pp. 164–165. HIV is found in varying concentrations in blood, semen, vaginal and cervical discharge, urine, tears, foetal material, breast milk and saliva. Current scientific knowledge indicates that only blood, semen, vaginal and cervical discharge and breast milk contain a sufficient concentration of the virus to be able to transmit HIV. For transmission to occur, the virus must reach the blood stream or lymphatic system, which can occur via mucous membranes in the body.

⁷ HRW, *Deadly Delay* (supra).

⁸ WHO, *World Report on Violence and Health* (supra).

⁹ Ibid. See also, UNAIDS and Global Coalition on Women and AIDS, *Violence Against Women and HIV/AIDS: Critical Intersections*, Information Bulletin Series, 1–9, 2004.

¹⁰ WHO, *World Report on Violence and Health* (supra).

¹¹ HRW, *Rape as a Weapon of War and a Tool of Political Repression*, 1995.

¹² HRW, *Struggling To Survive: Barriers to Justice for Rape Victims in Rwanda*, 2004, Vol. 16, No. 10(A), online: <http://hrw.org/reports/2004/rwanda0904/rwanda0904.pdf>; HRW, *Seeking Justice: The Prosecution of Sexual Violence in the Congo War*, 2005, Vol. 17, No. 1(A), online: <http://hrw.org/reports/2005/drc0305/drc0305text.pdf>; HRW, *Policy Paralysis: A Call for Action in HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa*, 2003, online: www.hrw.org/reports/2003/africa1203/7.htm#_Toc56508496; HRW, *Sexual Violence and its Consequences among Displaced Persons in Darfur and Chad*, Briefing Paper, 2005, online: <http://hrw.org/background/africa/darfur0505/darfur0405.pdf>.

Although most countries in the world criminalize rape and other forms of sexual assault, the definition of these crimes and the enforcement of laws prohibiting sexual violence are not always consistent with international human rights standards and obligations. For example, some national laws define the crime of rape so narrowly that the definition excludes certain non-consensual or coerced sexual acts. In some jurisdictions, gendered definitions exclude the possibility of charging an individual with raping a boy or man.¹³ Furthermore, some legal definitions of rape and sexual assault define marriage as an exemption or defence to the crime.¹⁴

Beyond these definitional issues, national law commissions, NGOs and various international bodies have documented the extent to which gaps exist in the protection, treatment, medical care and counselling of survivors of sexual violence.¹⁵ Similar gaps

¹³ For example, Zimbabwe, *Criminal Law (Codification and Reform) Act No., 23 of 2004* defines rape in the following way: “[W]here a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and at the time of the intercourse (a) the female person has not consented to it; and b) he knows that she has not consented to it or realizes that there is a real risk or possibility that she may not have consented to it.” This definition is supplemented by gender-neutral crimes of aggravated indecent assault and sexual intercourse.

¹⁴ For example, both Tanzania and Botswana fail to establish that rape in marriage is illegal: See Legal Assistance Centre [Namibia] (LAC), *Rape in Namibia: An Assessment of the Operation of the Combating of Rape Act 8 of 2000*, 2006, pp. 539–560. The often-referred-to “private” nature of marital rape (as occurring within the home and between husband and wife) is not a legal justification for failure of the law to extend to occurrences of domestic violence. The U.N. *Declaration on the Elimination of Violence against Women* calls on states to “exercise due diligence to investigate and punish acts of violence against women, whether committed by the State or by private actors”: *Declaration on the Elimination of Violence Against Women*, 20 December 1993, U.N. G.A. Resolution 48/104, U.N. Doc. A/48/49 (1993) [DEVAW], art. 4. Many countries are taking steps to remove marital rape exemptions as a defence to rape — which was the approach taken in both Namibia, *Combating of Rape Act 8 of 2000*, s. 3, and Zimbabwe, *Criminal Law (Codification and Reform) Act No. 23 of 2004*, s. 68(a). Notably, however, while Zimbabwe’s legislation provides that marriage is not a defence to rape (or other sexual crimes), the law states that no prosecution may be instituted against any husband for raping or indecently assaulting his wife without the authorization of the Attorney General. In the 2006 report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yakin Ertürk reported that “the criminal code in many countries provides for a suspended sentence in cases of rape if the victim agrees to marry the perpetrator...”: *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences (Y. Ertürk): Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women — The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, U.N. Doc E/CN.4/2006/61, online: <http://daccessdds.un.org/doc/UNDOC/GEN/G06/103/50/PDF/G0610350.pdf?OpenElement>.

¹⁵ WHO, *Guidelines for Medical-Legal Care for Victims of Sexual Violence*, 2003; M.L. Acosta, “Collecting evidence for domestic and sexual assault: highlighting violence against women in the health care system interventions,” *International Journal of Gynaecology and Obstetrics* 78 (Suppl.1) (2002): S99–S104; N.J. Christofides et al, “Women’s experiences of and preferences for services after rape in South Africa: interview study,” *British Medical Journal* 332 (2006): 209–213; K. Cullinan, “Many Obstacles to Healthcare for Rape Survivors,” *Health-e*, 2007, online: <http://allafrica.com/stories/printable/200704280062.html>; L. Martin, L. Artz and H. Combrinck, *Further Submission to the Portfolio Committee on Justice and Constitutional Development on the Criminal Law Sexual Offences Amendment Bill [B 50 — 2003]: Medico-Legal Services for Rape Survivors*, 2003, online: www.csvr.org.za/gender/docs/Medico-legal%201.htm; South African Law Reform Commission, *Project 107: Sexual Offences Report*, 2002, c. 6.

have been documented with respect to the treatment and protection of survivors of sexual violence as they interact with police, prosecutors and the trial process.¹⁶ Some countries' laws still include evidentiary rules on rape and sexual assault that are inconsistent with states' obligations to guarantee gender equality and non-discrimination.¹⁷ These types of practices both originate in, and contribute to, myths about women as being in a perpetual state of sexual consent and availability, as being in need of social control and restraint, and as unreliable and discreditable.¹⁸ In addition to further entrenching gender inequality, such practices can cause secondary victimization and undermine the willingness of survivors to report crimes of sexual violence.¹⁹ Moreover, there is a lack of standardization in the sentencing of persons convicted of sexual violence, and convicted persons often receive relatively light sentences.²⁰

¹⁶ The South African Law Reform Commission, for example, has called the filtering out of complaints of sexual violence from survivors at the police station level “a point of non-accountability that requires urgent attention”: South African Law Reform Commission, *Project 107* (supra), paras. 8.2.3 and 8.3. See also, *Report of the Special Rapporteur on Violence Against Women its Causes and Consequences* (R. Coomaraswamy): *Further Promotion and Encouragement* (supra); HRW and Amnesty International, *Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the Draft Criminal Law (Sexual Offences) Amendment Bill, 2003*, 2003; South African Law Reform Commission, *Project 107* (supra), paras. 6.2–6.3.

¹⁷ For example, the “cautionary rule” which requires judges to exercise extra caution before accepting the evidence of certain witnesses such as complainants in sexual offence cases, single witnesses and children — on the grounds that such evidence is inherently unreliable. Human rights organizations have identified abolishing the cautionary rule as a key feature of recent southern African legislation (for example, South Africa, Lesotho, Namibia). See B. Lopi, “Taking stock of sexual offences legislation in Southern Africa,” *Amalungelo/Rights*, October–November 2003, pp. 28–29, online via: www.genderlinks.org.za. Other examples include evidentiary and procedural provisions and practices that effectively put complainants on trial for failing to show enough resistance against their aggressor, for having a history of multiple sexual partners, or for in some way “inviting” the sexual violence: I. Bacik, C. Maunsell, and S. Gogan, *The Legal Process and Victims of Rape: A Comparative Analysis of the Laws and Legal Procedures Relating to Rape, and Their Impact Upon Victims of Rape, in the Fifteen Member States of the European Union*, Dublin Rape Crisis Centre and the School of Law, Trinity College, 1998.

¹⁸ Human rights advocates making a submission to Canadian Parliament in 1992 in favour of Bill C-49 (a law to amend the *Criminal Code* provisions that governed the admissibility of evidence of sexual activity; refining the definition of consent to a sexual act; and restricting the defence that an accused had an honest but mistaken belief that the woman had consented) wrote that “sexual assault law will never be consistent with women’s constitutional rights unless many of our evidentiary, procedural and substantive criminal laws are understood to have discriminatory origins and consequences”: Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, An Act to Amend the *Criminal Code* (Sexual Assault), 19 May 1992, Thirty-Fourth Parliament.

¹⁹ The U.N. Centre for International Crime Prevention defines “secondary victimization” as the “victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim”: U.N. Centre for International Crime Prevention, *Handbook on Justice for Victims — On the Use and Application for the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1999, p. 16; see also, Institute for Security Studies, *Violence Against Women: A National Survey*, 2003.

²⁰ Legal experts in South Africa have argued that “in the context of rape cases, the exercise of the sentencing discretion inevitably depends on the personal views and biases of the judge or magistrate and his or her perceptions regarding rape and its consequences”: B Pithey et al, *Legal Aspects of Rape in South Africa*, Discussion Document, commissioned by the Deputy Minister of Justice, Rape Crisis (Cape Town),

While the amendment of criminal laws cannot guarantee the elimination of sexual violence or the empowerment of women, legislative reform can play an instrumental role in impeding or promoting human rights in the realm of sexual violence. Law reform is one of many steps that must be taken in order to guarantee women's health and human rights.

A. Statutory Offences

NOTE:

The following article defines the offence of rape. Definitions of rape should be broad in scope and either focus on a lack of consent or on coercive circumstances.

Article 1. Rape

[Two options for Article 1 are provided below — 1A and 1B. One or the other may be selected, but not both. Note that if one of the options below for Article 2 (sexual assault) is selected, it is not strictly necessary to adopt either of the options for Article 1, because the broader definition of the offence of “sexual assault” in Article 2 clearly encompasses the acts defined as “rape” in Article 1. However, for reasons noted in the commentary below, it may be deemed necessary to have a specific offence of rape in addition to a broader offence that also addresses other forms of sexual assault.]

Option 1: Article 1A. Definition of the offence of rape based on “no consent”

- (1) A person (in this Act referred to as the accused) who, in relation to another person (in this Act referred to as the complainant), intentionally performs or continues to perform a sexual act that involves:
- (a) the insertion, to any extent whatsoever, of the penis of the accused into the vagina, anus or mouth of the complainant;
 - (b) the insertion of any other part of the body of the accused, any part of the body of an animal or any object into the vagina or anus of the complainant; or
 - (c) cunnilingus or any other form of genital stimulation;²¹

where such an act takes places without the consent of the complainant, is guilty of the offence of rape.

Women & Human Rights Project (University of the Western Cape), Institute of Criminology, UCT, 1999, c. 1, online via: <http://web.uct.ac.za/depts/sjrp/public.htm>.

²¹ This wording is derived from Namibia, *Combating of Rape Act 8 of 2000*, s. 1.

- (2) For the purposes of Section (1), “vagina” includes any part of the female genital organ.

Option 2: Article 1B. Definition of the offence of rape based on “coercive circumstances”

- (1) A person (in this Act referred to as the accused) who, in relation to another person (in this Act referred to as the complainant), intentionally and under coercive circumstances performs or continues to perform a sexual act that involves:

- (a) the insertion, to any extent whatsoever, of the penis of the accused into the vagina, anus or mouth of the complainant;
- (b) the insertion of any other part of the body of the accused, any part of the body of an animal or any object into the vagina or anus of the complainant; or
- (c) cunnilingus or any other form of genital stimulation;²²

is guilty of the offence of rape.

- (2) For the purposes of Section (1), “vagina” includes any part of the female genital organ.

Commentary: Article 1 (both options)

The definition assigned to a particular offence is extremely important with respect to the reporting and prosecution of crimes. Under-inclusive or imprecise definitions can lead to multiple injustices. As our understanding of gender-based violence has developed in recent years, how we define the crime of rape (and other sexual offences) has also shifted. For example, in order to be fully inclusive, many recent definitions of rape, at both national and international levels, are gender neutral, as are the proposed provisions here.²³ This recognizes the reality that while the vast majority of rapes occur by men against women and girls, men and boys can also be raped.

Definitions of rape may also be under-inclusive if they define rape narrowly, excluding conduct other than penetration of the vagina with the penis. International criminal tribunals have found that forced oral penetration is an extremely serious sexual offence and should therefore be classified as rape.²⁴ The definition of rape should therefore include the possibility of penetration of parts of the body other than the vagina, such as the mouth and the anus, as well as the possibility of penetration of the vagina or anus by objects other than the penis.

²² This wording is derived from Namibia, *Combating of Rape Act 8 of 2000*, s. 1.

²³ For example, see Namibia, *Combating of Rape Act 8 of 2000*, as well as definitions proposed by the International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).

²⁴ *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Decision of 22 February 2001 (ICTY Trial Chamber), para. 183.

The first option with respect to defining rape rests on the notion of lack of consent, which is a central element of many definitions of rape in national laws. The Trial Chamber of the International Criminal Court for the former Yugoslavia (ICTY) engaged in a survey of national laws in the case of *Prosecutor v. Kunarac, Kovac and Vukovic*, and found that the basic principle which is common to all of the legal systems reviewed was that “serious violations of sexual *autonomy* are to be penalized. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”²⁵

The second option is a definition based on coercive circumstances rather than lack of consent. A number of problems are raised when absence of consent is one of the essential elements of the offence of rape.²⁶ It can lead to the accused trying to establish that the complainant consented by presenting evidence about the complainant’s sexual history and effectively putting the survivor on trial instead of the accused.²⁷ It also means that the state bears the notoriously difficult burden of proving a negative proposition.

Certain jurisdictions have therefore shifted the emphasis away from the absence of consent to the idea of sex “under coercive circumstances,” coupled with a detailed definition of “coercive circumstances.”²⁸ This approach focuses on the actions of the

²⁵ *Ibid.*, paras. 453–457. The Trial Chamber further explained that, in practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of factors such as force, threats of force, or taking advantage of a person who is unable to resist. They concluded that

the Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. (para. 460)

²⁶ I.e., where absence of consent remains an element of the crime, the prosecution must prove that the woman did not consent. Where consent can be raised as a defence, the accused must prove that the complainant did consent.

²⁷ B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), para. 3.1.

²⁸ See, for example, s. 2 of Namibia, *Combating of Rape Act 8 of 2000*; ss. 750.520a–e of [Michigan, U.S.]; *Criminal Sexual Conduct Act of 1974*; J. Barga and E. Fishwick, *Sexual Assault Law Reform: A National Perspective*, 1995, p. 64. Similarly, the Trial Chamber of the ICTR, in the case of *Akayesu*, defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision of 2 September 1998 (Chamber 1), para. 598. Catharine MacKinnon has written in favour of adopting this definition in domestic regimes: “[A]s a practical matter, its focus on real world external rather than subjective realities makes it more susceptible to standard forms of legal proof. For the same reasons, it is adaptable to situations of inequality outside conventionally recognized conflicts”: C. MacKinnon, “Defining rape internationally: a comment on Akayesu,” *Colombia Journal of Transnational Law* 44 (2006): 956. The ICC’s *Finalised Draft Text of the Elements of Crimes* offers the following definition of rape:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

perpetrator rather than the survivor by considering the force, threat of force or other coercive circumstances used by the perpetrator, rather than the actions or words of the survivor.

In the article above, failure to disclose HIV status to a sexual partner has been intentionally left out of the definition of “coercive circumstances.” Including it would lead to the perverse result of considering a sexual act where there was no disclosure of HIV status as “rape” even if the sexual acts were otherwise consensual and condoms were used. It would also consider as “rape” certain safer sex acts (such as genital stimulation) where there was no possibility of transmitting HIV.

NOTE:

Definitions of sexual assault should be broad in scope. They often involve the same issues around lack of consent or coercive circumstances as definitions of rape.

Article 2. Sexual assault

[Two options for Article 2 are provided below — 2A and 2B. One or the other should be selected, but not both. As noted above, if one of the options for Article 2 is enacted, it is not strictly necessary to enact one of the Article 1 options, because the definition of “sexual assault” in Article 2 is broad enough to encompass the acts defined as “rape” in Article 1. However, if it is decided to enact both an option for Article 1 and an option for Article 2, then it is advisable to ensure consistency in the approach of defining the offences (i.e., based on either “no consent” or on “coercive circumstances”).]

