

GENDER-BASED VIOLENCE LAWS IN
SUB-SAHARAN AFRICA

2007

This Report was prepared for the Committee on African Affairs of the New York City Bar by the lawyers listed below in collaboration with Elizabeth Barad, of the Law Offices of Elizabeth Barad, and Elisa Slattery, of the Center for Reproductive Rights, as part of a pro bono project coordinated by The Cyrus R. Vance Center for International Justice

Prepared by: Enikő Horváth, Monwabisi Zukani, Desmond Eppel, Monica Kays, Abdoul Konare, Yeora S. Park, Ekaterina Y. Pischalnikova, Nathaniel Stankard and Tally Zingher
With the assistance of: Alana F. Montas and Nicole Manara

Graphic Design: Asma Shafi

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
A. Objectives	2
B. Political & Social Context	2
C. General Legislative Recommendations	3
II. INTERNATIONAL FRAMEWORK	4
A. Treaties/Conventions	5
1. International Instruments	5
2. Regional Instruments	7
B. Declarations, Resolutions and Other Pronouncements by Various International Bodies	8
C. Statutes and Jurisprudence of International Tribunals	10
1. International Criminal Tribunals for the former Yugoslavia and for Rwanda	10
2. Rome Statute of the International Criminal Court	13
D. Prohibition on Sexual Violence as an Established Norm of Customary International Law and an Emerging Jus Cogens Norm	14
III. CONSTITUTIONAL TREATMENT	15
IV. NATIONAL LEGISLATION ON SEXUAL VIOLENCE	18
A. Rape	18
1. Substantive Definitions	19
Item 1. “Rape”	19
Item 2. “Penetration” / “Sexual Intercourse”	21
Item 3. “Consent”	23
Item 4. “Force” / “Violence” / “Coercion”	24
2. Aggravating Circumstances	26
3. Defenses	28
Item 1. Marriage as a Defense to Rape	28
Item 2. Marrying the Victim	30
4. Penalties	30
Item 1. Imprisonment	30
Item 2. Compensation	31
B. Sexual Assault	32

TABLE OF CONTENTS
(continued)

	Page
1. Substantive Definitions	33
Item 1. “Sexual Assault”	33
Item 2. “Compelled Sexual Assault”	36
2. Penalties	37
C. General Considerations & Good Practices	38
1. Evidentiary Procedures	38
2. The Rights of Victims	41
3. Human Rights of the Accused and of Perpetrators	46
4. HIV and Sexual Violence	47
V. NATIONAL LEGISLATION ON DOMESTIC VIOLENCE	49
A. Domestic Violence	51
1. Substantive Definitions	51
Item 1. “Domestic Violence”	52
Item 2. “Domestic Relationship”	55
2. Duties of Police & Enforcement Officers	58
3. Protective Orders	60
Item 1. Initiation.....	61
Item 2. Interim Procedures & Orders	63
Item 3. Order Procedures	64
(a) <i>Conversion of Interim Orders</i>	64
(b) <i>Evidentiary Considerations & Standards</i>	64
(c) <i>Procedural Protections</i>	65
(d) <i>Prejudice in Other Proceedings</i>	66
Item 4. Order Contents	67
Item 5. Order Termination	71
4. Penalties	71
Item 1. Violation of Protective Order.....	71
Item 2. Separate Criminal Action.....	73
Item 3. Separate Civil Action.....	73
B. General Considerations & Good Practices	74

TABLE OF CONTENTS
(continued)

	Page
1. Survivor Rights	74
2. Rehabilitation	75
3. Relationship to Rape & Sexual Assault	75
VI. IMPLEMENTATION AND RAISING AWARENESS	76
A. <i>Training Public Officials</i>	77
B. <i>Provision of Services to Victims</i>	78
C. <i>Monitoring Effectiveness</i>	79
D. <i>Raising Awareness</i>	80
VII. CONCLUSIONS	81
VIII. ANNEX OF PROCEDURAL GUIDANCE	82

I. *Introduction*

“Gender-based violence includes acts of violence in the form of physical, psychological, or sexual violence against a person specifically because of his or her gender.”^{1,2} It “constitutes one of the most widespread human rights abuses and public health problems in the world today,” with devastating long term consequences for victims’ physical and mental health. Simultaneously, its broader social effects compromise the social development of children in the household, the unity of the family, the social fabric of affected communities, and the well-being of society as a whole.³ Governments are legally obligated to address the problem of gender-based violence through a range of measures, including legislation.

This Report documents examples of legislation in sub-Saharan Africa⁴ designed to combat gender-based violence and evaluates how law can effectively address the challenges associated with violence against women. Specifically, the Report looks at gender-based violence legislation with regard to rape, sexual assault, and domestic violence. It does not address the many other forms such violence may take, including female genital mutilation, trafficking in women, and forced prostitution. In addition, this Report is confined to gender-based violence against women; while it is recognized that men and boys are sometimes also subject to gender-based violence, the majority of victims are women and girls. In light of this, the terms “gender-based violence” and “violence against women” are used interchangeably in the Report.

We first provide an overview of the widespread prohibitions on gender-based violence in international and regional instruments, as well as of the recognition and application of these prohibitions by international tribunals in Part II of the Report. We then consider the pertinent constitutional provisions of selected sub-Saharan African States in Part III. Parts IV and V focus on the specific legislative provisions of selected sub-Saharan African States with regard to “rape,” “sexual assault” and “domestic violence” as forms of gender-based violence. Throughout Parts IV and V, the Report highlights general considerations to be taken into account in drafting and implementing such legislation. In addition, Part VI highlights particular good and best practices embraced by States – namely, training for public officials, providing services to victims, monitoring the effectiveness of legislation, and raising awareness – that are prerequisites

¹ All translations are by the authors unless otherwise noted.