Option 1: Article 2A. Definition of the offence of sexual assault based on “no consent”

- (1) A person (in this Act referred to as the accused) who, in relation to another person (in this Act referred to as the complainant):
 - (a) intentionally engages in or continues to engage in a sexual act with the complainant;
 - (b) intentionally compels, induces or causes the complainant to engage in a sexual act with:
 - (i) the accused;
 - (ii) a third person;
 - (iii) the complainant himself or herself; or
 - (iv) an object, including any part of the body of an animal; or
-
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

- (c) attempts or threatens, by an act or a gesture, to carry out an activity described in Section (1)(a) or (1)(b), if the accused has, or causes the complainant to believe upon reasonable grounds that he or she has, the present ability to effect his or her purpose;²⁹

where the complainant does not consent to such an act, is guilty of the offence of sexual assault.

- (2) For the purpose of Section (1), “a sexual act” means any conduct which a reasonable person, in light of all the circumstances, would consider as sexual or as offensive to the complainant’s sexual dignity.³⁰

Option 2: Article 2B. Definition of the offence of sexual assault based on “coercive circumstances”

- (1) A person (in this Act referred to as the accused) commits a sexual assault when, in relation to another person (in this Act referred to as the complainant), he or she:
- (a) intentionally, under coercive circumstances, engages in or continues to engage in a sexual act with the complainant;
 - (b) intentionally, under coercive circumstances, compels, induces or causes the complainant to engage in a sexual act with
 - (i) the accused;
 - (ii) a third person;
 - (iii) the complainant himself or herself; or
 - (iv) an object, including any part of the body of an animal; or
 - (c) attempts or threatens, by an act or a gesture, to carry out an activity described in Section (1)(a) or (1)(b), if the accused has, or causes the complainant to believe upon reasonable grounds that he or she has, the present ability to effect his or her purpose.³¹

²⁹ The language of Sections (1)(a) and (1)(b) is derived from a combination of South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007*, s. 5; and South African Law Reform Commission, *Project 107* (supra), pp. 117–119. Section (1)(c) is adapted from the Canadian criminal provision that considers an individual who attempts or threatens to carry out a sexual assault and has the perceived present ability to do so as having committed a sexual assault. See Canada, *Criminal Code*, R.S.C. 1985, c. C-46, s. 265.

³⁰ This definition is adapted in part from the test laid out by the Supreme Court of Canada for determining whether an assault is sexual in nature, which states: “Viewed in light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?”: *R. v. Chase* [1987] 2 S.C.R. 293, para. 11. The language relating to sexual dignity of the complainant originates from the definition of “sexual conduct” proposed by the Law Reform Commission of Canada: *Working Paper on Sexual Offences*, No. 22, 1978.

³¹ See corresponding footnote to Article 2A.

(2) For the purpose of Section (1), “a sexual act” means any conduct which a reasonable person, in light of all the circumstances, would consider as sexual or as offensive to the complainant’s sexual dignity.³²

Commentary: Article 2 (both options)

The objective of this article is to guard against the imposition of an unwanted sexual act by one person upon another.³³ *The scope of this offence is broadly defined and would encompass “rape” as defined under Article 1.* The debate surrounding whether to distinguish coercive sexual penetration (i.e., rape) from other forms of sexual assault has attracted much scholarly attention. On the one hand, proponents for retaining rape as a separate offence note that the concept of rape is deeply entrenched in popular thought and to include it as a form of sexual assault would trivialize the misconduct.³⁴ Supporters of an all-encompassing approach, on the other hand, suggest that sexual violations involving no penetration can be just as offensive or violent in nature and inflict as much harm to the survivor.³⁵ Replacing rape with a more inclusive offence of sexual assault would also alleviate some secondary trauma experienced by the complainant during trial as “it will no longer be fruitful for the defence counsel to pursue a line of questioning directed at raising a doubt as to whether penetration actually took place.”³⁶

Without claiming to resolve this debate, this publication provides options to legislators recognizing both sides of the issue (through the combination of Articles 1 and 2). A jurisdiction can choose to include only an offence of sexual assault (herein Article 2) in its legislation or offences of both rape and sexual assault (herein Articles 1 and 2). (The other provisions of this publication are drafted on the assumption that a jurisdiction will

³² See corresponding footnote to *Article 2A*.

³³ Various terminologies have been used to refer to the conducts prohibited under this article, such as “indecent act” and “indecent touching.” See, for example, South African Law Reform Commission, *Project 107* (supra), pp. 117–119; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (Australia), Chapter 5: Sexual Offences Against the Person, *Report*, 1999, s. 5.2.8. The reference to indecency, however, often results in an overemphasis on the morality associated with the proscribed acts. See, for example, *Harkin v. R.* (1989) 38 A Crim R 296 [NSW Court of Criminal Appeal], where it was held that whether an act is indecent is determined according to ordinary standards of morality and decency within the community. The term “sexual assault” is utilized in this publication to highlight the violent and oppressive nature of these acts. See C. Boyle, *Sexual Assault* (Toronto: The Carswell Company Ltd., 1984), p. 53. Characterizing these conducts as a form of assault acknowledges their impact on the complainant’s health, dignity, equality, sexual integrity and trust in others. See J. Du Mont, “Charging and sentencing in sexual assault cases: an exploratory examination,” *Canadian Journal of Women and the Law* 15 (2003): 305–341.

³⁴ Home Office, *Report of the Advisory Group on the Law of Rape*, 1975, p. 14. See also R. Hinch, “Inconsistencies and contradictions in Canada’s sexual assault law,” *Canadian Public Policy* 14 (1988): 282–294.

³⁵ Law Reform Commission of Canada, *Working Paper* (supra). See also, the following quote from Model Criminal Code Officers Committee (supra), p. 203: “All sexual crimes are serious crimes. They constitute grave intrusion upon the rights of others. They have the potential to have devastating long term effects on the victim. They must always be viewed seriously....”

³⁶ C. Boyle, *Sexual Assault* (supra), p.46. See also R. Gunn and C. Minch, *Sexual Assault: The Dilemma of Disclosure, the Question of Conviction* (Winnipeg: University of Manitoba Press, 1988), p. 101.

adopt the latter option (i.e., separate provisions dealing with both offences); some minor rewording is necessary to adapt the provisions to a jurisdiction with no explicit rape offence.)

Regardless of which approach is adopted, the offence of sexual assault should be sufficiently broad in scope. Currently, some jurisdictions have restricted the prohibited conducts to those involving physical touching between the accused and the complainant.³⁷ Some have limited the understanding of what constitutes a sexual act to activities that involve specific body parts or acts done with the intent of sexual gratification.³⁸ Such definitions incorrectly assume that offensive sexual acts always involve physical contact with the complainants' sexual organs or that sexual assaults are only committed to satisfy sexual desire.³⁹ Consequently, they fail to recognize the harm sustained by many complainants who experience sexual violations in forms that fall outside of the legal definition of sexual assault. In the options above, the term "sexual act" is defined broadly on an objective standard, and encompasses conduct that is not sexually motivated but nonetheless offensive to the sexual dignity of the complainant.⁴⁰

Similar to Article 1, included here are options for definitions of sexual assault based on either "lack of consent" or "coercive circumstances." The arguments regarding each option are the same as those articulated above for Article 1. The International Criminal Court and a growing number of jurisdictions are moving towards definitions in line with the latter option (i.e., "coercive circumstances") for the reasons noted above.⁴¹

³⁷ See, for example, Model Criminal Code Officers Committee, *Report* (supra), s. 5.2.8.

³⁸ For example, "sexual violation" is defined as a number of activities involving certain body parts in South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007*. Michigan, *Criminal Sexual Conduct Act* defines "sexual contact" as intentional touching "for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner": *Criminal Sexual Conduct Act* [Michigan], MCL, 1974 (Amend. 2007, Act 163), s. 750.520a(q).

³⁹ C. Boyle, *Sexual Assault* (supra), p. 74.

⁴⁰ In the words of Ontario Court of Appeal, "[A]n aggressive act of domination that violated the sexual integrity of [the complainant] constituted an assault that could properly be viewed as a sexual assault. A sexual assault does not require sexuality": *R. v. V.(K.B.)* (1992) 71 C.C.C. (3d) 65 aff'd [1993] S.C.R. 857 (Supreme Court of Canada).

⁴¹ The ICC defines sexual violence other than rape as

an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

See ICC, *Elements of Crimes*, ICC-ASP/1/3, 2002, p. 121. See also, Kenya, *Sexual Offences Act No. 3 of 2006*, ss. 43(1)–43(4); Michigan, U.S., *Criminal Sexual Conduct Act of 1974*, ss. 750.520b–750.520e; New Jersey, U.S., *Code of Criminal Justice of 1951*, s. 2C: 14-2a–14-2c.

Article 3. Definition of the offence of aggravated rape or sexual assault

- (1) A person commits an aggravated rape or an aggravated sexual assault when any one of the following aggravating factors applies:
- (a) the complainant suffers grievous bodily or mental harm as a result of the sexual assault;
 - (b) the complainant is under the age of 18 years, or is by reason of age exceptionally vulnerable;
 - (c) the complainant is physically or mentally disabled;
 - (d) the accused is the complainant's parent, guardian or caretaker, or is otherwise in a position of trust or authority over the complainant;
 - (e) the accused is one of a group of two or more persons participating in the commission of the sexual assault;
 - (f) the accused used a firearm or other weapon for the purpose of, or in connection with, the commission of the sexual assault; and
 - (g) there is evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, gender identity or any other similar factor.⁴²

Commentary: Article 3

In light of the breadth of the offences of rape and sexual assault, many jurisdictions have recognized that some are committed in such an offensive manner that they warrant heavier penalties.⁴³ Article 3 therefore stipulates a number of situations where a perpetrator is considered to have committed aggravated rape or aggravated sexual assault.

NOTE:

The following provisions provide essential interpretive guidance with respect to key concepts within the definitions of rape and sexual assault.

⁴²See South Africa, *Criminal Law Amendment Act 105 of 1997*, s. 51(1); Namibia, *Combating of Rape Act of 2000*, s.3(1); Canada, *Criminal Code*, s. 718.2 — for aggravating factors in sentencing. In Canada, sexual assaults are further categorized into sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, and aggravated sexual assault. See Canada, *Criminal Code*, R.S.C. 1985, c. C-46, ss. 271–273

⁴³ Model Criminal Code Officers Committee, *Report* (supra), p. 203.

Article 4. Defining “consent” or “coercive circumstances”

[Two options for Article 4 are provided below. Option 1 (Article 4A) defines the concept of “consent” and when it cannot be inferred or invoked as a defence to a charge of rape or sexual assault. If the approach of defining rape and/or sexual assault based on lack of consent is chosen with respect to Articles 1 and/or 2 above (i.e., Articles 1A and 2A), then Article 4A needs to be enacted. If the approach of defining these offences based on “coercive circumstances” has been chosen (i.e., Articles 1B and 2B), then Article 4B needs to be enacted.]

Option 1: Article 4A. Consent

- (1) For the purposes of this Act, consent must be given voluntarily, as a result of the complainant’s free will, assessed in the context of the surrounding circumstances.
- (2) Consent cannot be inferred by reason of:
 - (a) any words or conduct of a complainant where force, threat of force, coercion or taking advantage of a coercive environment undermined the complainant’s ability to give voluntary and genuine consent;
 - (b) any words or conduct of a complainant where the complainant is incapable of giving genuine consent; or
 - (c) the silence of, or lack of resistance by, a complainant to the alleged sexual violence.⁴⁴
- (3) It is not a defence to a charge of rape or sexual assault that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where:
 - (a) the accused’s belief arose from the accused’s self-induced intoxication or recklessness or wilful blindness; or
 - (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.⁴⁵

Commentary: Article 4A

The question of the *mens rea* (or mental element) of rape has been approached in different ways. In some jurisdictions, actual knowledge of non-consent is required to find the accused criminally responsible. Other jurisdictions have enumerated particular

⁴⁴ This language comes from ICC, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1, 2000, Rule 70.

⁴⁵ The language of Section (4) comes from Canada, *Criminal Code*, s. 273.2. See also, New South Wales (NSW), Australia, *Crimes Act of 1900*, s. 61HA.

factors which negate consent or have specified different standards of knowledge.⁴⁶ A number of jurisdictions ensure that an accused cannot escape culpability for failing to take reasonable steps to ascertain the complainant's consent.⁴⁷

It should never be necessary to prove that the accused forcibly overcame the physical resistance of the complainant in order to demonstrate non-consent.⁴⁸ The *Rules of Procedure and Evidence* of the International Criminal Court (ICC) state that inferring consent from the absence of proof of the use of physical force by the accused goes against international standards of evidence in cases of sexual violence.⁴⁹ In *M.C. v. Bulgaria*, the European Court of Human Rights found that

any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual's sexual autonomy.⁵⁰

Option 2: Article 4B. Coercive Circumstances

(1) For the purposes of this Act, “coercive circumstances” include, but are not limited to:

- (a) the application of force, whether explicit or implicit, direct or indirect, physical or psychological, against any person, or any use of force which damages or destroys such person's movable or immovable property;
- (b) threats, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or to damage or destroy such person's movable or immovable property under circumstances where it is not reasonable for the complainant to disregard the threats;

⁴⁶ See, for example, Rule 70 of the *Rules of Procedure and Evidence* of the ICC. The Canadian *Criminal Code* lists factors which negate purported consent (s. 273.1) and restrict the defence of a “mistaken belief in consent” to cases where the accused took reasonable steps to ascertain the complainant's consent (s. 273.2).

⁴⁷ See the laws in New Zealand, Canada and England, cited by the Victorian Law Reform Commission [Australia], *Sexual Offences: Final Report*, 2004, p. 417. See also, U.K. Home Office Report, *Setting the Boundaries: Reforming the Law on Sex Offences*, 2000.

⁴⁸ Various courts have explicitly rejected the pernicious “rape myth” (i.e., the myth that unless women resist sexual activity they must be consenting) that has led to systemic discrimination against women in the criminal law. See, for example, *R. v. Ewanichuk* [1999] 1 S.C.R. 330 (Supreme Court of Canada). In *Ewanichuk*, the court quoted from Susan Estrich: “[R]ape is assuredly not the only crime in which consent is a defence; but it is the only crime that has required the victim to resist physically in order to establish nonconsent”: “Rape,” 95 *Yale Law Journal* 1087 (1986): 1090.

⁴⁹ See Rule 70 of *Rules of Procedure and Evidence* of the ICC. In *Kunarac*, the Appeals Chamber of the ICTY found that there is no “resistance” requirement in customary international law. It maintained that such a requirement is “wrong on the law and absurd on the facts”: *Prosecutor v. Kunarac, Kovac and Vukovic*, judgment of 12 June 2002, Appeals Chamber, para. 128.

⁵⁰ *M.C. v. Bulgaria*, Application No. 3927/98, judgment of 4 December 2003, para. 166.

- (c) abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that the complainant is inhibited from indicating his or her resistance to such an act or his or her unwillingness to participate in such an act;
- (d) circumstances where the complainant is unlawfully detained;
- (e) circumstances where the complainant is under the age of fourteen years, and the accused is more than three years older than the complainant;
- (f) circumstances where the complainant is affected by:
 - (i) physical disability, mental incapacity or other inability, whether permanent or temporary;
 - (ii) any medicine, drug, alcohol or other substance which mentally incapacitates the complainant;
 - (iii) unconsciousness; or
 - (iv) sleep or lack of sleep;
 to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to, or to engage in, the sexual act;
- (g) circumstances where the complainant submits to or engages in the sexual act by reason of having been induced, whether verbally or through conduct, by the accused, or by some other person to the knowledge of the accused, to believe that the accused or the person with whom the sexual act is being committed is some other person;
- (h) circumstances where, as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the accused, or by or on the part of some other person to the knowledge of the accused, the complainant is unaware that a sexual act is being committed with him or her; or
- (i) circumstances where the presence of more than one person is used to intimidate the complainant.⁵¹

NOTE:

Historically, rape or other sexual assault within a marriage was often considered lawful in some jurisdictions. Criminalizing marital rape or other sexual assault is required by international human rights standards.

Article 5. Marital rape

- (1) No marriage or other relationship shall constitute a defence to a charge of rape or sexual assault under this Act.⁵²

⁵¹ This wording is derived from a combination of Namibia, *Combating of Rape Act 8 of 2000*, s. 2(2)(a)-(i), and Kenya, *Sexual Offences Act of 2006*, art. 43(2)(c). For other examples of definitions of “coercive circumstances,” see Lesotho, *Sexual Offences Act No. 29 of 2003*, s. 32; *Criminal Sexual Conduct Act* [Michigan], MCL, 1974, s. 750.520b(1)(f).

⁵² Article 5 is derived from Namibia, *Combating of Rape Act No. 8 of 2000*; see also, South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007*, s. 56 (1).