² *Sixteen Days of Action Against Gender Based Violence*,
<http://www.refugeesinternational.org/content/article/detail/7138> (last visited June 8, 2007).

³ *Violence Against Women: The Health Sector Responds* (2003),
<http://www.paho.org/English/DPM/GPP/GH/VAWhealthsector.htm>.

⁴ The designation ‘sub-Saharan Africa’ is used here to refer to the following countries: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Réunion, Rwanda, Saint Helena, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Uganda, United Republic of Tanzania, Zambia and Zimbabwe. See United Nations Department of Economic and Social Affairs, Population Division, *World Population Prospects: The 2006 Revision* (Sept. 2006), Definition of Major Areas and Regions: Sub-Saharan Africa, available at <http://esa.un.org/unpp/index.asp?panel=5#SSA>.

to ensuring proper implementation of gender-based violence legislation. The final part of the Report is dedicated to a brief conclusion.

A. **Objectives**

This Report is intended for use by governmental and non-governmental organizations and agencies that (i) develop gender-based violence legislation, (ii) ensure the implementation and enforcement of gender-based violence legislation and/or, (iii) provide related services. It aims to identify certain good and best practices in addressing gender-based violence, provides examples of model legislation, and briefly describes considerations to take into account when undertaking efforts to replicate these practices elsewhere. The authors are optimistic that this Report will serve as a guide for countries that have yet to pass legislation addressing violence against women, but are contemplating doing so.

While the Report provides a framework for developing effective prevention and response strategies, it does not offer an exhaustive set of approaches to fit every possible situation. Since preventing and responding to the complex problem of gender-based violence requires inter-agency, inter-disciplinary and multi-sectoral collaboration, this Report encourages reflection and cooperation between various organizations. It is intended for use only as a guideline, complementing rather than replacing any other useful material particular jurisdictions may have in relation to combating gender-based violence.

B. **Political & Social Context**

The legislative provisions and pending reforms discussed here represent a significant achievement in efforts to strengthen women's rights. Researchers have documented their positive impact through a variety of measures, including an increase in the number of women who report gender-based violence cases to the police.⁵ However, the widespread failure to enforce existing laws remains a significant hurdle to further progress.⁶

In addition, though legislative changes have occurred, for many residents of sub-Saharan African countries, laws, including those targeting gender-based violence, do not have the same practical impact as the authority and decisions of informal systems of justice exercised by village (or clan, tribe, etc.) elders and/or family mediation mechanisms. In this environment, despite the efforts of non-governmental organizations and civil society, few sub-Saharan African countries have succeeded in addressing gender-based violence comprehensively.

For example, Kenya has undertaken substantial efforts in the last decade to revise its civil and penal codes, and has implemented a nationwide system of "Victim Support Units" to address violence against women. But progress has been extremely slow. One observer has noted the following barriers to successful implementation:

⁵ Sarah Bott, Mary Ellsberg & Andrew Morrison Mary Ellsberg, *Preventing and Responding to Gender-Based Violence in Middle and Low-Income Countries: A Multi-Sectoral Literature Review and Analysis*, 20 (World Bank, Working Paper No. 3618, 2005).

⁶ *Id.*

Women and children face serious social and cultural barriers to legal redress. Women are often reluctant to use legal remedies [for reasons such as:] they do not believe that they are entitled to protection ... they are afraid of additional violence from the perpetrator ... they are pressured to avoid bringing “shame” upon their family, or ... [where the perpetrator is a family member,] jailing the perpetrator [may] cut off the family’s economic support. Support for new laws has often been low among the police, the judiciary and the general public, especially when laws counter long-standing traditions of discrimination against women. Law enforcement institutions often simply refuse to enforce the laws.⁷

Finally, a significant number of sub-Saharan African countries do not have any legislation to address gender-based violence in the first place. Despite the challenges faced by sub-Saharan African States in enacting and implementing legislative reforms, however, there is now a widespread recognition that gender-based violence must be addressed. Although no consensus has emerged on the best way to confront such violence, public awareness will drive further efforts to target this injustice, which demonstrates a fundamental lack of respect for women.

C. General Legislative Recommendations

Specific recommendations are outlined in each section of this Report, but the following are general considerations that should underlie all drafting initiatives for gender-based violence legislation:

Definitions:

- **Legal definitions should be broad to reflect the realities of gender-based violence in Africa.** For example, marital rape and intimate partner violence are two categories of gender-based violence that should be incorporated into definitions of rape and domestic violence, respectively. By expanding the definitions and creating inclusive legislation, sub-Saharan African States can better protect their citizens.
- **Legislation should clearly define key elements of gender-based violent crimes to reduce the potential for abuse of judicial discretion.** Clear explanations of key concepts, like “consent” and “penetration”, are essential to the uniform application of laws against gender-based violence.

⁷

Joyce Mulama, *Courts Far From A Safe Haven*, available at <http://ipsnews.net/news.asp?idnews=36828> (Mar. 7, 2007) (quoting Ann Njogu, executive director of the Centre of Rights Education and Awareness, a women’s rights organization based in the Kenyan capital of Nairobi).

Procedures:

- **Legislation should provide clear standards of proof to protect the rights of both the victim and the accused.** Additionally, the potential for abuse of judicial discretion (in favor of either victims or assailants) requires that legislators include clear guidance on the administration of penalties in rape, sexual assault, and domestic violence cases.
- **Crimes like rape and sexual assault should be prosecuted with equal force whether they occur inside or outside the home.** Legislation against sexual assault and rape should specifically cover these crimes when committed by spouses and/or intimate partners. A clear expression of legislative intent will facilitate enforcement.