Commentary: Article 5

The U.N. General Assembly specifically identified marital rape and other forms of sexual assault as an act of gender-based violence in its 1993 *Declaration on the Elimination of Violence against Women*.⁵³ The Declaration calls on states to “exercise due diligence to investigate and punish acts of violence against women, whether committed by the State or by private actors.”⁵⁴ Marital rape and sexual violence occurring within the family are also explicitly listed in the *Beijing Declaration and Platform for Action* as a form of violence against women which states have a duty to combat.⁵⁵ The U.N. Human Rights Committee — the body tasked with monitoring the implementation of the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁶ — has issued statements and recommendations to a number of countries urging them to take effective measures to combat marital rape and ensure that violence against women constitutes an offence punishable under criminal law.⁵⁷ The fact that marital rape and sexual assault often occurs in the home — or in other “private” settings — does not absolve states of their responsibility to protect women.

In both statutory and common law, examples exist where marriage is treated as an exemption to the crime of rape.⁵⁸ Exemptions for rape within marriage reinforce the view that wives are the property of their husbands and that women do not have the right to make independent choices about their actions, bodies and sexuality. Marriage vows

⁵³ DEVAW, art. 2.

⁵⁴ DEVAW, art. 4.

⁵⁵ *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

⁵⁶ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR].

⁵⁷ The countries include Uzbekistan, Sri Lanka, Greece, Thailand, Zimbabwe, the former Yugoslav Republic of Macedonia and Tanzania. The Committee considers the failure to criminalize marital rape as a violation of art. 3, 6, 7, and 26 of the ICCPR. For an example, see U.N. Human Rights Committee, “Concluding Observations of the Human Rights Committee: Uzbekistan,” 26/04/2001, CCPR/CO/71/UZB, Seventy-First Session, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, online: www.unhcr.ch/tbs/doc.nsf/0/537007e299bf539ec1256a2a004b86cb?Opendocument.

⁵⁸ For example, rape within marriage is not illegal in Botswana and Tanzania. In Kenya, *Sexual Offences Act No. 3 of 2006*, the section defining when rape shall be considered unlawful “shall not apply in respect of persons who are lawfully married to each other” (s.43(5)). While Zimbabwe’s legislation provides that marriage is not a defence to rape (or other sexual crimes), the law requires that no prosecution may be instituted against any husband for raping or indecently assaulting his wife without the authorization of the Attorney General: Zimbabwe, *Criminal Law (Codification and Reform Act No. 23 of 2004*, s. 68(a). For more on this subject, see (LAC), *Rape in Namibia* (supra), c. 18. The foundation of the marital rape exception can be traced to 17th century English jurisprudence, although it no longer forms part of the law of England. See, for example, R.K. Bergen, *Marital Rape: New Research and Directions*, National Online Resource Center on Violence Against Women, 2006, p. 2. See also, L. E. Eskow, “The ultimate weapon?: demythologizing spousal rape and reconceptualizing its prosecution,” *Stanford Law Review* 48 (1996): 680; and U.S. National Center for Victims of Crime, “Public Policy, Issues: Spousal Rape,” online: http://www.ncvc.org/ncvc/main.aspx?dbID=dash_Home, citing D. Russel, *Rape in Marriage: Expanded and Revised Edition With a New Introduction*, (Bloomington and Indianapolis: Indiana University Press, 1990), p. 17.

are not an agreement to sexual intercourse at any time and under any circumstances, regardless of whether a party to the marriage is drunk, violent or abusive. The European Court of Human Rights has stated that the abolition of the marital rape exemption conforms not only with “a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.”⁵⁹

In the context of the HIV/AIDS epidemic, the explicit criminalization of marital rape and other forms for sexual assault also signals recognition that married women are not immune from the risk of HIV transmission in violent or forced sex.⁶⁰ Criminalization of marital rape recognizes that an inability to negotiate safer sex or insist on spousal fidelity as a result of fear of violence exacerbates the risk of HIV transmission.⁶¹ The failure to recognize marital rape as rape may also pose a barrier for survivors to access health services, including post-exposure prophylaxis for HIV.

National laws criminalizing marital rape cover a spectrum, from removing marital rape exemptions in criminal law, to adding text specifying that marriage is not a defence to a charge of rape.⁶² Some countries have explicitly built a clause into their definition of rape that specifies that the crime is perpetrated by one person “whether or not married to the other person.”⁶³ Such a clause may also be included in laws to address domestic violence. Explicitly excluding the defence of marriage may be a preferable option where the existence or possibility of rape occurring with marriage remains a matter of widespread denial.⁶⁴

⁵⁹ *CR v. UK*, European Court of Human Rights (ECHR), judgment of 22 November 1995, Publications of the European Court of Human Rights, Series A, No 335-C, para. 42.

⁶⁰ WHO, *Violence Against Women and HIV/AIDS: Setting the Research Agenda*, Meeting Report, 2000; Namibia, *Combating of Rape Act of 2000*, s. 2(1)(a-b).

⁶¹ U.N. Secretary-General’s Task Force, *Facing the Future Together* (supra).

⁶² For example, in Canada, sexual assault within marriage became criminal for the first time in 1983 when the marital rape exemption was repealed: *Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125, s. 6. In the U.K. the marital rape exemption was abolished in its entirety in 1991 when the House of Lords held that it was an outdated and offensive common-law fiction: *R. v. R*. A corresponding amendment to the statutory law in the U.K. was made through Section 147 of the *Criminal Justice and Public Order Act*, 1994. Removal of marriage as a defence to rape is the approach taken in Namibia, *Combating of Rape Act No. 8 of 2000*, s. 3. See also Lesotho, *Sexual Offences Act No. 29 of 2003*, s. 3(3).

⁶³ This wording is derived from Zimbabwe, *Sexual Offences Act of 2001*, s. 8(1), which has been since repealed by Zimbabwe, *Criminal Law (Codification and Reform) Act of 2004*, c. 9:23.

⁶⁴ See D. Hubbard, “Making rape in marriage illegal,” *The Namibian*, 30 April 1999, online via: www.namibian.com.na/.

B. Evidence and Procedure

NOTE:

Some rules of evidence that put into question the credibility of certain witnesses can cause revictimization of the complainant, pose undue challenges to successful prosecution and violate human rights standards.

Article 6. Abolition of cautionary rules

- (1) A court may not treat the evidence of a witness in criminal proceedings involving the alleged commission of a sexual offence with caution merely because that witness is:
- (a) the complainant in the proceedings; or
 - (b) less than 18 years of age.⁶⁵

Article 7. No requirement for corroboration

- (1) In a case of rape or sexual assault, no corroboration of the complainant's testimony shall be required.⁶⁶

Commentary: Articles 6 and 7

Cautionary rules and the requirement for corroboration are two distinct rules of evidence that often intersect. Cautionary rules require judges and juries to exercise special caution when considering the evidence of certain witnesses — such as complainants in sexual assault cases, women and children — on the grounds that the evidence of such witnesses is inherently potentially unreliable.⁶⁷ Cautionary rules are commonly invoked in sexual assault cases, where a complainant is the only witness to the offence.⁶⁸ The requirement for corroboration is a rule found in some jurisdictions that prohibits a criminal conviction being obtained upon the uncorroborated testimony of a complainant.⁶⁹ Prosecution of

⁶⁵ See Namibia, *Combating of Rape Act No. 8 of 2000*, art. 5; see also, South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, s. 60.

⁶⁶ This language comes from Rule 96 of the *Rules of Procedure and Evidence* of both the ICTR and the ICTY. Likewise, the *Rules of Procedure and Evidence* of the ICC prohibit the requirement of corroborating evidence particularly in sexual violence cases: ICC, *Rules of Procedure and Evidence*, Rule 63.4. See also, s. 274 of the Canadian *Criminal Code*, s. 23AB of New Zealand, *Evidence Act of 1908* and s. 450C of NSW, Australia, *Crimes Act of 1900*.

⁶⁷ South African Law Reform Commission, *Project 107* (supra), p. 175.

⁶⁸ A. T. Morris, “The empirical, historical and legal case against the cautionary instruction: a call for legislative reform,” *Duke Law Journal* 1 (1988): 154–173, p. 154.

⁶⁹ See M. Anderson, “The legacy of the prompt complaint requirement, corroboration requirement, and cautionary instructions on campus sexual assault,” *Boston University Law Review* 84 (2004): 945–1022, at 948, for a general description of the corroboration requirement. By way of example, the criminal law of Scotland requires that each essential element of a charge be supported by evidence from at least two

sexual assault cases is particularly affected by this requirement because rape and sexual assault often take place in private.

These rules of evidence lack empirical basis and are rooted in antiquated stereotypes of women and children. Historically, various courts in common law and Roman-Dutch law systems justified these evidentiary rules on the contentions that an accusation of rape or sexual assault is relatively easy to make and difficult to disprove and that women and children are prone to lie and to fantasize about sexual matters.⁷⁰ Similar contentions were found in sharia law.⁷¹ The validity of such claims was unequivocally rejected by the Supreme Court of Appeal of South Africa.⁷² With regard to the claim that an accusation of rape or sexual assault is relatively easy to make and difficult to disprove, the Supreme Court of Appeal of South Africa found that complainants in sexual assault cases, particularly women, often encounter significant risks of secondary victimization when pursuing legal recourses against the perpetrators.⁷³ The claim that women and children are prone to lie and to fantasize about sexual matters was similarly dismissed in the face of growing empirical evidence that “refutes the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witness.”⁷⁴ The credibility of testimonies given by children has also been affirmed. The Supreme Court of Canada, for example, has adopted the position that the evidence of children is as reliable as that of adults.⁷⁵

Furthermore, a growing body of case law has considered these rules of evidence in violation of human rights standards. The Supreme Court of Namibia, for example, found that cautionary rules violated the constitutional prohibition on discrimination against women.⁷⁶ Similarly, the Kenya Court of Appeal found the requirement for corroboration

different sources to procure successful conviction. See E. Angiolini (Lord Advocate of Scotland), *Lord Advocate’s Rape Crisis Speech*, March, 2008, online via: www.crownoffice.gov.uk.

⁷⁰ South African Law Reform Commission, *Project 107* (supra), pp. 459–460 and 474. In common law, the rules are generally attributed to the writings of Lord Hale, a 17th century English chief justice: M. Hale, *The History of the Pleas of the Crown* (1st Am. ed. 1847), pp. 633–636, as cited in *P. v. Rincon-Pineda* (1975) 14 Cal.3d 864 (Supreme Court of California).

⁷¹ In some interpretations of sharia law, a woman’s testimony, like that of a minor or a person without necessary capacity, is worth half that of a man. See A. Akiyode-Afolabi, *Democracy, Women’s Rights and Sharia Law in Nigeria*, PeaceWomen Project. 2003, online via: www.peacewomen.org/news/Nigeria/newsarchive03/Shariawomen.html.

⁷² *S. v. Jackson*, [1998] ZASCA 13 (Supreme Court of Appeal of South Africa).

⁷³ *Ibid.*, para. 14.

⁷⁴ *Ibid.*, paras. 14–15; see also, K. Mack, “Continuing barriers to women’s credibility: a feminist perspective on the proof process,” *Criminal Law Forum* 4 (1993): 327–353, at 336.

⁷⁵ *R. v. W. (R.)*, [1992] S.C.R. 122 (Supreme Court of Canada), paras. 24–26. The Court cited the following text from Wilson J.’s decision in *R. v. B. (G.)*, [1990] 2 S.C.R. 30 (Supreme Court of Canada), with approval: “While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.”

⁷⁶ *S. v. D.*, [1992] 1 SA 509 (High Court of Namibia), at 516H, cited with approval in *S. v. K* [1999] NR 348 (Supreme Court of Namibia).

in sexual assault cases unconstitutional because it discriminated against women and girls.⁷⁷ These rules have been abolished by some southern African legislatures.⁷⁸ Such legislative reforms also bring rules of evidence more in accordance with the United Nations Standards and Norms in Crime Prevention and Criminal Justice.⁷⁹

Commentators have praised these developments as better protecting women's rights by encouraging survivors of rape and sexual assaults to come forward, and facilitating successful prosecution.⁸⁰

Articles 6 and 7 respectively address cautionary rules and the need for corroboration, recognizing each as a distinct rule of evidence with overlapping but separate rationales. Article 6 explicitly prohibits extra caution being taken with respect to the evidence of certain witnesses in sexual assault cases.⁸¹ This phrasing is considered preferable over legislation that merely abolishes the requirement to exercise special caution, which still permits judges to apply cautionary rules on a discretionary basis.⁸² Article 7 establishes that no corroboration of the complainant's testimony is required.

Article 8. Evidence of previous consistent statements

- (1) Evidence relating to previous consistent statements by the complainant in a case of rape or sexual assault shall be admissible, but no inference may be drawn only from the fact that no such previous statements have been made.⁸³

⁷⁷ *Mukungu v. Republic*, [2003] 2 EA (Kenya Court of Appeal).

⁷⁸ For examples of legislation that abolishes cautionary rules, see South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007*, s. 60; Namibia, *Combating of Rape Act No. 8 of 2000*, s. 7. See also, Tanzania, *Sexual Offences Special Provisions Act No. 4 of 1998*, s. 27, for an example of legislation that eliminates the corroboration requirement.

⁷⁹ U.N. General Assembly, "Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women," A/RES/52/86, 2 February 1998, Annex II, 7(d).

⁸⁰ B. Bedont and K. Hall Martinez, "Ending impunity for gender crimes under the International Criminal Court," *The Brown Journal of World Affairs* 6(1): 65–85, at 78; HRW, *International Justice for Women: The ICC Marks a New Era*, Human Rights Watch Backgrounder, 1 July 2002; B Lopi, "Taking stock" (supra).

⁸¹ See, for example, the Model Criminal Code Officers Committee, *Report* (supra), ss. 5.2.40 and 5.2.41. Section 5.2.40 stipulates that "the judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual cases as a less reliable class of witness." The same prohibition is applied to children witnesses (s. 5.2.41).

⁸² See K. Mack, "Continuing barriers to women's credibility: a feminist perspective on the proof process," *Criminal Law Forum* 4 (1993): 327–353. See, for example, U.K., *Criminal Justice and Public Order Act of 1994*, s. 32 (1): "Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is ... b) where the offence charged is a sexual offence, the person in respect of whom it is alleged to have been committed, is hereby abrogated."

⁸³ See South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, s. 58; Namibia, *Combating of Rape Act of 2000*, s. 6. Various jurisdictions forbid the admission of statements made by witnesses before they give evidence during a criminal trial, but make an exception for a rape complainant who made a "previous consistent statement" at the first reasonable opportunity. While this

Article 9. Evidence of period of delay between offence and complaint

- (1) In any proceedings against a person under this Act, the court may not draw any inference from the length of any delay between the alleged commission of such offence and the reporting thereof.⁸⁴

Article 10. Similar fact evidence

- (1) A court before which criminal proceedings are pending, where the accused is charged with the commission of any sexual offence, shall, subject to the provisions of Section (2), admit evidence of the commission or alleged commission of similar offences by the accused upon application made to such court and may consider such evidence in relation to any matter to which it is relevant.
- (2) The court may only admit evidence as referred to in Section (1) if such evidence:
- (a) has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused; and
 - (b) is not intended merely to prove the character of the accused.
- (3) The court shall record the reasons for its decision to admit or to refuse evidence as referred to in Section (1) as part of the proceedings.⁸⁵

Commentary: Article 10

Similar fact evidence is evidence of a feature associated with an accused person that exists independently of the circumstances surrounding the commission of the alleged offence, but which is relevant to the alleged offence.⁸⁶ As a general rule of evidence, evidence is often not admissible if it proves only that the accused has the propensity or

exception can help to counter a defence of consent, it is open to misuse: If a complainant delayed reporting the rape, the court may question his or her credibility. Therefore, if legislated, the exception must balance the potential utility of the exception with the opportunity for abuse. See B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), c. 8.

⁸⁴ See South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*, s. 59; Namibia, *Combating of Rape Act of 2000*, s. 7. The barriers to reporting rape are well-documented. They include a fear of not being believed, problems with physical access to police, fear of retaliation, anxiety about the legal process, and realistic assessments of the low chance of a successful conviction. See, for example, J. Kim, *Rape and HIV Post-Exposure Prophylaxis: The Relevance and the Reality in South Africa*, Discussion Paper, WHO meeting on violence against women and HIV/AIDS, 2000, at 6.

⁸⁵ See Namibia, *Combating of Rape Act of 2000*, art. 16. According to the United States Federal Rules of Evidence, in a sexual offence case “evidence of the defendant’s commission of another offence or offences of sexual assault is admissible, and may be considered on any matter to which it is relevant” (28 USC Rule 413).