Support:

- **State action should go beyond the establishment of legal recourse to include support services, response centers, and law enforcement training.** Well-drafted gender-based violence legislation will only achieve the desired result when combined with the enforcement and support services that women need to exercise their rights.
- **Culturally sensitive awareness campaigns directed at both men and women are an essential component of long-term solutions to violence against women.** Local governments, national agencies, and NGOs should coordinate efforts to educate all community members about the definition and consequences of rape, sexual assault, and domestic violence. While cultural beliefs about the roles of men and women are not easily changed, national governments must adopt a long-range plan to stop the cycle of gender-based violence.

II. *International Framework*

As a general matter, but with significant variations in the scope and type of protection afforded, gender crimes are covered by international humanitarian, criminal, and human rights law.⁸ Various international and regional instruments and declarations have recognized violence against women as a “form of discrimination and a violation of women’s human rights.”⁹ The widespread inclusion of a prohibition of gender-based violence in international and regional treaties and declarations, its recognition and application by the international tribunals, as well as its prevalence in the national legislation of the majority of States indicates that this prohibition represents a consensus in the international community about the normative force of a prohibition on gender-based violence.¹⁰

⁸ See Kelly D. Askin, Stefan A. Riesenfeld Symposium 2002: *Prosecuting Wartime Rape and Other Gender Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int’l L. 288, 290-294 (2003).

⁹ The Secretary-General, *In-depth Study on All Forms of Violence Against Women*, ¶ 22, delivered to the General Assembly, U.N. Doc. A/61/122/Add.1 (Nov. 17, 2006).

¹⁰ Barbara Stark, *Symposium on Integrating Responses to Domestic Violence: Domestic Violence and*

A. Treaties/Conventions

Treaty law is considered the most undisputable source of international law: when two or more sovereign States undertake an obligation, they are bound by it. A wide array of multilateral universal and regional treaties and conventions address the subject of gender-based violence. The most significant of these treaties and conventions are described below.

1. **International Instruments**

As pre-World War II international instruments proved ineffective to address the mass violence committed against civilians during World War II, the existing Geneva Conventions were amended in 1949. On the subject of violence against women, Article 27 of the Fourth Geneva Convention adopted in 1949 provides that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”¹¹ Additional Protocols supplementing the 1949 Geneva Conventions adopted in 1977 also prohibit sexual violence.¹² However, the language used by all of these articles generally focuses on women’s “honour,” “dignity” and “special respect”¹³ instead of emphasizing the fundamentally violent nature of these crimes.¹⁴ Although the Geneva Conventions do not specifically list sexual violence as a form of the “grave breaches” prohibited by Article 147, the case law developed by the international tribunals and the Rome Statute of the International Criminal Court,¹⁵ as discussed below, interpret the notion of grave breach to encompass sexual violence.¹⁶ Moreover, it is widely accepted that the Geneva Conventions and the Additional Protocols are an inherent part of customary international law as “laws or customs of war.”¹⁷

International Law: Good-Bye Earl (Hans, Pedro, Gen, Chou, Etc.), 47 Loy. L. Rev. 255, 265 (2001); See also Dean Adams, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 San Diego Int’l L.J. 357, 367 (2005); See also David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 Duke J. Comp. & Int’l L. 219, 222-226 (2005); See also Askin, *supra* note 8, at 293.

¹¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 74 U.N.T.S. 287.

¹² “[A]rticle 76(1) of Protocol I states: ‘Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault.’” Askin, *supra* note 8, at 304 (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) art. 76(1), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391). “Article 4(2)(e) of Protocol II proscribes ‘[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.’” *Id.* (quoting Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(2)(e), June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609).

¹³ See General and Specific Protection of Women Under International Humanitarian Law, Feb. 3, 2004, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66UH37/\\$File/ihl-women_%20ICRC_002_0840.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/66UH37/$File/ihl-women_%20ICRC_002_0840.pdf).

¹⁴ See Askin, *supra* note 8, at 304.

¹⁵ The Rome Statute of the ICC explicitly links sexual violence and grave breaches of the Geneva Conventions. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Criminal Court, June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, art. 8, U.N. Doc. A/CONF.183/9 (July 17, 1998).

¹⁶ See, e.g., Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 511 (Nov. 16, 1998).

¹⁷ See Askin, *supra* note 8, at 309.

The International Covenant on Civil and Political Rights (ICCPR)¹⁸ and the Universal Declaration of Human Rights (UDHR)¹⁹ contain provisions prohibiting discrimination on the basis of sex. Although these instruments do not explicitly refer to violence against women, sexual violence has been interpreted as falling under the prohibition against “inhuman or degrading treatment” in the ICCPR.²⁰ Each instrument requires States parties to take affirmative action to give effect to the rights enumerated.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture broadly, including “pain or suffering is inflicted ... with the consent or acquiescence of a public official or other person acting in an official capacity.”²¹ The former United Nations Special Rapporteur on Violence Against Women has interpreted this definition to include certain forms of violence against women²² and has stated that “the international human rights framework could be applied to address discriminatory laws or customs, like exceptions for marital rape or the defence of honour, which exempt perpetrators of domestic violence from sanctions and reflect the consent of the State.”²³

The Convention on the Rights of the Child is a general instrument on the rights of the child, and requires that States parties “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”²⁴

The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not explicitly prohibit violence against women, but rather “discrimination against women in all its forms.”²⁵ Recommendations issued by the Committee on the Elimination of Discrimination Against Women, which oversees States’ compliance with the treaty, have clearly defined “discrimination” to include violence against women.²⁶ The Committee’s General Recommendation No. 19 (1992) provides a broad definition of gender-based violence:

¹⁸ International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 6 I.L.M. 368, 993 U.N.T.S. 171.
¹⁹ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

²⁰ See Mitchell, *supra* note 10, at 245.

²¹ Convention Against Torture, G.A. Res. 39/46, art. 1, U.N. Doc. A/RES/39/46 (Dec. 14, 1984).

²² See United Nations Special Rapporteur on Violence Against Women, *Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, ¶ 44, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996) (prepared by Ms. Radhika Coomaraswamy).

²³ *Id.* ¶ 45.

²⁴ *Id.* Convention on the Rights of the Child, G.A. Res. 44/25, art. 19, U.N. Doc. A/RES/44/25 (Nov. 20, 1989).

²⁵ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, art. 2, U.N. Doc. A/RES/34/180 (Dec. 18, 1979).

²⁶ “Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.” See CEDAW General Recommendation 19, ¶ 1 (1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>.

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.²⁷

General Recommendation No. 19 also clarifies that gender-based violence can constitute a violation of States' "obligations under general international human rights law and under other conventions" and that States may also "be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."²⁸ CEDAW obligates States "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices, which constitute discrimination against women."²⁹

The Optional Protocol to CEDAW (1999) establishes the competence of the Committee on the Elimination of Discrimination against Women to receive and consider complaints from individuals or groups within its jurisdiction (communications procedure)³⁰ and provides for an additional inquiry procedure (of which States may opt out).³¹ The Committee has issued numerous decisions addressing gender-based violence. For example, one decision found that Hungary had violated its obligations under CEDAW because it did not provide "the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence."³²

2. Regional Instruments

Certain important regional treaties also address violence against women and place an affirmative duty on the States parties to take measures to protect women from violence.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994) (Convention of Belém do Para) has been described as "the only treaty directed solely at eliminating violence against women and has frequently been cited as a model for a binding treaty on violence against women."³³ This convention affirms that women have a right to be free from violence in both the public and private spheres and places affirmative obligations on the States parties to take measures to prevent, punish and eradicate

²⁷ *Id.* ¶ 6.

²⁸ *Id.* ¶¶ 8-9.

²⁹ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 25, art. 2(f).

³⁰ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, art. 1, U.N. Doc. A/RES/54/4 (Oct. 15, 1999).

³¹ *Id.* arts. 8-10.

³² U.N. Comm. on the Elimination of Discrimination Against Women, *Part I Report of the Committee on the Elimination of Discrimination Against Women on its 32d session*, at 88, U.N. Doc. A/60/38/Annex (Jan. 26, 2005).

³³ The Secretary-General, *supra* note 9, ¶ 248.

violence against women, incorporating a due diligence standard.³⁴ It also establishes a reporting mechanism and a complaints procedure open to individuals and organizations.³⁵

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides for strong protections against gender-based violence and incorporates its elimination under the scope of women's rights to life, integrity and security of the person and the right to dignity.³⁶ The African Charter on the Rights and Welfare of the Child includes protection from sexual abuse under the scope of "torture, inhuman or degrading treatment."³⁷ Each of these instruments places affirmative duties on the States parties to take affirmative action to eradicate violence, including by means of legislative, social and educational measures.

B. *Declarations, Resolutions and Other Pronouncements by Various International Bodies*

In addition to binding international and regional instruments, several declarations and programs of action on violence against women have been drafted by a variety of international actors. While these declarations do not bind States, they provide strong evidence of a solid international consensus supporting the notion of "emerging customary international law" with respect to prohibiting violence against women.³⁸

The most significant of these declarations is the Declaration on the Elimination of Violence Against Women (1993). This declaration relies on the human rights foundation established by the international conventions discussed above as well as on the Universal Declaration of Human Rights.³⁹ The declaration sets forth a broad definition of violence against women⁴⁰ and calls for 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."⁴¹

³⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem do Parà" art. 7, June 9, 1994, 33 I.L.M. 1535.

³⁵ *Id.* arts. 10, 12.

³⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa arts. 3-4 (Banjul), July 11, 2003, *available at* <http://www.pambazuka.org/en/petition/1/protocol.pdf>.

³⁷ African Charter on the Rights and Welfare of the Child art. 16, Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49.

³⁸ *See Stark, supra* note 10, at 265.

³⁹ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, pmbL., U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

⁴⁰ Article 1 of the Declaration on the Elimination of Violence Against Women defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." *Id.* art. 1. Article 2 of the Declaration also provides a non-exclusive list of actions that fall within this definition, including "physical, sexual and psychological violence occurring in the family...marital rape...other traditional practices harmful to women" and "physical, sexual and psychological violence occurring within the general community...." *Id.* art. 2.

⁴¹ *Id.* art. 4(c).

Another significant step in advancing the international human rights framework to combat gender-based violence was the creation of the United Nations Special Rapporteur on Violence Against Women,⁴² providing a forum for collecting and analyzing information on violence against women throughout the world. Among other issues, the Special Rapporteur on Violence Against Women has analyzed the application of the due diligence standard, which appears in the Declaration on the Elimination of Violence Against Women, CEDAW General Recommendation No. 19, the 1995 Beijing Platform for Action, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, UN Resolution 1994/45 (appointing the Special Rapporteur on Violence Against Women),⁴³ and concluded “On the basis of the practice and *opinio juris* outlined above ... that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.”⁴⁴

Other important declarations include the Vienna Conference on Human Rights (1993), the Programme of Action of the International Conference on Population and Development (1994), the Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (1995), the Southern African Development Community’s Declaration on Gender and Development (1997) and the Addendum on the Eradication of All Forms of Violence Against Women and Children (1998), recognizing that violence against women can constitute a violation of human rights.⁴⁵ These declarations seek to provide momentum to the movement to eradicate violence against women and call for national and international action.