⁸⁶ South African Law Reform Commission, *Project 107* (supra), p. 210.

disposition to commit a crime or a particular crime. The main reason for its exclusion is the prejudicial effect it may have on the mind of the judge or jury. However, the rule has been criticized because it may prevent evidence that has considerable probative value and may deny the prosecution the ability to produce the only available corroborative evidence.⁸⁷ Sometimes, a person who is charged with a sexual offence may already have a conviction for a similar offence. Alternatively, a person may be the subject of similar allegations by more than one complainant. Further, in situations in which the complaints of a number of survivors against the same accused are not heard in the same trial, it will be necessary for a person who is the complainant in respect of one charge and a witness in respect of a second charge (involving a different complainant) to give evidence at both trials.

In such circumstances, the court must determine whether evidence of the prior conviction or of the other allegations should be admitted as relevant to the offence with which the accused is charged. The aim of the provision above is to create a rule of evidence that allows the admission of evidence that is genuinely relevant to the question of the accused's guilt and excludes evidence that is simply prejudicial to the accused.

NOTE:

The admission of evidence of a complainant's previous sexual conduct or experience may subject complainants to further trauma and humiliation, mislead judges and juries, and eventually discourage other survivors from reporting their incidents. Such evidence is seldom relevant to the adjudication in cases of rape or sexual assault.

Article 11. Evidence of complainant's previous sexual conduct or experience

[Two options for Article 11 are provided below — 11A and 11B. One or the other should be selected, but not both.]

Option 1: Article 11A. Mandatory prohibition on evidence of complainant's previous sexual conduct or experience

(1) In cases of rape or sexual assault, the prior or subsequent sexual conduct or experience of the complainant and witnesses shall not be admitted as evidence.⁸⁸

⁸⁷ D.G. Sturgess, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Brisbane: Director Prosecutions, 1986), para. 7.126. See, for example, *DPP v. P* [House of Lords, UK] [1991] 2 AC 447; *S v. Wilmot* [South Africa, Supreme Court of Appeal] [2002] ZASCA 42.

⁸⁸ This language reflects the rules of the ICC, ICTY, ICTR and the United Nations Transitional Administration in East Timor (UNTAET) Special Panel for Serious Crimes. See Rule 71 of the ICC *Rules of Procedure and Evidence*, Rule 96 of the *Rules of Procedure and Evidence* of the ICTR and the ICTY and Rule 34.3 of UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure.

Option 2: Article 11B. Discretionary regime on evidence of complainant's previous sexual conduct or experience

- (1) No evidence as to the sexual reputation of the complainant shall be admissible in criminal proceedings against a person charged with rape or sexual assault.⁸⁹
- (2) In proceedings in respect of rape or sexual assault, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant:
 - (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
 - (b) is less worthy of belief.⁹⁰
- (3) In proceedings in respect of an offence of rape or sexual assault, no evidence shall be adduced by, or on behalf of, the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the court determines, in accordance with the procedures set out in Section (5), that the evidence:
 - (a) tends to rebut evidence that was previously adduced by the prosecution;
 - (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue; or
 - (c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused;

provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.⁹¹

⁸⁹ This language comes from Namibia, *Combating of Rape Act of 2000*, art. 18. See also, Canada, *Criminal Code*, s. 277.

⁹⁰ This language comes from Canada, *Criminal Code*, s. 276. The major advantage of this subsection is that it "target[s] expressly those two areas which cause concern in the area of sexual history; namely, evidence showing that the complainant was more likely to have consented, or was not a witness to be believed": Model Criminal Code Officers Committee, *Report* (supra), p. 235.

⁹¹ This language is derived from Namibia, *Combating of Rape Act of 2000*, art. 18. The (wider) criteria for admission found in Canada, *Criminal Code*, s. 276 would allow the admission of evidence where such evidence:

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

See also Kenya, *Sexual Offences Act No. 3 of 2006*, s. 34(3); United States Federal Rules of Evidence (28 USC Rule 412).

- (4) In determining whether evidence is admissible under Section (3), the court shall take into account:
- (a) the potential prejudice to the complainant’s personal dignity and right of privacy;
 - (b) the interests of justice, including the right of the accused to make a full answer and defence;
 - (c) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;
 - (d) society’s interest in encouraging the reporting of sexual assault offences;
 - (e) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
 - (f) the need to remove from the fact-finding process any discriminatory belief or bias;
 - (g) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; and
 - (h) any other factor that the court considers relevant.⁹²
- (5) An application for leave to introduce evidence referred to in this section is to be:
- (a) in writing;
 - (b) made in the absence of the jury (if any) and, if the accused so requests, in the absence of the complainant;
 - (c) made *in camera*; and
 - (d) determined after the court has allowed such submissions or other evidence as the court considers necessary for the determination of the application.
- (6) If the court gives leave under this section, the court must state in writing the reasons for doing so and cause those reasons to be entered in the records of the court.⁹³

Commentary: Articles 11A and 11B

Historically, a complainant’s previous sexual conduct or experience has generally been considered admissible evidence in court in sexual assault cases. Studies have shown that many complainants found the admission of evidence relating to their previous sexual conduct or experience troubling and an intrusion into their privacy.⁹⁴ A significant number of sexual assault survivors were found to either not report or withdraw their cases

⁹² This language is derived from Canada, *Criminal Code*, s. 276.

⁹³ The language of these subsections comes from Australia’s Model Criminal Code. See Model Criminal Code Officers Committee, *Report* (supra), p. 222. In addition, Rule 72 of the ICC *Rules of Procedure and Evidence* confirms the importance of *in camera* procedures to consider the admissibility of evidence.

⁹⁴ L. Kelly, J. Temkin and S. Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials*, [U.K.] Home Office, 2006, pp. 61–69; P.J. Schwikkard, “A critical overview of the rules of evidence relevant to rape trials in South African law,” in S. Jagwanth et al (eds), *Women and the Law* (Pretoria, South Africa: HSRC Publishers, 1994), pp. 198–218, at 204.

as a result.⁹⁵ Oftentimes, evidence relating to previous sexual conduct or experience is used by the defence to suggest that a complainant is more likely to have consented to the incident in question and is less worthy of belief.⁹⁶ An increasing body of case law has dismissed such inferences as lacking factual basis and has prohibited evidence of previous sexual conduct or experience from being adduced for the purpose of discrediting the complainant.⁹⁷ Jurisdictions around the world have also enacted legislation to restrict the admissibility of evidence of a complainant's previous sexual conduct or experience.⁹⁸ There exists some empirical evidence suggesting that these legislative reforms encourage reporting of sexual assault and make the trial process less disturbing for complainants.⁹⁹

Two legislative formulations concerning the prohibition on evidence of complainant's previous sexual conduct or experience are provided above — a mandatory regime that imposes a blanket ban on the admission of such evidence, and a discretionary model that allows judges to determine the admissibility of such evidence in closely defined circumstances.

Option 1 (*Article 11A*) describes a mandatory scheme that prohibits the admission of any evidence relating to previous sexual conduct or experience of complainants or witnesses in sexual assault cases. A mandatory prohibition is found in the rules of evidence adopted by various U.N. tribunals and the ICC.¹⁰⁰ Some people have argued that a discretionary regime admitting some evidence of previous sexual conduct or experience is insufficient to protect the rights of complainants in sexual assault cases. They contend that issues related to previous sexual conduct or experience are often laden with prejudice and stereotype and should not be subjected to personal discretion.¹⁰¹ Studies have found

⁹⁵ Ibid.

⁹⁶ B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), p. 103.

⁹⁷ *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (Supreme Court of Canada). McLachlin J held: "The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar": para. 38. This decision was reaffirmed in *R. v. Darrach*, [2000] 2 S.C.R. 443 (Supreme Court of Canada). See also, *S. v. Johannes Myeni*, [2002] 2 S.A.C.R. 411 (Supreme Court of Appeal of South Africa).

⁹⁸ Legislation that restricts the admission of evidence of sexual activity is often referred to as "rape shield laws." In the Canadian case of *R. v. Seaboyer*, McLachlan J points out that the term is less than fortunate, as "the legislation offers protection not against rape, but against the questioning of complainants in trials for sexual offences": para. 38.

⁹⁹ J. Marsh, A. Geist and N. Caplan, *Rape and the Limits of Law Reform* (Boston: Arbor House Publishing Co., 1982).

¹⁰⁰ ICC, *Rules of Procedure and Evidence*, Rule 71; U.N. International Criminal Tribunal for Yugoslavia, *Rules of Procedure and Evidence*, 1993, Rule 96 (iv); U.N. International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, 1995, Rule 96 (iv); UNTAET, *Regulation No. 2000/30 on Transitional Rules of Criminal Procedure*, Rule 34.3 (d).

¹⁰¹ For a summary of arguments that have been advanced in support of a mandatory model, including the susceptibility of adjudicators being affected by societal stereotypes concerning sexuality, see Model Criminal Code Officers Committee, *Report* (supra), pp. 239–241. A minority of judges on the Supreme Court of Canada also held the view that the area of law concerning sexual assault is particularly prone to utilization of stereotypes: *R. v. Seaboyer* (L'Heureux-Dube J., dissenting), para. 207.

that judges under the discretionary regime have a tendency towards allowing evidence of other sexual conduct, in part because of societal perception on issues relating to rape and sexuality.¹⁰²

Option 2 (*Article 11B*) outlines a discretionary approach to evidence of previous sexual conduct or experience in sexual assault cases. Some people have advocated for discretionary regimes on several grounds. First, a mandatory regime is not flexible enough to deal with all of the possible fact situations that may arise in the future. Second, a mandatory regime may deny an accused a fair trial.¹⁰³ In some circumstances, raising specific aspects of a complainant's previous sexual conduct or experience may be essential to proving an accused's innocence. A discretionary regime, therefore, offers a more flexible approach that allows the admission of "evidence which has real probative value in the absence of overriding countervailing considerations."¹⁰⁴ Third, in some jurisdictions, a discretionary model is also considered more in line with the legal tradition.¹⁰⁵ A discretionary regime has found support in the legislatures of a number of jurisdictions.¹⁰⁶ The provisions in *Article 11B* afford judges limited discretion in determining the admissibility of evidence of previous sexual conduct or experience in certain circumstances. The article completely prohibits evidence of a complainant's sexual reputation or evidence of a complainant's sexual activity used to infer that a complainant is more likely to have consented or is less trustworthy. Such information is considered irrelevant and misleading.¹⁰⁷ The article lists a number of factors that judges should consider when determining the admissibility of evidence of previous sexual conduct or experience that does not fall under the aforementioned exclusions. Any request to introduce such evidence in court must follow the stipulated procedures.

¹⁰² A. McColgan, "Common law and the relevance of sexual history evidence," *Oxford Journal of Legal Studies* 16 (1996): 275–308. See also Model Criminal Code Officers Committee, *Report* (supra), pp. 239–241, where examples of English judges' inappropriate admission of complainants' sexual activity as evidence in court were noted as potential challenges to the discretionary approach.

¹⁰³ For example, the Supreme Court of Canada held that a blanket prohibition on evidence of complainants' sexual activities, with a few exceptions, violates the defendants' right to a fair trial and suffers from overbreadth as such evidence may in some cases be considered relevant to the defence of the accused: *R. v. Seaboyer*. Some experts consider the resulting law as an appropriate balance of the rights of the complainant and of the accused: B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), c. 9.

¹⁰⁴ *Ibid.*, para. 74.

¹⁰⁵ Model Criminal Code Officers Committee, *Report* (supra), p. 254.

¹⁰⁶ See, for example, Namibia, *Combating of Rape Act of 2000*, art. 18; Kenya, *Sexual Offences Act No. 3 of 2006*, s. 34; Canada, *Criminal Code*, ss. 276, 276.1, 276.2 and 277.

¹⁰⁷ Australia's Model Criminal Code describes evidence of sexual reputation as "too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances": Model Criminal Code Officers Committee, *Report* (supra), p. 219. The Supreme Court of Canada has considered evidence of sexual activity used to infer about a complainant's character misleading and has upheld the constitutionality of its inadmissibility: *R. v. Darrach*, [2000] 2 S.C.R. 443.

NOTE:

The use in court of complainants' personal records, including confidential records between complainants and counsellors, threatens the efficacy of post-assault care and infringes upon complainants' privacy.

Article 12. Production of personal records

[Two options for Article 12 are provided below — 12A and 12B. One or the other should be selected, but not both.]

Option 1: Article 12A. Mandatory prohibition on the production of person records

- (1) No record relating to a complainant or a witness shall be disclosed in any criminal, civil, legislative, administrative or other proceedings involving the alleged commission of a rape or sexual assault, unless the complainant or witness to whom the record relates has consented in writing to such disclosure.¹⁰⁸
- (2) For the purpose of Section (1), “record” means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records; personal journals and diaries; and records containing personal information, the production or disclosure of which is protected by any other legislation, but does not include records made by persons responsible for the investigation or prosecution of the offence.¹⁰⁹

Commentary: Option 1 (Article 12A)

In sexual assault cases, the defence may seek access to private information, particularly counselling records, relating to the complainants and witnesses for a number of purposes.¹¹⁰ Information contained in these records is often taken out of context and misused in an attempt to cast doubt on the complainants' and witnesses' moral character and credibility.¹¹¹ In some jurisdictions where evidence of complainants' sexual

¹⁰⁸ This wording is derived from Canada, *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.2, and U.S. Department Of Justice, *Report To Congress: The Confidentiality Of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors: Findings and Model Legislation*, 1995, art. 103.

¹⁰⁹ This definition is derived from Canada, *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.1.

¹¹⁰ J. Temkin, “Digging the dirt: disclosure of records in sexual assault cases,” *Cambridge Law Journal* 61(1) (2002): 126–145, at 126.

¹¹¹ For example, counselling records of complainants, particularly women, before the alleged incident of rape or sexual assault have often been used to suggest that the complainants are incapable of telling the truth about what had happened. See S. Bronitt and B. McSherry, “The use and abuse of counselling records in sexual assault trials: reconstructing the ‘rape shield’?” *Criminal Law Forum* 8(2) (1997): 259–291, at 262.

reputation and previous sexual conduct has been barred, the use of complainants' personal information records in court allows the defence to circumvent such legislative prohibition.¹¹² Further, complainants' records from post-assault counselling have sometimes been introduced as evidence of facts surrounding the incident in question.¹¹³

Many legal scholars have challenged such use of private records in sexual assault trials, arguing that this information is seldom relevant to the case and that its quality as admissible evidence is questionable for several reasons.¹¹⁴ First, most personal information records are not prepared with the intention of detailing what has transpired and therefore do not represent faithful documentations of the incidents at issue. Second, documents such as medical charts and counsellors' notes are not reviewed by the complainants and may contain inaccurate descriptions of facts. Third, it is not uncommon for survivors of rape or sexual assault to blame themselves for what has occurred. To introduce such personal feelings contained in private records as evidence does not contribute to fact-finding, but rather runs a high risk of misleading the judges and juries.¹¹⁵

Compelled disclosure of personal information records in court also invades the right to privacy of complainants and witnesses.¹¹⁶ Oftentimes, complainants face public humiliation, stigmatization and disruption of social and family life consequent to such disclosure.¹¹⁷ Studies have found a real possibility for survivors of rape and sexual assault to refrain from reporting their cases due to the fear of private information becoming a matter of public record.¹¹⁸ With respect to the use of counselling records at trials, there is ample empirical evidence that shows the efficacy of therapy being undermined as a result.¹¹⁹ For instance, complainants and counsellors alike may be

¹¹² *R. v. O'Connor*, [1995] 4 S.C.R. 411 (Supreme Court of Canada), para. 123, L'Heureux-Dube J., dissenting. See also Bronitt and McSherry, "The use and abuse..." (supra), pp. 260–261.

¹¹³ For example, in *R. v. O'Connor*, the Supreme Court of Canada allowed post-assault counselling records to be used in court as they may contain, *inter alia*, information concerning the unfolding of events underlying the criminal complaint.

¹¹⁴ Temkin, "Digging the dirt" (supra), pp. 129–130. See also *R. v. Osolin*, [1993] 4 S.C.R. 595 (Supreme Court of Canada), para. 189, L'Heureux-Dube J., dissenting.

¹¹⁵ In *R. v. O'Connor*, at para. 110, L'Heureux-Dube J. stated in dissent: "[T]hese records may very well have a greater potential to derail than to advance the truth-seeking process."

¹¹⁶ The European Court of Human Rights has considered the protection of medical data of fundamental importance to an individual's right to respect for private life, which is guaranteed by art. 8 of the *European Convention on Human Rights*. See *Z v. Finland* (1998) 25 E.H.R.R. 371.