The adoption of binding instruments and the issuance of declarations calling for States to ensure the eradication of violence against women have not been sufficient to eliminate violence against women. As a result, the Special Rapporteur on Violence Against Women has considered “best practices” or “good practices” in fighting violence against women. These are practices that have “led to actual change, contributed to a policy environment more conducive to gender equality and/or have broken new ground in non-traditional areas for women.”⁴⁶ The development of such practices highlights the role played by international civil society networks, human rights non-governmental organizations, women’s rights activists on the international level

⁴² The United Nations Special Rapporteur on Violence Against Women was appointed to “[s]eek and receive information on violence against women, its causes and consequences from Governments, treaty bodies, specialized agencies, other special rapporteurs” and to “recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to remedy its consequences.” U.N. Econ. & Soc. Council, Comm. On Human Rights, *Report on the 50th Session*, at 143, U.N. Doc. E/CN.4/1994/132 (Jan. 31-Mar. 11, 1994).

⁴³ The United Nations Special Rapporteur on Violence Against Women, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, ¶¶ 25-27, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (prepared by Yakin Ertürk).

⁴⁴ *Id.* at 29.

⁴⁵ See The Secretary-General, *supra* note 9, at 21, 25-26.

⁴⁶ The United Nations Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, ¶ 2147, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2003/75/Add.1 (Feb. 27, 2003) (prepared by Radhika Coomaraswamy).

and regional programs such as the UNDP Africa Regional Gender Programme in addressing gender-based violence.⁴⁷

In addition, the sizable body of resolutions and declarations issued by multilateral international bodies – the UN General Assembly and the Security Council – that forcefully condemn the mass sexual violence that took place in Rwanda, the former Yugoslavia, Sierra Leone, East Timor, Japan, Haiti, Myanmar (Burma), and Afghanistan should be mentioned.⁴⁸ Although non-binding, such condemnations provide valuable evidence of *opinio juris* as to the prohibition of sexual violence in international law.

C. Statutes and Jurisprudence of International Tribunals

Gender-based violence was not specifically adjudicated during the Nuremberg and Tokyo war crimes proceedings despite the high frequency of such crimes in the course of World War II. However, the years following the post-WWII period, and specifically the last decade following the establishment of the *ad hoc* international tribunals for Rwanda and the former Yugoslavia, saw a significant development in international jurisprudence relating to gender-based crimes. This progress – despite the difficulty of prosecuting such crimes in part because of the graphic nature of evidence and still-prevalent cultural sensitivities – is yet another confirmation of the international community’s increasing acceptance of a prohibition on gender-based violence as a fundamental principle of law.

1. **International Criminal Tribunals for the former Yugoslavia and for Rwanda**

Following the atrocities that took place in Yugoslavia and Rwanda, which included numerous egregious cases of sexual violence,⁴⁹ the UN Security Council created two *ad hoc* tribunals to adjudicate the crimes committed.⁵⁰ The Statutes of both tribunals authorize the prosecution of war crimes, genocide and crimes against humanity.⁵¹ In the course of adjudicating the cases brought before them, the tribunals have developed an important body of jurisprudence concerning gender-based violence.

In its 1998 decision, *Prosecutor v. Akayesu*, the Trial Chamber of the International Criminal Tribunal for Rwanda (the “ICTR”) convicted the accused of genocide and crimes against humanity for acts of sexual violence.⁵² This was a revolutionary decision in the area of gender-based violence in international law. In *Akayesu*, a local official was found guilty on the basis of his acts and omissions in relation to – but not on the basis of physically engaging

⁴⁷ *Id.* ¶¶ 2148-2170.

⁴⁸ See Mitchell, *supra* note 10, at 254.

⁴⁹ See, e.g., Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath (1996), available at <http://www.hrw.org/reports/1996/Rwanda.htm>.

⁵⁰ See Tina R. Karkera, *The International Criminal Court’s Protection of Women: The Hands of Justice at Work*, 12 Am. U.J. Gender Soc. Pol’y & L. 197, 201-202 (2003).

⁵¹ See Askin, *supra* note 8, at 306.

⁵² *Id.* at 318.

in – mass rape, forced public nudity and sexual mutilation of Tutsi women perpetrated by Hutu men.⁵³

Another significant element of the *Akayesu* decision was the ICTR’s comprehensive definition of rape and sexual violence. The tribunal defined rape as “a physical invasion of sexual nature, committed on a person under circumstances which are coercive.”⁵⁴ The Trial Chamber specifically noted that its definition of rape went beyond the traditional definition of rape in national jurisdictions: the Court defined rape as forced intercourse that may include “objects and/or the use of bodily orifices not considered to be intrinsically sexual.”⁵⁵ Sexual violence, as a concept larger than rape, was defined by the Court as “any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”⁵⁶ The decision cited forced nudity as an example of sexual violence that does not necessarily include physical contact.⁵⁷

In *Prosecutor v. Delalic* (“Celebici Judgment”),⁵⁸ a group of individuals who worked in different capacities at the Celebici prison camp in Bosnia and Herzegovina were found guilty of, among other things, torture for acts or omissions that included rape and other forms of sexual violence.⁵⁹ The International Criminal Tribunal for the former Yugoslavia (the “ICTY”) found that “willfully causing great suffering or serious injury to body or health” amounted to a grave breach of the Geneva Conventions.⁶⁰

This decision is particularly significant in developing the notion of command responsibility in the area of sexual violence. The Court found that superiors may be held liable for failing to adequately supervise, monitor, prevent the misconduct of or punish their subordinates who commit sexual violence offenses. According to the standard used by the Court, actual knowledge of misconduct by subordinates is not necessary to give rise to criminal liability because knowledge may be inferred from the circumstances.⁶¹ In the context of mass violence, and specifically in situations where women prisoners are guarded by men representing the opposing group in a conflict, officials or commanders should be aware of the potential danger of sexual violence perpetrated against vulnerable groups.⁶²

⁵³ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 692-697, 706, (Sept. 2, 1998).

⁵⁴ *Id.* ¶ 688.

⁵⁵ Using an example from testimony offered before the Court, the Trial Chamber explained that “thrusting a piece of wood into the sexual organs of a woman as she lay dying – constitutes rape in the Tribunal’s view.” *Id.* ¶ 686.

⁵⁶ *See Akayesu*, ICTR-96-4-T, ¶ 688.

⁵⁷ *See Askin*, *supra* note 8, at 319.

⁵⁸ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, (Nov. 16, 1998).

⁵⁹ *See Kelly D. Askin*, *Developments in International Criminal Law*, 93 Am. J. Int’l L. 1, 114 (1999).

⁶⁰ *See Delalic*, IT-96-21-T ¶ 866.

⁶¹ *Id.* ¶¶ 333, 386.

⁶² In addition to finding that forced fellatio between two brothers constituted “inhuman treatment and cruel treatment” on the basis of command responsibility, for example, the Trial Chamber noted that the act “could constitute rape for which liability could have been found if pleaded in the appropriate manner.” *See Askin*, *supra* note 8, at 325 (quoting *Delalic*, Indictment, Case No. IT-96-21-1, ¶ 1066 (Mar. 19, 1996)).

*Prosecutor v. Furundzija*⁶³ involved multiple instances of rape of a single woman. The accused, who was the commanding officer present during certain acts of sexual violence and facilitated the commission of the crimes, was found guilty of the charges of “violation of the laws and customs of war (torture and outrages upon personal dignity, including rape).”⁶⁴ The Court held that the humiliation accompanying sexual violence constituted torture.⁶⁵ Moreover, the Court found that forcing somebody to witness the rape of another person amounted to torture.⁶⁶ The Court also rejected a demand brought by the defense to disqualify the presiding judge for bias or an appearance of bias. (The presiding judge was a woman with an extensive background in gender advocacy, who had served on a UN commission that had strongly condemned wartime rape and had advocated for the vigorous prosecution of such crimes).⁶⁷

In *Prosecutor v. Kunarac*, the ICTY found a group of persons guilty of crimes against humanity based on acts of rape and enslavement.⁶⁸ An important contribution of this case to the international jurisprudence on gender-based violence was the clarification of the legal standard for the elements of sexual violence crimes. The Court rejected *Furundzija*’s difficult-to-prove requirement of “coercion or force or threat of force against the victim or a third person” as too restrictive.⁶⁹ The Trial Chamber in *Kunarac* emphasized the victim’s sexual autonomy in determining whether the sexual act was unwanted, with the legal and factual inquiry focusing on whether the consent was “given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”⁷⁰

While considering the nature of consent, the appeal judgment in the ICTR case of *Prosecutor v. Gacumbitsi*⁷¹ specifically clarified that “it is not necessary... for the Prosecution to introduce evidence concerning the words or conduct of the victim [or] evidence of force” and that the Trial Chamber can “infer non-consent from the background circumstances, such as an

⁶³ *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment (Dec. 10, 1998).

⁶⁴ *See Askin*, *supra* note 59, at 111, 133.

⁶⁵ *Id.*

⁶⁶ *Furundzija*, IT-95-17/1 ¶ 267(ii).

⁶⁷ *See Askin*, *supra* note 8, at 331-332. The *Furundzija* decision was another significant step in the elaboration of gender-based crimes jurisprudence. However, the Court, having surveyed national legislations on rape, elaborated another international law definition of rape, which was largely viewed as more conservative than the one articulated by the ICTR in *Akayesu*. The Trial Chamber defined rape in international law as consisting of:

“(i) 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;

(ii) by coercion of force or threat of force against the victim or a third person.”

⁶⁸ *See Furundzija*, IT-95-17/1 ¶ 185. *See also* Rana Lehr-Lehnhardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. Pub. L. 317, 332-333 (2002).

⁶⁹ *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 438 (Feb. 22 2001).

⁷⁰ The Court also looked to the common law definition of rape as an act perpetrated in the absence of the victim’s free will or genuine consent. *Id.* ¶ 460.

⁷¹ *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgment, ¶ 148 (July 7, 2006) (*Gacumbitsi Appeal*).

ongoing genocide campaign or the detention of the victim.”⁷² The same standard applied to the perpetrator’s knowledge of the victim’s lack of consent.⁷³

The *Kvocka* decision further expanded the scope of criminal superior liability relating to sexual crimes. Although only one of the five accused was charged with physically committing the rape crimes, all five accused were found guilty of perpetrating sexual violence in a detention camp, which amounted to the crime of persecution.⁷⁴ The ICTY found that “[a]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise... can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise.”⁷⁵ In the context of an armed conflict, where women and girls are detained by force and guarded by armed men, those in charge have the duty to take steps to protect the vulnerable groups if sexual violence is likely to occur: “[i]f a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.”⁷⁶ The Court also found that not only the actual act of rape, but also “[the] threat of rape or other forms of sexual violence [which] undoubtedly caused severe pain and suffering” satisfied the elements of the charge of torture.⁷⁷

2. Rome Statute of the International Criminal Court

Negotiations conducted in Rome in June-July of 1998 led to the adoption of the Rome Statute of the International Criminal Court (the “ICC”). Representatives from 160 countries, 17 intergovernmental organization and 15 UN agencies participated in the negotiations; over 200 NGOs were also present.⁷⁸ The Rome Statute entered into force on July 1, 2002, once 60 States became parties.⁷⁹ As of January 1, 2007, 104 States from different regions of the world have become parties.⁸⁰ Even in the notable absence of some States’ ratification, this represents a sign of important support by the international community for the principles set forth in the Rome Statute. The Rome Statute lists and defines crimes, and sets forth the procedures and organization of the ICC.