¹¹⁷ L. Kelly, J. Temkin and S. Griffiths, *Section 41* (supra), pp. 64–67; A. Cossins, "Tipping the scales in her favour: the need to protect counselling records in sexual assault trials," in P. Eastale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Sydney, Australia: Federation Press, 1998), pp. 94–106.

¹¹⁸ South African Law Reform Commission, *Project 107* (supra), pp. 212–213. See also, L. Kelly, J. Temkin and S. Griffiths, *Section 41* (supra), pp. 61–69.

¹¹⁹ For a summary of research on this topic, see American Psychological Association, *Brief Amicus Curiae of the American Psychological Association in Support of Respondents: Jaffee v. Redmond* [Supreme Court of United States], 1996, pp. 14–15, online via: www.apa.org/psyclaw.

hesitant to discuss certain sensitive issues that are integral to the therapeutic process due to the fear of them being disclosed in court.¹²⁰ Complainants may also terminate treatment prematurely or avoid seeking necessary support altogether.¹²¹

To address this concern, Option 1 (*Article 12A*) stipulates a mandatory regime that prohibits the disclosure of personal information records in all proceedings involving sexual assault cases unless written consent is provided by the complainants or the witnesses to whom the records relate. A similar mandatory approach has been adopted by other jurisdictions but with narrower scopes, primarily targeting psychiatric and counselling records.¹²² This provision extends the protection against disclosure to all records that can reasonably be considered as private, except documents that are prepared by people responsible for the investigation or prosecution of the case at trial.¹²³ This approach reflects the reality that the defence in rape and sexual assault cases does not limit itself to counselling records in its effort to uncover information to discredit the complainants and witnesses.¹²⁴ The U.S. Supreme Court has endorsed a mandatory model with respect to the production of confidential counselling records at trials, arguing that the legislative purpose of the complainant-counsellor privilege would be compromised if complainants cannot predict with some degree of certainty whether particular discussions they had with counsellors will be protected.¹²⁵

Option 2: Article 12B. Discretionary restriction on the production of personal records

- (1) Subject to Section (3), no record relating to a complainant or a witness shall be disclosed in any criminal, civil, legislative, administrative or other proceedings involving the alleged commission of a rape or sexual assault unless the complainant or witness to whom the record relates has consented in writing to such disclosure.

¹²⁰ D. Shuman, M. Weiner and G. Pinard, “The privilege study (part III): psychotherapist–patient communications in Canada,” *International Journal of Law and Psychiatry* 9 (1986): 393–429; B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), p. 126.

¹²¹ D. Shuman, M. Weiner and G. Pinard, “The privilege study” (supra); J. Lindenthal and C. Thomas, “Psychiatrists, the public and confidentiality,” *Journal of Nervous and Mental Disease* 170 (1982): 319–323, at 321.

¹²² See ICC, *Rules of Procedure and Evidence*, Rule 73. For examples of legislation that affords a blanket privilege to counselling records, see § 13-90-107(1)(g), 6 C.R.S. (1985 Supp.) of Colorado [U.S.A.]; *Massachusetts General Laws*, chapter 233, section 20J of Massachusetts [U.S.A.]; and the *Evidence Act*, No. 76, 2001, s. 127B of Tasmania, Australia. In *Jaffee v. Redmond*, (1996) 518 U.S. 1, 116 S.Ct. 1923, the United States Supreme Court endorsed such legislation, noting that it serves the private interests of complainants and the public interests in ensuring citizens’ mental well-being.

¹²³ The constitutionality of this broader scope of protection has been affirmed by the Supreme Court of Canada. See *R. v. Mills*, [1999] 3 S.C.R. 668.

¹²⁴ *House of Commons Debates* (Canada), No. 122 (4 February 1997), pp. 7649–7651.

¹²⁵ *Jaffee v. Redmond*, p. 1932.

- (2) For the purpose of this article, “record” means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records; personal journals and diaries; and records containing personal information, the production or disclosure of which is protected by any other legislation, but does not include records made by persons responsible for the investigation or prosecution of the offence.¹²⁶
- (3) A court may, upon application by any interested party, order disclosure of a record in full or in part in any manner that the court deems fit after it has considered any potential prejudice to the dignity, privacy and security of the person to whom the record relates, including the nature and extent of any harm that would be caused to such person, and if it is satisfied that:
- (a) the evidence contained in such record will, on its own or in conjunction with any other evidence, have substantial probative value regarding a fact in issue;
 - (b) no other evidence that has similar probative value regarding the fact in issue is available; and
 - (c) the public interest outweighs the protection of the dignity, privacy and security of such person.¹²⁷
- (4) The party making an application referred to in Section (3) must satisfy the court that:
- (a) a personal record exists and is held by an identified record holder;
 - (b) such record contains information which is likely to be relevant to a fact in issue at the proceedings pending before the court or to the competence of a witness to give evidence; and
 - (c) granting the application will be in the interests of justice.¹²⁸
- (5) In determining whether to order disclosure of a record, a court may hold a hearing *in camera*.¹²⁹
- (6) A court shall furnish reasons for granting or refusing access to a personal record.¹³⁰

¹²⁶ See corresponding footnote in *Article 12B*.

¹²⁷ The wording of this section is derived from NSW, Australia, *Criminal Procedure Act No, 209 of 1986*, s. 298.

¹²⁸ This language comes from the draft sexual offence bill by the South African Law Reform Commission. The Commission ultimately decided not to adopt this provision because it was satisfied with the common law procedure that requires judges to assess the relevance of the evidence when determining whether it may be introduced at trial. See South African Law Reform Commission, *Project 107* (supra), pp. 212–215.

¹²⁹ This language is adapted from Canada, *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.6.

¹³⁰ South African Law Reform Commission, *Project 107* (supra), p. 215.

Commentary: Option 2 (Article 12B)

Instead of adopting the complete mandatory prohibition on disclosure reflected in Option 1, Option 2 (*Article 12B*) provides a discretionary scheme that generally prevents the disclosure of complainants' and witnesses' personal information records, except in some limited circumstances. Under these provisions, the judge determines whether a case warrants the disclosure of private records. The judge reviews the contents of the personal information records and determines whether to grant the requesting party access to these records. A judge is required to consider both the probative value of the confidential records and the potential adversity to be faced by the complainant if these documents become public; disclosure of personal information records can only be ordered if a court is satisfied that the former outweighs the latter.

Discretionary models have been favoured in certain jurisdictions.¹³¹ When considering the option of a blanket prohibition on the disclosure of personal information records, many legal scholars have expressed concerns over the potential infringement of the accused's constitutional right to make full answer and defence.¹³² The Supreme Court of Canada has repeatedly taken the position that the production of complainants' personal records in sexual assault trials should be allowed when the probative value of such records is high.¹³³ However, some researchers have observed that vesting the discretion in judicial officers has allowed the defence to apply for access to records using stereotypical arguments about women and children, and that judges frequently exercise such discretion in favour of disclosure.¹³⁴

¹³¹ See, for example, NSW, Australia, *Criminal Procedure Act No. 209 of 1986*; Canada, *Criminal Code*, R.S.C. 1985, c. C-46, ss. 278.1–278.8. See *R. v. Mills*, [1999] 3 S.C.R. 668 (Supreme Court of Canada). In this case, it was held that when ordering the production of confidential records, a court must balance the privacy and equality right of the complainant with the constitutional right of the accused to make full answer and defence.

¹³² For example, the South African Law Reform Commission rejected a proposal to include in its draft sexual offence bill a prohibition on complainants' personal records, citing on-going constitutional challenges concerning similar provisions in other jurisdictions as one of the reasons. See South African Law Reform Commission, *Project 107* (supra), p. 216.

¹³³ See, for example, *R. v. O'Connor* and *R. v. Mills*. The preamble to Canada, *An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)*, c. 30, 1997 states: "WHEREAS the Parliament of Canada recognizes that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make a full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny."

¹³⁴ J. Koshan, "Disclosure and protection in sexual violence cases: situating *Stinchcombe*," *Alberta Law Review* 40(3) (2002): 655; K. Busby, "Third party records cases since *R v. O'Conner*," *Manitoba Law Journal* 27(3) (2001): 356.

Article 13. Expert evidence of psychological effects of sexual offences

- (1) Evidence of the psychological effects and surrounding circumstances of rape or sexual assault shall be admissible in criminal proceedings where such offence is tried:
 - (a) in order to show that the sexual act to which the charge relates is likely:
 - (i) to have been committed towards, or in connection with, the complainant concerned; or
 - (ii) to have been committed without consent or under coercive circumstances; or
 - (b) to prove, for the purpose of imposing an appropriate sentence, the extent of the harm suffered by the complainant.¹³⁵

Commentary: Article 13

Jurisdictions have varying rules on the admissibility of expert evidence. In cases of rape and sexual assault, expert testimony is frequently admissible in order to respond to a defence that the complainant did not act like a “real” rape complainant. Expert testimony can explain complainant behaviours such as failing to fight back, delaying reporting, blaming themselves, and memory lapses. It can help counter judges’ and jurors’ misconceptions about the dynamics and impact of rape and sexual assault.¹³⁶

Article 14. Competence of children to testify

- (1) All persons below the age of 18 years shall be presumed to be competent to testify in criminal proceedings and no such person shall be precluded from giving evidence unless the court finds, at any stage of the proceedings, that he or she does not have the ability or the mental capacity, verbal or otherwise, to respond to questions in a way that is understandable to the court, in which case the court shall note the reasons for such a finding on the record of the proceedings.
- (2) The evidence given by a person referred to in Section (1) shall be admissible in criminal proceedings contemplated in that section, and the court shall attach such weight to such evidence as it deems fit.¹³⁷

¹³⁵ This provision is derived from Namibia, *Combating of Rape Act of 2000*, art. 8.

¹³⁶ See K. Lonsway, *The Use of Expert Witnesses in Cases Involving Sexual Assault*, Violence Against Women Online Resources, 2005, online via: www.vaw.umn.edu. These issues are also addressed in B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), c. 10, where the importance of allowing expert testimony prior to sentencing is emphasized. Online via: <http://web.uct.ac.za/depts/sjrp/public.htm>.

¹³⁷ HRW has reported that the discretion afforded to judges in determining the competency of a child witness tends to work to the disadvantage of child complainants. See HRW, *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Africa*, p. 26. The South African Law Commission concluded that “[b]ased on recent research ... the memory of children is as accurate as that of adults, that children do not lie more than adults, and that children can discern fact from

Article 15. Protection of complainants and witnesses

- (1) The court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of complainants and witnesses. These measures shall not be prejudicial to, or inconsistent with, the rights of the accused and a fair and impartial trial.¹³⁸

NOTE:

Open courts and media scrutiny can increase the traumatic experience of trial for survivors of rape and sexual assault. The provision below is a well-recognized exception to the principle that criminal proceedings should be public.¹³⁹

Article 16. Presumption of proceedings to be held *in camera*

- (1) All parts of any proceedings in respect of an offence under this Act is to be held *in camera*, unless the court otherwise directs.
- (2) The court may direct that the part of proceedings in which evidence is given by the complainant be held in open court only if the court is satisfied that:
- (a) special reasons in the interests of justice require the part of the proceedings to be held in open court; or
 - (b) the complainant consents to giving his or her evidence in open court.
- (3) In determining whether to make a direction under Section (2), the court shall consider:
- (a) the right to a fair and public hearing;
 - (b) whether there is a real and substantial risk that the complainant, witness or justice system participant would suffer significant harm if his or her identity were disclosed;
 - (c) whether the survivor, witness or justice system participant needs the order for his or her security or to protect him or her from intimidation or retaliation;

fantasy particularly in the context of acts of abuse.” These findings should be reflected in legislation. See South African Law Reform Commission, *Project 107* (supra).

¹³⁸ The language of this section comes from the *Rome Statute of the International Criminal Court*, 1998, art. 68.

¹³⁹ *In camera* proceedings involve holding a trial or a hearing in a place not open to the public, such as the judge’s chambers or a courtroom with all persons who are not necessary for the proceedings (for example, spectators) excluded.

- (d) society's interest in encouraging the reporting of offences and the participation of survivors, witnesses and justice system participants in the criminal justice process;
 - (e) whether effective alternatives are available to protect the identity of the survivor, witness or justice system participant;
 - (f) the salutary and deleterious effects of the proposed order;
 - (g) the impact of the proposed order on the freedom of expression of those affected by it; and
 - (h) any other factor that the court considers relevant.
- (4) Holding proceedings *in camera* does not affect the entitlement of a complainant or witnesses to have support person or persons present when giving evidence.¹⁴⁰

Article 17. Restrictions on publication of information revealing the complainant and other evidence

- (1) In any proceedings against a person under this Act, no person shall publish in any manner whatsoever any information that could identify the complainant, unless the court directs otherwise.
- (2) The court may direct that a person may publish information that could identify the complainant, only if the court is satisfied that:
- (a) special reasons in the interests of justice require the publication of this information; or
 - (b) the complainant consents to the publication of this information.
- (3) In any proceedings against a person under this Act, a court may make an order forbidding publication of the whole or any part of the evidence tendered in the proceedings or of any report or account of that evidence.
- (4) In determining whether to make a direction under Sections (2) and (3), the Court shall consider:
- (a) the right to a fair and public hearing;
 - (b) whether there is a real and substantial risk that the complainant, witness or any other participant to the proceedings would suffer significant harm if his or her identity were disclosed;

¹⁴⁰ The wording of this article is derived from ss. 291 and 291A of NSW, Australia, *Criminal Procedure Act of 1995*; ss. 486.4 and 486.5 of the Canadian *Criminal Code*; s. 153 of Namibia, *Criminal Procedure Act of 1977*; and s 153 of South Africa, *Criminal Procedure Act of 1977*. See also ICC, *Rules of Procedure and Evidence*, ICC-ASP/1/3, 2002, Rule 72. Courts in various jurisdictions have upheld the constitutionality of such provisions, despite the accused's right to a fair trial. See, for example, *Nel v. Le Roux NO* 457 US 1982 [South Africa Constitutional Court] and *Richmond Newspapers Inc v. Virginia* 448 US 556 (1980) [U.S. Supreme Court].

- (c) whether the complainant, witness or any other participant to the proceedings needs the order for his or her security or to protect him or her from intimidation or retaliation;
- (d) society's interest in encouraging the reporting of offences and the participation of complainants, witnesses and other participants in the criminal justice process;
- (e) whether effective alternatives are available to protect the identity of the complainant, witness or any other participant in the proceedings;
- (f) the salutary and deleterious effects of the proposed order;
- (g) the impact of the proposed order on the freedom of expression of those affected by it; and
- (h) any other factor that the court considers relevant.¹⁴¹

NOTE:

The sensitive nature of rape and sexual assault, combined with the adversarial nature of the criminal justice process, can make giving evidence for complainants and witnesses in sexual offence cases particularly difficult.¹⁴² It is in the interest of justice and human rights to ensure that complainants and witnesses are protected from trauma and treated fairly when giving evidence.

Article 18. Alternative arrangements for giving evidence by the complainant

- (1) In any proceedings against a person under this Act, a complainant and a witness is entitled (but may choose not):
 - (a) to give evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom; or
 - (b) to give that evidence by use of alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused or any other person or persons in the courtroom, including the following:
 - (i) use of screens;
 - (ii) planned seating arrangements for people who have an interest in the proceedings (including the level at which they are seated and the people in the complainant's line of vision);
 - (iii) requiring legal practitioners not to robe; and

¹⁴¹ The wording of this article is derived from s. 292 of NSW, Australia, *Evidence Act of 1995*; s. 486 of the Canadian *Criminal Code*; s. 154 of Namibia, *Criminal Procedure Act of 1977*, s 154 of South Africa, *Criminal Procedure Act of 1977*.

¹⁴² See J. Esselman Tomz and D. McGillis, *Serving Crime Victims and Witnesses, 2nd Edition* [U.S.] National Institute of Justice, 1997, p. 4. See also, I. Bacik, C. Maunsell, and S. Gogan, *The Legal Process and Victims of Rape* (supra), pp. 30–32 and 110–135. This report identified that 80 percent of the participants interviewed in the study reported negative feelings about testifying, including humiliation, embarrassment, stress and anxiety.

- (iv) requiring legal practitioners to be seated while examining or cross-examining the witness.