The Rome Statute addresses gender-based violence crimes by establishing sexual violence as a crime and articulating procedures for investigating and prosecuting sexual violence offenses.⁸¹

Sexual violence crimes specifically enumerated in the Rome Statute are classified both under war crimes and as crimes against humanity. This makes it possible to bring cases

⁷² *Id.* ¶ 155.

⁷³ *Id.* ¶ 157.

⁷⁴ See Lehr-Lehnardt, *supra* note 68, at 335-336.

⁷⁵ Prosecutor v. Kvocka, Case No. IT-98-30-T, Judgment, ¶ 327 (Nov. 2, 2001).

⁷⁶ *Id.* ¶ 318.

⁷⁷ See Kvocka, IT-98-30-T, ¶ 327 ¶ 561.

⁷⁸ See Lehr-Lehnardt, *supra* note 68, at 336.

⁷⁹ See Establishment of the International Criminal Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited May 28, 2007).

⁸⁰ See The States Parties to the Rome Statute, <http://www.icc-cpi.int/statesparties.html> (last visited May 28, 2007).

⁸¹ See Lehr-Lehnardt, *supra* note 68, at 340.

before the ICC for crimes that are not committed in wartime,⁸² allowing for some additional flexibility for the.

Mindful of the psychological trauma to victims and of fear of reprisals, which may prevent victims and witnesses from participating in judicial proceedings, as well as, perhaps, learning from the difficulties encountered in prosecuting sexual violence in the ICTY and ICTR cases,⁸³ the Rome Statute has designated special procedures to address the concerns of victims and witnesses⁸⁴ and created a Victims and Witnesses Unit.⁸⁵ Staff in this special unit must have “experience in trauma, including trauma related to crimes of sexual violence.”⁸⁶ A provision requiring a “fair representation of female and male judges” on the court, in addition to the traditional requirement of geographical and legal system diversity, will hopefully also prove a step forward in the development of jurisprudence for violent crimes against women.⁸⁷ As a practical matter, in the course of the conduct of the proceedings, women victims and witnesses are likely to feel more comfortable in an environment where women are present.

The Rome Statute mandates that the law applied by the ICC “must be consistent with internationally recognized human rights,”⁸⁸ which may provide an argument for compelling the Court to apply principles derived from human rights instruments, including relevant non-binding declarations and resolution.

D. *Prohibition on Sexual Violence as an Established Norm of Customary International Law and an Emerging Jus Cogens Norm*

A clear consensus is emerging in the international community that the prohibition of sexual violence is a firm principle of customary international law⁸⁹ and is perhaps reaching the level of a peremptory norm of *jus cogens*. *Jus cogens* stands for universal or higher law. A *jus cogens* norm is a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a

⁸² These include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization” and other crimes of comparable gravity, as well as trafficking in women and children, with respect to crimes against humanity, and actions constituting grave breaches or serious violations of the Geneva Conventions with respect to war crimes. “Crimes against humanity” are defined as acts “committed as part of a widespread or systematic attack directed against any civilian population.” See Rome Statute of the International Criminal Court, *supra* note 15, arts. 7-8.

⁸³ In *Prosecutor v. Tadic*, one of the first sexual violence cases brought before the ICTY, all rape charges had to be dropped when the victim received threats and refused to testify. See Lehr-Lehnardt, *supra* note 68, at 342.

⁸⁴ See Rome Statute of the International Criminal Court, *supra* note 15, art. 68.

⁸⁵ *Id.* art. 43(6).

⁸⁶ *Id.*

⁸⁷ See Rome Statute of the International Criminal Court, *supra* note 15, art. 36(8)(a)(iii).

⁸⁸ *Id.* art. 21(3).

⁸⁹ See Askin, *supra* note 8; Adams, *supra* note 10; Mitchell, *supra* note 10. *But see* Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 Case W. Res. J. Int’l L. 287, 303 (2002). “It is questionable whether a general norm of the prohibition of rape, in and of itself, in [sic] human rights law. It is likewise uncertain that the crime rape under humanitarian law has been considered, in and of itself, as imposing a non derogatory obligation on the community of States other than protection against its infliction. And quite frankly, rape has never been cited, heretofore, as a peremptory norm.”

subsequent norm of general international law having the same character.”⁹⁰ Therefore, a *jus cogens* norm is superior to any treaty or customary international law. The deeper significance of *jus cogens* status in international law is that violations of such a superior norm supercede the highly revered notion of State sovereignty and give rise to universal jurisdiction.⁹¹

The national legislation of nearly every State in the world in one form or another outlaws rape.⁹² Also, as the foregoing discussion has shown, the prohibition of violence against women, expressed through the multiplicity of international and regional instruments and developed through the jurisprudence of international tribunals, is recognized and accepted by the international community of States. In addition, although there is no unanimous consensus on what norms rise to the level of *jus cogens*, the list would “presumably include genocide, crimes against humanity, war crimes, torture, aggression, piracy, and slavery.”⁹³ The ICTY and ICTR jurisprudence have established that sexual violence could constitute at least some of these crimes and thus may also be elevated to the ranks of a *jus cogens* norm.