(2) If, to enable evidence to be given as referred to in Section (1), the court considers it appropriate to do so, the court may adjourn the proceeding or any part of the proceeding from the courtroom to another court or place.¹⁴³

Article 19. Complainant and witness entitled to have support person(s) present when giving evidence

- (1) A complainant is entitled to have a person or persons chosen by the complainant present near the complainant, and within the complainant's sight, when the complainant is giving evidence in proceedings in respect of an offence under this Act.
- (2) A witness is entitled to have a person or persons chosen by the witness present near the witness, and within the witness's sight, when the witness is giving evidence in proceedings in respect of an offence under this Act.
- (3) The entitlement applies:
 - (a) even if the complainant or witness gives evidence by means of closed-circuit television or other technology or under any alternative arrangements available to the complainant or witness; and
 - (b) even if the proceedings, or the part of the proceedings in which the complainant or witness gives evidence, are held *in camera*.
- (4) Without limiting the entitlement of a complainant or witness under this section, the person or persons chosen to be with the complainant or witness when he or she gives evidence may include a parent, guardian, relative, friend or support person of the complainant or witness, or a person assisting the complainant or witness in a professional capacity.
- (5) An accused is not entitled to object to the suitability of the person or persons chosen by a complainant or witness to be with the complainant or witness when giving evidence, and the court is not entitled to disallow the complainant's or witness' choice of person or persons on its own motion, unless the complainant's or witness' choice is likely to prejudice the accused's right to a fair trial.¹⁴⁴

¹⁴³ This wording is based on s. 294B of NSW, Australia, *Criminal Procedure Act of 1986*. See also, ss. 158(2) and (3) of South Africa, *Criminal Procedure Act of 1977*; s. 158A(2) of Namibia, *Criminal Procedure Act of 1977*.

¹⁴⁴ An example of such a situation might be because the person chosen by the complainant is a witness or potential witness in the proceedings. This wording of this article is derived from s. 294C of NSW, Australia, *Criminal Procedure Act of 1986*. See also s. 158A(2)(c) of Namibia, *Criminal Procedure Act of 1977*.

Commentary: Articles 18 and 19

Complainants and witnesses of sexual offences may find being in the same room as the accused one of the most difficult aspects of the trial process. Where a complainant or witness finds it distressing to be in the same room as the accused, it might mean that he or she is unable to give evidence effectively or that the complainant or witness suffers further stress and trauma from testifying. Similarly, survivors of sexual violence may be particularly vulnerable to power dynamics in a courtroom environment (like those reinforced by the wearing of legal robes) and may therefore find they are intimidated and unable to communicate effectively on the witness stand. The principal rationale of the alternative arrangements outlined above is that they can help to ease a complainant's distress related to the trial process generally, as well as reduce fears of confronting the accused and giving evidence in court.

Increasing recognition of trauma related to giving evidence in cases of sexual violence has led a number of legal systems to take steps to make the criminal justice system more sensitive to the needs of complainants.¹⁴⁵ The constitutionality of alternative provisions enacted in law has been upheld in response to challenges related to the fair trial rights of the accused.¹⁴⁶

Giving evidence by closed circuit television (CCTV) allows complainants and witnesses to give evidence from a remote location (usually a room within the court precincts) which is appropriately equipped. The evidence is transmitted to the courtroom, so the court can see and hear the witness and the witness can respond to questions remotely.

Where CCTV is unavailable, less costly alternatives can be employed towards the same end. A mobile screen, for example, can be used to ensure that the witness does not have direct eye contact with the accused. Other physical arrangements, such as special seating arrangements, may also be used to facilitate this. While screens and seating arrangements may be more practical in some cases than CCTV, they may not be as

¹⁴⁵ For example, the *Rules of Procedure and Evidence* of the ICC empower a Chamber to “allow a witness to give oral testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself”: Rule 67. This particular rule goes on to say that “[t]he Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.” Both the ICTY and the ICTR have similar relevant provisions: *Rules of Procedure and Evidence*, Rule 75. Examples of national laws that include alternative arrangements for vulnerable witnesses include South Africa, *Criminal Procedure Act of 1977*, ss. 158(2) and (3); U.K., *Youth Justice and Criminal Evidence Act of 1999*, ss. 23–30; Namibia, *Criminal Procedure Act of 1977*, s. 158A; s. 486 of Canada, *Criminal Code*; NSW, Australia, *Criminal Procedure Act of 1986*, ss. 290–294C.

¹⁴⁶ For example, in *R v. Staggie and Another*, [2003] 1 BCLR 43 (C), the South African High Court (Cape of Good Hope Provincial Division) upheld the constitutionality of a witness testifying by CCTV and giving an *in camera* hearing of the testimony of the complainant. See also *Klink v. Regional Court Magistrate NO and Others* [1996] 3 BCLR 402 (E). In *R v. Levogiannis*, [1993] 4 S.C.R. 475, the Supreme Court of Canada upheld the constitutionality of s. 486(2.1) of Canada, *Criminal Code* permitting a young complainant to testify behind a screen. See also *R v. Ngo* [2001] NSWSC 339 [Supreme Court of NSW, Australia].

effective at reducing trauma as the complainant or witness can still hear the accused and is aware of the accused's physical proximity.¹⁴⁷

Recent studies have surveyed vulnerable witnesses to determine their perspectives on the success and utility of alternative measures for giving evidence. Findings indicate that special measures are effective at decreasing anxiety and distress and increasing the overall satisfaction of complainants with the criminal justice system.¹⁴⁸ Alternative arrangements not only help to protect complainants and witnesses, but can also advance the interests of justice by ensuring that evidence is provided in as unhindered a manner as possible. However, it is worth noting that despite provisions allowing for their use, some reports indicate that in some jurisdictions, alternative measures such as CCTV and screens are used infrequently and inconsistently.¹⁴⁹

Article 20. Arrangements for complainant and witnesses giving evidence when accused person is unrepresented

- (1) This Article applies to proceedings in respect of an offence under this Act during which the accused is not represented by counsel.
- (2) The complainant cannot be examined in chief, cross-examined or re-examined by the accused, but may be so examined instead by a person appointed by the court.
- (3) The court may order that a witness cannot be examined in chief, cross-examined or re-examined by the accused, but may be so examined instead by a person appointed by the court.
- (4) The person appointed by the court is to ask the complainant or the witness only the questions that the accused requests that person to put to the complainant.
- (5) Any such person, when acting in the course of an appointment under this section, must not independently give the accused legal or other advice.¹⁵⁰

¹⁴⁷ NSW Law Reform Commission, *Report 101: Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, 2003, paras. 6.14–6.15.

¹⁴⁸ See, for example, B. Hamlyn, A. Phelps and G. Sattar, *Key findings from the Surveys of Vulnerable and Intimidated Witnesses, 2000/2001 and 2003*, U.K. Home Office, 2004; M. Kebbell, C. O'Kelly and E. Gilchrist, "Rape victims' experiences of giving evidence in English courts: a survey," *Psychiatry, Psychology and Law* 14(1) (2007): 111–119.

¹⁴⁹ Reasons for this include lawyers being uncomfortable with CCTV technology and concerns about reducing the impact of a complainant's evidence. For a discussion of these concerns, see NSW Law Reform Commission, *Report 101* (supra), paras. 6.14–6.16.

¹⁵⁰ This article is based on s. 294A of NSW, Australia, *Criminal Procedure Act of 1986*. See also, s. 486.3 of Canada, *Criminal Code*.

Article 21. Instructions to the jury

- (1) In any proceedings in which evidence is given in ways prescribed by Articles 15–20, and where the trial involves a jury, the court must:
- (a) inform the jury that it is standard procedure for complainants’ and witnesses’ evidence in such cases to be given by those means or use of those arrangements; and
 - (b) warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because it is given by those means or by use of those arrangements.¹⁵¹

NOTE:

Complainants often do not feel adequately involved in the various stages of the trial process. The article below is intended to empower the complainant in a number of ways.

Article 22. Rights of complainant during pre-trial, trial and post-trial processes

- (1) In a case of rape or sexual assault, the complainant has the right to:
- (a) be reasonably protected from the accused;
 - (b) be notified of all court proceedings, including hearings to determine pre-trial release, probation and parole;
 - (c) attend all public court proceedings relating to the offence, unless the court determines that the evidence of the complainant would be materially affected if he or she heard the evidence of other witnesses either during the trial or other hearings, including hearings to determine pre-trial release, probation and parole;
 - (d) request the prosecutor to present to the court information the complainant feels is relevant to pre-trial release of the accused, or to conviction or sentencing of the accused;
 - (e) avail himself or herself of the protections for complainants and witnesses giving testimony provided for in Articles 15–20; and
 - (f) be kept informed about the pre-trial release, conviction, sentencing, imprisonment and release of the accused.¹⁵²

¹⁵¹ This wording is derived from Section 294A of NSW, Australia, *Evidence Act of 1995*. The Canadian *Criminal Code* specifies: “No adverse inference may be drawn from the fact that an order is, or is not, made under this section.” See, for example, ss. 486.1(1), 486.2(1) and 486.3(5).

¹⁵² See South African Law Reform Commission, *Project 107* (supra), p. 339. For a legal provision outlining the rights of complainants in bail applications, see s. 60A of Namibia, *Criminal Procedure Act of 1977*. For legal provisions establishing special duties on prosecutors and police, see Namibia, *Combating of Rape Act of 2000*, art. 9–10.

Commentary: Article 22

Rape and sexual assault (like other crimes) are prosecuted by the state, not the complainant. This often means that complainants do not feel adequately involved in the pre-trial, trial and post-trial processes, with a number of negative consequences. First, complainants may not feel empowered in the process. Second, a complainant's safety may be undermined when his or her perspective is not represented in pre-trial release, probation or parole hearings. Third, the quality of the complainant's testimony may be compromised.¹⁵³ The complainant rights enumerated in this article are intended to counter these negative consequences to the maximum extent possible.

C. Sentencing Reform

NOTE:

Considerable inconsistencies often exist with respect to sentencing for crimes of sexual violence. Sentences are frequently criticized as not being reasonable given the seriousness of the criminal acts committed. Three different approaches are outlined here, all of which aim to promote consistency in the sentencing of those found guilty of rape or sexual assault.

[Two options with respect to sentencing are provided below. Option 1 reflects the approach of legislating presumed minimum sentences, as reflected in Articles 23–25. Option 2 (Article 26A or 26B) contemplates the development of sentencing guidelines. Option 1 and Option 2 are not mutually exclusive; they may be simultaneously applied.]

Option 1: Statute defines presumptive minimum sentences

Article 23. Presumed minimum sentencing

- (1) Subject to the provisions in Article 25, any person who is convicted under this Act shall be liable:
- (a) in the case of rape:
 - (i) to imprisonment for a period of not less than [number] years for a first conviction;¹⁵⁴
 - (ii) to imprisonment for a period of not less than [number] years for a second or subsequent conviction;¹⁵⁵ or

¹⁵³ “Due to the fact that she has been given so little information about the trial and what is expected of her, it is of little surprise that the rape complainant's testimony is often unclear, contradictory and incomplete.”: B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), c. 4.

¹⁵⁴ In Namibia, the minimum sentence for a first offence of rape without aggravating circumstances is five years.

- (b) in the case of sexual assault:
 - (i) to imprisonment for a period of not less than [number] years for a first conviction;
 - (ii) to imprisonment for a period of not less than [number] years for a second or subsequent conviction.¹⁵⁶

Article 24. Increased penalties for aggravated offences of rape or sexual assault¹⁵⁷

- (1) Subject to the provisions in Article 25, any person who is convicted of an aggravated offence under this Act shall, be liable:
 - (a) in the case of rape:
 - (i) to imprisonment for a period of not less than [number] years for a first conviction;
 - (ii) to imprisonment for a period of not less than [number] years for a second or subsequent conviction; or
 - (b) in the case of sexual assault:
 - (i) to imprisonment for a period of not less than [number] years for a first conviction;
 - (ii) to imprisonment for a period of not less than [number] years for a second or subsequent conviction.¹⁵⁸

Article 25. Substantial and compelling circumstances

- (1) If the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in Articles 23 and 24, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.¹⁵⁹

Commentaries: Articles 23–25

Legal experts in South Africa argue that “in the context of rape cases, the exercise of the sentencing discretion inevitably depends on the personal views and biases of the judge or

¹⁵⁵ In Namibia, the minimum sentence for a second or subsequent offence of rape without aggravating circumstances is 10 years.

¹⁵⁶ See South Africa, *Criminal Law Amendment Act 105 of 1997*, s. 51(2)(b).

¹⁵⁷ Note: This Article would trigger higher presumed minimum sentences in the case of a rape or sexual assault that was accompanied by any of the aggravating factors listed in Article 3 above.

¹⁵⁸ In Namibia, aggravated rape sentences range from 10 to 15 years for a first offence, depending on the circumstances of the crime; and from 20 to 45 years for a second or subsequent offence, depending on the circumstances of the crime.

¹⁵⁹ The wording of this provision is derived from South Africa, *Criminal Law Amendment Act 105 of 1997*, s. 51 (3)(a) and Namibia, *Combating of Rape Act of 2000*, s. 3(2).

magistrate and his or her perceptions regarding rape and its consequences.”¹⁶⁰ One approach to limit such personal views and biases is to limit judicial discretion through a mandatory minimum sentence. The option above would not be an absolute limit to this discretion, as judges would be able to depart from the minimum where the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

Mandatory minimum sentencing that allows no leeway for judicial discretion has been criticized for creating potentially unreasonable and unjust decisions.¹⁶¹ *Presumed* mandatory minimum sentences that allow some form of judicial discretion (as above), are still controversial. Proponents of mandatory minimum sentences will generally note that the law should ensure that sentences reflect the gravity of the offence and that prescribed minimums will help circumvent leniency in sentencing. They may also point out that the minimum sentences reflect community sentiments that justice should be done.

Opponents of mandatory minimum sentences highlight that they restrict judicial discretion to sentence according to the gravity of the offence. They may also note that, in addition to acting as retribution, prevention and a deterrent, sentencing should also be concerned with rehabilitation of the offender. Research from South Africa has revealed highly divergent interpretations of “substantial and compelling circumstances” from judges, and judicial resentment of the limitations on judicial discretion.¹⁶² Research results from Namibia on the application of minimum sentences for rape have been more positive.¹⁶³

Option 2: Statute covers development of sentencing guidelines

Article 26. Sentencing guidelines

[Two options with respect to developing sentencing guidelines are presented below. Option 2A (Article 26A) envisions the creation of a commission with this mandate, whereas Option 2B (Article 26B) would create a process for appellate courts to outline sentencing guidelines in a judgment. Either Option 2A or Option 2B should be selected, but not both.]

¹⁶⁰ See B. Pithey et al, *Legal Aspects of Rape in South Africa* (supra), c. 12.

¹⁶¹ See, for example, *Sillery v. The Queen* [High Court of Australia] (1981) 180 CLR 353, p. 357.

¹⁶² See, for example, J. Nesor, “Mandatory minimum sentences in the South African context,” *Crime Research in South Africa* 3(3) (2001), online: www.crisa.org.za/downloads/vvs.pdf; J. Sloth-Nielsen and L. Ehlers, *A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa*, Institute for Security Studies Paper 111, 2005; Open Society Foundation for South Africa, *Sentencing in South Africa: Conference Report*, 2006.

¹⁶³ (LAC), *Rape in Namibia* (supra), pp. 439–478.

Option 2A: Article 26A. Sentencing guideline commission

- (1) The Ministry of Justice shall establish an independent commission that shall, on an ongoing basis, oversee the development of sentencing guidelines.¹⁶⁴

Option 2B: Article 26B. Sentencing guideline judgments

- (1) A Full Court of Appeal may give a judgment establishing sentencing guidelines.
- (2) Each of the following is entitled to appear and be heard in proceedings in which the Full Court is asked or proposes to establish or review sentencing guidelines:
- (a) the Director of Public Prosecutions [or equivalent authority];
 - (b) the Attorney-General [or equivalent authority]; and
 - (c) an organization representing the interests of offenders or survivors of crime that has, in the opinion of the Full Court, a proper interest in the proceedings.
- (3) A sentencing guideline is to guide a sentencing court in determining sentences for:
- (a) offences generally or a particular class of offences; or
 - (b) offenders generally or a particular class of offenders.
- (4) A sentencing guideline may:
- (a) indicate an appropriate range of penalties for a particular offence or offences of a particular class; and
 - (b) indicate how particular aggravating or mitigating factors (or aggravating or mitigating factors of a particular kind) should be reflected in a sentence.
- (5) In particular, a sentencing guideline may indicate (and give guidance about the extent of) a reduction of sentence below the level that would otherwise be appropriate in any of the following cases:
- (a) where the offender has co-operated with authorities in the investigation of an offence;
 - (b) where the offender has pleaded guilty to the charge; or
 - (c) where the offender has contributed in some other way to reducing the burden on the criminal justice system or the burden of crime on the community.
- (6) A sentencing court:
- (a) should have regard to relevant sentencing guidelines; but

¹⁶⁴ For examples of such commissions, see the Minnesota Sentencing Guidelines Commission, online: www.msgc.state.mn.us/index.htm; the United States Sentencing Commission, online: www.ussc.gov; and the Sentencing Guidelines Council of England and Wales, online: www.sentencing-guidelines.gov.uk.

(b) is not bound to follow a particular guideline if, in the circumstances of the case, there are good reasons for not doing so.¹⁶⁵

Commentary: Article 26 (both options)

Sentencing guidelines are a promising approach to counteract the personal biases of judges and ensure uniformity in sentencing. Two particular options are laid out above.

The first option (Option 2A—*Article 26A*) is to establish an independent commission to develop sentencing guidelines. Such guidelines might be in the form of a detailed matrix or grid, or a detailed discussion paper. For example, the [U.S.] Minnesota Sentencing Guidelines Commission has established guidelines which specify recommended sentences. The guidelines are based on a grid structure: the vertical axis of the grid represents the severity of the offence for which the offender was convicted; the horizontal axis represents a measure of the offender’s criminal history. The court may depart from the presumptive correct sentence if special circumstances exist. By way of another example, the Sentencing Guidelines Council of England and Wales issues sentencing guidelines in the form of detailed discussion papers that recommend a range of appropriate sentences.¹⁶⁶

The second option (Option 2B—*Article 26B*) is to create a mechanism by which certain courts — usually full benches of appellate courts — can have judgments designated as sentencing guideline judgments. Guideline cases are judgments that go beyond the facts raised in a particular case to suggest a sentencing scale in one or more commonly encountered factual situations. Sentencing guideline judgments are not binding in a formal sense: a court, when sentencing, has discretion to sentence within the range expressed in the guideline, but also to depart from it if the particular circumstances require.¹⁶⁷

D. Other Provisions

NOTE:

Few reported cases of rape or sexual assault are successfully prosecuted. Imposing legislative duties on the police and prosecutors is designed to reduce the rate at which

¹⁶⁵ This article is based on NSW, Australia, *Criminal Law (Sentencing) (Sentencing Guidelines) Amendment Act No 29 of 2003*.

¹⁶⁶ For an example of the former, see U.S. Sentencing Commission, *Federal Sentencing Guidelines Manual*, 2008 ed. For an example of the latter, see England and Wales, Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline*, 2007, online: www.sentencing-guidelines.gov.uk/guidelines/council/quick.html.

¹⁶⁷ For an example of a sentencing guideline judgment that also provides an overview of the nature of such judgments, see *R v. Jurisic* (1998) 45 NSWLR 209. For a database of sentencing guideline judgments in England and Wales, see www.sentencing-guidelines.gov.uk/guidelines/other/courtappeal/default.asp.

charges are not laid and investigations are dropped.¹⁶⁸ The provisions below also provide an opportunity to develop standard guidelines and training for police and prosecutors in the handling of these cases.

Article 27. Police “first contact” duties

- (1) Where a complaint of rape or sexual assault is made, the first member of the police force in contact with the complainant must, except where compelling reasons exist:
 - (a) accompany the complainant to a private room;
 - (b) explain the procedures that will follow from an allegation of rape or sexual assault being made by the complainant;
 - (c) open an initial investigation and take a basic statement from the complainant;
 - (d) establish if the complainant is in need of emergency medical assistance (including post-exposure prophylaxis for possible HIV exposure) and, if so, arrange for the complainant to obtain emergency medical assistance and be accompanied to a hospital or clinic;¹⁶⁹
 - (e) inform the complainant that she or he has the right to make a full statement after a medical examination;
 - (f) contact a sexual offences investigation officer; and
 - (g) remain with the complainant until the sexual offences investigation officer arrives.¹⁷⁰

Article 28. Special duties of prosecutor

- (1) In criminal proceedings at which an accused is charged with rape or sexual assault, the prosecutor must consult with the complainant in such proceedings in order:
 - (a) to ensure that all information relevant to the trial has been obtained from the

¹⁶⁸ The inclusion of police duties to assist survivors in the body of legislation is not unusual. For example, including such duties has been effective at ensuring that police perform certain functions in the context of domestic violence. See, for example, South Africa, *Domestic Violence Act of 1998*, art. 2; Zimbabwe, *Domestic Violence Act of 2006*, ss. 5–6.

¹⁶⁹ Police guidelines on the handling of sexual assault and rape survivors should make clear that a complainant who opts not to make a police statement, for whatever reason, should not be denied emergency medical assistance, including post-exposure prophylaxis for possible HIV exposure.

¹⁷⁰ Sexual offences investigation officers are officers specially trained to address the needs of survivors of sexual assault and to liaise between the survivor and the senior investigating officer, medical staff and prosecutors. Their role is to ensure that survivors receive a high standard of care and support throughout the entire investigation, and to ensure that the best possible evidence is obtained for the investigation and any subsequent prosecution. See Hampshire Constabulary, *Minimum Standards of Investigation for Offences of Rape and/or Assault by Penetration*, 2007, online via: www.hampshire.police.uk. A number of countries in southern Africa have each introduced some form of specialized facilities at police stations for addressing gender violence that typically include separate rooms with trained staff.

- complainant, including information relevant to the question of whether the accused should be released on bail and, if the accused were so released, whether any conditions of bail should be imposed; and
- (b) to provide all such information to the complainant as will be necessary to lessen the impact of the trial on the complainant.¹⁷¹

Article 29. National instructions and training for police and prosecutors with respect to rape or sexual assault

- (1) The National Commissioner of the [relevant] Police Service must, in consultation with the [relevant] Minister(s) issue and publish national instructions regarding all matters which must be followed by all police officials who are tasked with investigating and receiving reports of sexual violence, including the following:
- (a) the manner in which the reporting of an alleged sexual offence is to be dealt with by police officials; and
 - (b) the manner in which sexual offence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a sexual offence may be discontinued.¹⁷²
- (2) The National Commissioner of the [relevant] Police Service must develop a training course for police officers, which must:
- (a) include training on the national instructions referred to in Section (1);
 - (b) include social context training in respect of sexual offences; and
 - (c) provide for and promote the use of uniform norms, standards and procedures;
- with a view to ensuring that as many police officers as possible are able to deal with sexual offences cases in an appropriate, efficient and sensitive manner.¹⁷³
- (3) The National Director of [the relevant Prosecuting Authority] must, in consultation with the [relevant] Minister(s), issue and publish directives regarding all matters which are to be followed by all members of the prosecuting authority who are tasked with conducting prosecutions of sexual offence cases, which have a bearing on complainants of such offences, including the following:
- (a) the manner in which sexual offence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;

¹⁷¹ See Namibia, *Combating of Rape Act of 2000*, art. 9.

¹⁷² This article is adapted from South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007*, s. 66(1)(a).

¹⁷³ *Ibid.*, s. 66(1)(b).

- (b) the circumstances in which the court must consider directing that the proceedings not take place in open court and in which the court must consider prohibiting the publication of the identity of the complainant; and
- (c) the information to be placed before the court during sentencing, including pre-sentence reports.¹⁷⁴

(4) The National Director of Public Prosecutions [or equivalent authority] must develop training courses for Public Prosecutors which must:

- (a) include training on the directives referred to in Section (3);
- (b) include social context training in respect of sexual offences; and
- (c) provide for and promote the use of uniform norms, standards and procedures;

with a view to ensuring that as many prosecutors as possible are able to deal with sexual offence cases in an appropriate, efficient, and sensitive manner.¹⁷⁵

Commentary: Articles 27–29

In most legal systems, police are required to investigate all allegations of rape and sexual assault.¹⁷⁶ Based on the results of the police investigation, a decision will be made whether or not to lay charges. This discretion generally rests with police services. If charges are laid, the decision as to whether a charge should be prosecuted is generally made by a separate and independent prosecution office. Following a decision to prosecute, the prosecution authority (or public prosecutor) takes the case forward through the criminal trial process, based on the evidence gathered during the police investigation.

In cases of rape or sexual assault, reports of offences are frequently not investigated or prosecuted, either because the complainant withdraws the charges or the investigating officer dismisses the allegations or discontinues the investigation.¹⁷⁷ For example, complainants may be actively discouraged from proceeding with reports or may decide not to cooperate further because they consider the process too traumatic. Investigating officers may also be pressured by relatives of the complainant or others to drop the case. In general terms, prosecutorial discretion regarding when to pursue a charge laid by the

¹⁷⁴ Ibid., s. 66(2)(a).

¹⁷⁵ Ibid., s. 66(2)(b).

¹⁷⁶ For example, the South Africa Police Service’s guidelines regarding sexual offences state that “until the contrary is proved, allegations of sexual offences are to be accepted as such.” See South Africa Police Service, *National Instruction No. 22/1988: Sexual Offences: Support to Victims and Crucial Aspects of the Investigation*, 1998, online via: www.doj.gov.za.

¹⁷⁷ A well-documented study on attrition rates in South African rape cases found that for every 394 women raped, 272 incidents are reported to the police and, of these, only 17 become cases (i.e., the docket is opened for investigation) and only one eventually results in a conviction. See N. Andersson et al, *Prevention of Sexual Violence: A Social Audit of the Role of the Police in the Jurisdiction of Johannesburg's Southern Metropolitan Local Council*, CIETAfrica, 1998, p. 9. The South African Law Reform Commission has called the filtering out of complaints of sexual violence from victims at the police station level “a point of non-accountability that requires urgent attention”: South African Law Reform Commission, *Project 107* (supra), paras. 8.2.3 and 8.3.

police includes an evaluation of the existence of (a) a reasonable prospect of conviction; and (b) public interest reasons to proceed or discontinue the prosecution. It is not the role of the police to consider whether there exists a reasonable prospect of conviction when deciding whether to lay charges, continue an investigation, or refer a case on to the prosecuting authorities. Given high attrition rates in cases of sexual violence, some law reform commissions have recommended that charges should never be withdrawn at the police station level.¹⁷⁸

International human rights law supports the notion of a duty to investigate. The *Declaration on the Elimination of Violence against Women* urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹⁷⁹ International jurisprudence has also underscored this point. The European Court of Human Rights has recognized that, under the prohibition of degrading treatment and the right to respect for private life, states have a positive obligation both to enact criminal legislation to effectively punish rape and to apply this legislation through effective investigation and prosecution.¹⁸⁰ Some superior courts have also recognized that the right to be free from violence is indicative of a legal duty resting on the police to take positive action to prevent violent crime.¹⁸¹

The provisions above are aimed at ensuring that police provide some basic services to survivors of rape or sexual assault. They also provide for the prosecutor to ensure that information has been obtained from the complainant regarding any reasons to oppose bail. The provisions also provide for establishing standard protocols and training for police and prosecutors to guide the process of investigation and prosecution. The development of instructions and training for police and prosecutors is an opportunity to address the high attrition rates associated with cases of sexual assault or rape during investigation. There are a number of documents that might serve as the basis for such guidelines.¹⁸²

¹⁷⁸ See, for example, South African Law Reform Commission, *Sexual Offences: Process and Procedure*, Discussion Paper 102, Project 107, 2002, paras. 8.4.1–8.4.7. See also, L. Artz and B. Pithey, *Submission to the Portfolio Committee for Justice and Constitutional Development in Response to The Criminal Law (Sexual Offences) Amendment Bill: Government Gazette No. 25282, 30 July 2003.*

¹⁷⁹ DEVAW, art. 4(c).

¹⁸⁰ See, for example, *M.C. v. Bulgaria* (application no. 39272/98).

¹⁸¹ See, for example, *Ghia Van Eeden (Formerly Nadel) v. Minister of Safety and Security*, 2001(4) SA 646 (T) [South African Supreme Court of Appeal], p. 18.

¹⁸² See, for example, (LAC), *Guidelines For Service Providers on the Combating of Rape Act*, 2005, online via: <http://www.lac.org.na/>; Hampshire Constabulary [U.K.], *Minimum Standards of Investigation for Offences of Rape and/or Assault by Penetration* (supra); South Africa Police Service, *National Policy Guidelines for Victims of Sexual Offences*, 1998, online via: www.doj.gov.za; Rape Crisis Network Ireland, *The Investigation of Sexual Violence: Priority Recommendations*, 2007, online via: www.rcni.ie.

NOTE:

In most countries there exists a gap between the health care needs of survivors of sexual violence and the services provided.¹⁸³ The provision below provides an opportunity to develop standard guidelines and training for health care practitioners in the handling of these cases.

Article 30. National instructions and training for health care practitioners with respect to rape and sexual assault

(1) The Director of the [national health authority] must, in consultation with the [relevant] Minister(s) and key stakeholders, issue and publish national instructions regarding all matters that are to be followed by all medical practitioners and any other relevant persons when dealing with sexual offence cases, with particular reference to:

- (a) the administering of post-exposure prophylaxis;
- (b) the manner in which the reporting of an alleged sexual offence is to be dealt with if the offence is reported to a designated public health establishment; and
- (c) the manner in which assistance in the investigation and prosecution of sexual offences, generally, must be provided.

(2) The Director of the [national health authority] must develop training courses for health care workers, which:

- (a) include training on the directives referred to in Section (1);
- (b) include social context training in respect of sexual offences; and
- (c) provide for and promote the use of uniform norms, standards and procedures;

with a view to ensuring that as many medical practitioners and any other relevant persons as possible are able to deal with sexual offence cases consistently in an appropriate, efficient and sensitive manner.¹⁸⁴

(3) The State shall bear the cost of the care, treatment, testing, prevention and counselling as referred to in this section.¹⁸⁵

¹⁸³ See, for example, WHO, *Guidelines for Medical-Legal Care for Victims of Sexual Violence*, 2003; M.L. Acosta, "Collecting evidence for domestic and sexual assault: highlighting violence against women in the health care system interventions," *International Journal of Gynaecology and Obstetric* 78(Suppl.1) (2002): S99–S104; N. Christofides et al, "Women's experiences of and preferences for services after rape in South Africa: interview study," *British Medical Journal* 332 (2006): 209–213.

¹⁸⁴ This article is adapted from South Africa, *Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007*, ss. 66(3)(a)–(b).

¹⁸⁵ This sub-section is derived from the recommendations of the South African Law Reform Commission, which has stated that the government "has the constitutional obligation to progressively realize socio-economic rights and the Commission regards the provision of treatment and counselling services to

Commentary: Article 30

The provision above provides an opportunity to ensure that high-quality treatment, support and care is provided for survivors of sexual violence and that standard protocols are adopted to guide the process of evidence collection.¹⁸⁶

Human rights organizations have articulated broad support for imposing a legislative duty on the state to cover the cost of treatment. They have noted that a sexual offence will often involve physical or psychological injury, and that because many complainants cannot pay for treatment, a failure to provide treatment would marginalize the poor.¹⁸⁷ Human rights organizations have also highlighted the importance of providing post-exposure prophylaxis to reduce the long-term effects of an assault.¹⁸⁸ According to a 2004 survey of 12 southern African countries, only four countries had policies requiring health facilities to administer post-exposure prophylaxis after a sexual assault, and none required this by law.¹⁸⁹

This article leaves it to the health sector to design the framework of the response, in the form of national directives and training. A number of documents exist that might serve as the foundation for such guidelines.¹⁹⁰

complainants of sexual offences as but the first step in such a realisation process”: See South African Law Reform Commission, *Project 107* (supra), p. 224.

¹⁸⁶ The need to ensure these aims is outlined in WHO, *Guidelines for Medical-Legal Care for Victims of Sexual Violence*, 2003, pp. 11–12. Since sexual violence often occurs without any witnesses, medical evidence can serve as important corroboration or non-corroboration of the complainant’s evidence. See (LAC), *Guidelines for Service Providers* (supra).

¹⁸⁷ See South African Law Reform Commission, *Project 107* (supra), c. 6.

¹⁸⁸ Amnesty international and HRW stated simply that “[i]n the context of South Africa’s explosive HIV/AIDS epidemic, sexual violence can be a death sentence for too many women and girls.” See HRW and Amnesty International, *Submission to the Parliamentary Portfolio Committee on Justice and Constitutional Development, Parliament of South Africa, on the Draft Criminal Law (Sexual Offences) Amendment Bill of 2003*, 2003.

¹⁸⁹ See Gender and Media Southern Africa (GEMSA), “Still many gaps in Southern Africa’s commitment to women’s rights,” news release, Johannesburg, 10 December 2004, online via: www.genderlinks.org.za. HRW calls for “strengthened support and treatment services for survivors of rape and other sexual violence, including provision of HIV post-exposure prophylaxis (PEP), voluntary and confidential HIV testing, testing and treatment for other sexually transmitted diseases, legal assistance, and other appropriate counseling”: *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses Against Women and Girls in Southern Africa*, 2003, p. 87.

¹⁹⁰ See, for example, WHO, *Guidelines for Medical-Legal Care for Victims of Sexual Violence*, 2003; (LAC), *Guidelines for Service Providers* (supra); South African Law Reform Commission, *Project 107* (supra), c. 6; Department of Public Health [Massachusetts, U.S.], *Massachusetts Sexual Assault Nurse Examiner Program, SANE Protocols for Ages 12 and Above*, 2003; T. Jacobs and R. Jewkes, “Vezimfilho: a model for health sector response to gender violence in South Africa,” *International Journal of Gynaecology and Obstetrics* 78(Supp. 1) (2002): S51–S56.

Article 31. Judicial training

- (1) The Ministry of Justice shall ensure judges and/or magistrates undergo special training with respect to rape and sexual assault cases.
- (2) “Special training” is here defined as a comprehensive program of education covering topics including, but not limited to:
 - (a) the physical and psychological effects of rape and sexual assault on survivors;
 - (b) working with medical evidence;
 - (c) dealing with child complainants and witnesses;
 - (d) dealing with complainants and witnesses with mental disabilities;
 - (e) interviewing techniques;
 - (f) profiles of sex offenders;
 - (g) human rights issues;
 - (h) perceptions, myths and facts of sexuality and sexual offences;
 - (i) complainants’ experiences within the criminal justice system;
 - (j) causes and prevention of secondary victimization associated with sexual violence; and
 - (k) links between HIV infection and violence against women.¹⁹¹

E. Courts and Survivor Care Centres

NOTE:

Dedicated sexual offences courts may offer an effective and accessible means of reducing secondary trauma faced by rape and sexual assault complainants and of ensuring that their assailants are brought to justice.

Optional: Article 32. Dedicated courts

- (1) The Minister of Justice shall establish [number] regional courts dedicated to trying cases of rape and sexual assault.
- (2) The objectives of the courts shall include, but not be limited to:
 - (a) the elimination of inappropriate and insensitive treatment of complainants of rape or sexual assault in the criminal justice system;
 - (b) the development of a coordinated and integrated approach to the processing and management of sexual offence cases by all relevant stakeholders including, but not limited to, law enforcement officials, medical practitioners, prosecutors,

¹⁹¹ These issues are identified in M. Sadan et al, *Pilot Assessment: The Sexual Offences Court in Wynberg and Cape Town and Related Services*, Institute for Democracy in South Africa, 2001, pp. 48–49, online: www.idasa.org.za/; and the training program, “Dealing with Rape and Sexual Offences,” offered by South Africa’s Centre for the Study of Violence and Reconciliation, online via: www.csvr.org.za.

- magistrates, judges, counselling service providers, intermediaries, interpreters and all other players in the criminal justice system; and
- (c) the improvement of the reporting, prosecution and conviction rate for sexual offences.¹⁹²
- (3) Each sexual offences court shall include, but not be limited to, the following features:
- (a) at least one court dedicated to hearing rape and sexual assault cases;
 - (b) at least one permanent judge [or magistrate] per court who has undergone special training;¹⁹³
 - (c) at least two permanent prosecutors per court who have undergone special training;¹⁹⁴
 - (d) at least one intermediary per court, who has undergone special training, to explain court procedures to complainants and assist complainants with testifying in court;
 - (e) at least one counsellor per court, who has undergone special training, to administer pre and post-trial counselling and referral services for complainants;
 - (f) at least one interpreter, who has undergone special training, made available to complainants during pre-trial consultations with prosecutors, counsellors or intermediaries;
 - (g) facilities to enable alternative means of giving testimony, as provided for in Articles 16–19; and
 - (h) measures to advise the complainant that these facilities are available.¹⁹⁵
- (4) Each sexual offences court shall adopt a complainant-centered approach. This includes, but is not limited to:
- (a) complainants shall be treated with utmost sensitivity and respect at all times;
 - (b) every effort shall be made, by all involved with the court process, to provide clear and comprehensive information to complainants regarding the court processes and procedures including, but not limited to:
 - (i) courtroom layout;
 - (ii) the complainant’s role in, and rights during, the proceedings;
 - (iii) the role of each other person involved in the trial process; and
 - (iv) trial timelines and potential delays; and

¹⁹² These were the goals of the Wynberg Sexual Offences Court, the first in South Africa.

¹⁹³ In order ensure that judges are properly trained, sensitive to the needs of complainants and well versed in the necessary legal processes and procedures, permanent rather than rotating magistrates were recommended by a number of sources: see, for example, M. Sadan et al, *Pilot Assessment* (supra), p. 20.

¹⁹⁴ A minimum of two prosecutors are necessary so that at all times one can be in court while the other is available to consult with complainants. Ideally the sexual offences courts would have more than two. See, for example, M. Sadan et al, *Pilot Assessment* (supra).

¹⁹⁵ Critics note that while measures such as private waiting rooms, CCTV facilities and *in camera* hearings may exist, complainants are often not advised of these facilities. See, for example, K. Moul, *The Court Doors May Be Open, but What Lies Behind Those Doors? An Observation of the Wynberg Sexual Offences Court*, Social Justice Resource Project, Institute of Criminology, Cape Town, 2000, online: <http://web.uct.ac.za/depts/sjrp/public.htm>.

- (c) complainants shall be encouraged to voice concerns and their input shall be sought in relation to major decisions regarding the prosecution of the case.¹⁹⁶
- (5) The sexual offences courts shall hear only cases of rape or sexual assault, but shall otherwise fulfill the same role and occupy the same position as other regional courts in the national court system.¹⁹⁷
- (6) The Minister of Justice shall ensure that all those involved in the court process, including but not limited to law enforcement, prosecutors, defence attorneys, magistrates, judges, interpreters, counsellors and intermediaries receive appropriate ongoing special training, defined here as a comprehensive and inter-disciplinary program of education covering topics including, but not limited to:
- (a) court process and procedure and each player's role in this process;
 - (b) the physical and psychological effects of rape and sexual assault on survivors;
 - (c) medical evidence and DNA;
 - (d) working with survivors of sexual violence;
 - (e) working with child complainants and witnesses, including child development;
 - (f) working with complainants and witnesses with mental disabilities;
 - (g) interviewing techniques;
 - (h) profiles of sex offenders;
 - (i) human rights issues;
 - (j) perceptions, myths, facts and stereotypes related to sexuality, sexual offences and survivors;
 - (k) causes and prevention of secondary victimization associated with sexual violence;
 - (l) links between HIV infection and violence against women;
 - (m) experiences of complainants within the criminal justice system; and
 - (n) the personal impact of working with survivors of sexual violence.¹⁹⁸
- (7) The state shall ensure that such courts receive adequate ongoing financing.¹⁹⁹

¹⁹⁶ This article is informed by Yukon Justice [Canada], *Yukon Domestic Violence Treatment Option Court: Protocols and Letters of Understanding*, 2004, online: www.lfcc.on.ca/Sutherland_DVTOProtocol.pdf; and K. Moul, *The Court Doors May Be Open* (supra).

¹⁹⁷ One study of dedicated commercial crime courts found that dedicated courts that remain within the structure of the national court system are more effective than specialized courts created by specific legislation. The study provides a variety of reasons, including: the standard rules of evidence and precedence apply, making the administration of justice more predictable and consistent; the rules of selection, appointment, promotion and dismissal are the same as for other courts, meaning there is far more opportunity for interchange and career mobility for members of staff in these courts; and such courts will avoid problems of “precedence and authority” and problems related to overlapping jurisdictions. See A. Altbecker, *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court*, Institute for Security Studies, 2003, online: www.iss.org.za.

¹⁹⁸ This article is informed by M. Sadan et al, *Pilot Assessment* (supra), pp. 48–49; T. Jacobs and R. Jewkes, “Vezimfilho” (supra).

¹⁹⁹ Limited resources are the most significant obstacle to the efficient and effective operation of sexual offences courts. See L. Vetten, *While Women Wait: Can Specialist Sexual Offences Courts and Centres*

Commentary: Article 32

Some of the impacts of secondary victimization can be addressed through the adoption of appropriate procedures for police, prosecutors and medical personnel. A further option is to establish a dedicated court system for offences of rape or sexual assault. This approach has been adopted in South Africa, where a dedicated sexual offences court was established in 1993. The Wynberg Sexual Offences Court (a pilot project) aimed to reduce the secondary victimization suffered by rape and sexual assault complainants by making the court process less intimidating and more attune to complainants' needs. The Wynberg Court also attempted to increase the nation's dramatically low conviction rate in rape and sexual assault cases through better coordination within the criminal justice system.

In 1999, South Africa's National Director for Public Prosecutions established the Sexual Offences and Community Affairs Unit (SOCA). SOCA was explicitly tasked with "co-ordinating the establishment of special courts for the adjudication of sexual offences and gender-based violence" across South Africa. As of 2007, South Africa had 54 sexual offences courts.²⁰⁰

A number of studies and reports have examined the Wynberg Sexual Offences Court and its successors.²⁰¹ Despite shortcomings, dedicated sexual offences courts are an important and effective means of improving the adjudication of rape cases and reducing the secondary victimization of complainants.

While South Africa's dedicated sexual offences courts have made substantial headway in providing services to complainants of sexual violence and in shifting the attitudes of those working in the criminal justice system, there is still much room for improvement. Limited resources appear to be the cause of a number of shortcomings.²⁰² Another problem is the location and limited number of sexual offences courts: Most are located in urban areas, and transportation costs mean that the courts are still inaccessible to most women.

Observers voiced the need for guidelines and an oversight system in order to ensure that South Africa's sexual offences courts are coordinated and providing a consistent level of service across the country. This may include criteria to determine which cases will be

Reduce Secondary Victimization?, Centre for the Study of Violence and Reconciliation, 2001, online: www.csvr.org.za.

²⁰⁰ M. Sadan et al, *Pilot Assessment* (supra), p. 9; D. Berger (ed.), *South Africa Yearbook 2007/2008* (Pretoria: Government Communication and Information System, 2007), pp. 361–396.

²⁰¹ Studies include: M. Sadan et al, *Pilot Assessment* (supra); K. Moul, *The Court Doors May Be Open* (supra); S. Rasool, "Sexual offences courts: do more courts mean better justice?" *Nedbank ISS Crime Index* 4(2) (2000), online: www.iss.co.za/CrimeIndex/00Vol4No2/SexualOffences.html; and L. Vetten, *While Women Wait* (supra).

²⁰² M. Sadan et al, *Pilot Assessment* (supra),.

prioritized, procedural guidelines for all officials, and standardized inter-disciplinary trainings.²⁰³

NOTE:

Dedicated care centres may offer an effective and accessible means of ensuring greater integration between those that provide care to survivors of rape or sexual assault.

Optional: Article 33. Survivor Care Centres

- (1) The Minister of Health, in conjunction with the Minister of Justice, shall establish [number] regional Survivor Care Centres to provide care and support for survivors of rape and sexual assault.
- (2) The objectives of the Survivor Care Centres shall include, but not be limited to:
 - (a) the elimination of inappropriate and insensitive treatment of survivors of rape or sexual assault during post-assault medical care, and in the criminal justice system;
 - (b) the development of a coordinated and integrated approach to the processing and management of sexual offence cases by all relevant stakeholders including, but not limited to, law enforcement officials, medical practitioners, prosecutors, counselling service providers, and all others who may come into contact with the survivors;
 - (c) the improvement of medical treatment for survivors of sexual offences and, in particular, treatment related to HIV/AIDS and other sexually transmitted infections; and
 - (d) the improvement of reporting, prosecution and conviction rates for sexual offences.
- (3) Each Survivor Care Centre shall include, but not be limited to, the following features:
 - (a) at least one medical examination room;
 - (b) bathing facilities;
 - (c) at least one medical doctor on call 24 hours a day who has undergone special training;²⁰⁴
 - (d) at least one registered nurse on call 24 hours a day who has undergone special training;
 - (e) at least one prosecutor on call 24 hours a day who has undergone special training;²⁰⁵

²⁰³ Ibid.; S. Rasool, “Sexual offences court” (supra).

²⁰⁴ According to a study by the Bureau of Justice Assistance into South Africa’s system of Survivor Care Centres, it is important that doctors be available at all times: [South Africa] Bureau of Justice Assistance, *Thuthuzela Care Centres: Has Treatment of Rape Survivors Improved Since 2000?*, 2004, online: www.vera.org/publication_pdf/380_728.pdf.

²⁰⁵ This is currently available, according to L. Vetten, *While Women Wait* (supra).

- (f) at least one investigating officer who has undergone special training;
 - (g) at least one counsellor who has undergone special training;
 - (h) at least one interpreter who has undergone special training; and
 - (i) as many community volunteers as are deemed necessary to provide support to survivors at the Care Centre, all of whom have undergone special training.
- (4) Each Survivor Care Centre shall adopt a survivor-centered approach. This includes, but is not limited to:
- (a) survivors will be treated with dignity and respect at all times;
 - (b) every effort shall be made to provide clear and comprehensive information to survivors regarding, but not limited to, medical examinations and procedures (including information about HIV/AIDS) and follow-up care, police procedures, and court procedures; and
 - (c) survivors shall be able to comfortably voice concerns and their input shall be sought in relation to all decisions regarding their health.²⁰⁶
- (5) The Minister of Justice and the Minister of Health shall ensure that all those who work with Survivor Care Centres receive appropriate ongoing special training, including, but not limited to:
- (a) proper handling of physical evidence;
 - (b) working with survivors of sexual violence;
 - (c) assessing a complainant's safety on discharge;
 - (d) working with child complainants and witnesses, including on issues of child development;
 - (e) working with complainants and witnesses with mental disabilities;
 - (f) human rights issues;
 - (g) perceptions, myths, facts and stereotypes related to sexuality, sexual offences and survivors of sexual violence;
 - (h) causes and prevention of secondary victimization associated with rape;
 - (i) links between gender violence and health;
 - (j) links between HIV infection and violence against women; and
 - (k) the personal impact of working with survivors of sexual violence.²⁰⁷
- (6) The state shall ensure that Survivor Care Centre receive adequate ongoing financing.

²⁰⁶ This article is informed by the National Prosecuting Authority of South Africa, *Thuthuzela Care Centre: Turning Victims into Survivors*, brochure, undated, online: www.npa.gov.za/UploadedFiles/THUTHUZELA%20Brochure%20New.pdf; Yukon Justice [Canada], *Yukon Domestic Violence* (supra); K. Moulton, *The Court Doors May Be Open* (supra).

²⁰⁷ This article is informed by M. Sadan et al, *Pilot Assessment* (supra), pp. 48-49; T. Jacobs and R. Jewkes, "Vezimfilho" (supra).

Commentary: Article 33

The lack of coordination between those involved with survivors of sexual offences (such as police, medical professionals, prosecutors and counsellors) can play a significant role in secondary victimization of survivors. For example, complainants may not receive adequate information about their medical condition, the court process and the accused's release on bail.²⁰⁸ This lack of coordination also contributes to low conviction rates which, in turn, lower the incentive of survivors to report sexual offences.

In order to address these problems, South Africa has developed a system of Thuthuzela Care Centres (TTCs). "Thuthuzela" is a Xhosa word for "comfort." TTCs are located in public hospitals in communities with high rates of rape and sexual assault. The chief goal of TTCs is to provide support and comfort to complainants of rape and sexual assault. TTCs also aim to increase efficiency in the management of sexual offence cases in order to decrease the time span of each case (from the initial report to the ultimate judgment) and to increase the conviction rate.²⁰⁹

TTCs approach these goals by employing a centralized and multi-disciplinary approach to sexual offences cases. The experiences of the TTCs reveal a number of positive results, including that TTCs better address the medical needs of rape and sexual assault survivors (including post-exposure HIV prophylaxis), and that TTCs have improved the manner in which survivors of rape and sexual assault are treated by police, medical personnel and prosecutors.²¹⁰ While TTCs have achieved favourable results, people who move to establish care centres along similar lines should note some criticisms of the model. For example, it has been noted that in the South African context, TTCs receive little government funding, which affects their ability to meet their intended objectives.²¹¹

²⁰⁸ See, for example, "Care centres have a holistic approach to dealing with rape and its survivors." *The Star* [South Africa], 28 November 2003, online: www.thestar.co.za/index.php?fSectionId=129&fArticleId=295934.

²⁰⁹ An overview of TTCs is available in National Prosecuting Authority of South Africa, *Thuthuzela Care Centre: Turning Victims into Survivors* (supra).

²¹⁰ See, for example, UNICEF, *Thuthuzela Care Centres*, online: www.unicef.org/southafrica/hiv_aids_998.html; [South Africa] Bureau of Justice Assistance, *Thuthuzela Care Centres* (supra).

²¹¹ See, for example, L. Vetten, *While Women Wait* (supra).