Even in the absence of complete consensus on the exact status of norms banning gender-based crimes (and notably sexual violence), as well as a lack of full clarity on the exact elements constituting these crimes, it is clear that the international community strongly condemns such offenses. The elaboration of sound national legislation with adequate implementing safeguards is accordingly a moral and legal duty for every State member of the international community.

III. *Constitutional Treatment*

Gender-based violence, whether committed by a State or a non-State actor, constitutes a violation of the individual’s rights and fundamental freedoms. In particular, the victim’s right to dignity, mental and physical integrity, liberty and security of the person, as well as his or her right to be free of inhuman or degrading treatment and torture, are breached. Gender-based violence also violates the individual’s right to health and, in some cases, life. In addition, gender-based violence constitutes “discrimination” as defined in art. 1 of the Convention on the Elimination of Discrimination Against Women (“CEDAW”).⁹⁴ As former president Nelson Mandela of South Africa noted in his opening speech to the South African Parliament in 1994, “[f]reedom cannot be achieved unless women have been emancipated from all forms of oppression.”⁹⁵

In light of the variety of fundamental rights encroached upon in any instance of gender-based violence, many constitutional provisions are relevant to a consideration of national legislation pertaining to such violence.

⁹⁰ Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331.

⁹¹ See Mitchell, *supra* note 10, at 228-229.

⁹² Sellers, *supra* note 89, at 301-302.

⁹³ See Mitchell, *supra* note 10, at 232.

⁹⁴ Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 25, art. 1.

⁹⁵ Nelson Mandela’s speech was presented in the State of the Nation address. Nelson Mandela, President, State of the Nation Address by the President of South Africa, May 1994, <http://www.anc.org.za/ancdocs/history/mandela/1994/sp940524.html>.

Human dignity. The most general provision of relevance, included in many constitutions, is a reference to the right to human dignity. For example, the Constitution of South Africa provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”⁹⁶ In a comparable manner, Nigeria’s Constitution proclaims that “[e]very individual is entitled to respect for the dignity of his person, and accordingly . . . no person shall be subject to torture or to inhuman or degrading treatment.”⁹⁷

Right to life. In situations where gender-based violence results in death – whether directly or indirectly through the transmission of life-threatening infections such as HIV – the victim’s right to life is contravened. Provisions guaranteeing the right to life are found in many constitutions.⁹⁸

Prohibition of torture & inhuman or degrading treatment. References to a prohibition on torture and inhuman or degrading treatment are also present in many constitutions. For example, the Constitution of Namibia guarantees protection from “inhuman or degrading treatment.”⁹⁹ These constitutional provisions are particularly relevant in the context of gender-based violence committed by government actors, such as rape by members of the armed forces or by police officers while the victim is in detention.

Certain States go further and assume a duty to prevent violence by private actors. For example, the Constitution of South Africa assures the right “to be free from all forms of violence from either public or private sources.”¹⁰⁰

Right to security of the person or bodily integrity. Certain constitutions also provide a right to security and bodily integrity – a right clearly infringed upon in any instance of gender-based violence. For example, the Constitution of South Africa provides everyone with the right “to bodily and psychological integrity, which includes the right to security and control over their body.”¹⁰¹ The Constitution of Botswana provides for the protection of “life, liberty, security of the person and the protection of the law.”¹⁰² It is implicit from provisions of this kind that gender-based violence is an infringement of the individual’s fundamental right to security of the person. The Constitution of Rwanda succinctly articulates the duty of the State in this regard: “The human person is sacred and inviolable. The State and all public administration organs have the absolute obligation to respect, protect and defend him or her.”¹⁰³

Right to health. Considering the significant direct and indirect effects gender-based violence has on the physical and psychological health of victims, constitutional provisions that provide for a right to health may also be relevant in establishing the duty of States to prevent gender-based violence. Benin’s law to define principles and rights concerning reproductive

⁹⁶ *Constitution of the Republic of South Africa* § 10 (1996).

⁹⁷ *Constitution of the Federal Republic of Nigeria* art. 34(1) (1999).

⁹⁸ South Africa has the clearest formulation: “Everyone has the right to life.” *S. Afr. Const.* § 11. *See also* *Constitution of the Republic of Rwanda* art. 12 (2003).

⁹⁹ *Constitution of the Republic of Namibia* art. 8(2)(b) (1990).

¹⁰⁰ *S. Afr. Const.* § 12(1)(c).

¹⁰¹ *Id.* § 12(2)(b).

¹⁰² *Constitution of Botswana* art. 3(a) (1966).

¹⁰³ *Rwanda Const.* art. 10 (“La personne humaine est sacrée et inviolable. L’Etat et tous les pouvoirs publics ont l’obligation absolue de la respecter, de la protéger et de la défendre.”).

health draws out this connection clearly: certain acts, including “all forms of sexual violence of which women and children are generally the victims”¹⁰⁴ are considered detrimental to the sexual and reproductive health of individuals and accordingly punishable under criminal law.

Many States provide for a right to health in their constitutions, including the Democratic Republic of Congo (“DRC”),¹⁰⁵ Benin,¹⁰⁶ South Africa¹⁰⁷ and Rwanda.¹⁰⁸ In addition, a right to access information regarding family planning and protection of maternal health in childbirth is guaranteed by the Constitution of Ethiopia.¹⁰⁹

Right to equal treatment and non-discrimination. Gender-based or sexual violence can be viewed as having patriarchal origins and can still be understood as an offence of power, domination and force, as the Constitutional Court of South Africa recently showed.¹¹⁰ Since the vast majority of victims of gender-based violence are women, provisions on equal treatment and non-discrimination in all constitutions place a clear duty on States to protect women from such violence. For example, the Constitution of Mauritius seeks to protect individuals from discrimination on the basis of sex, prohibiting discriminatory treatment or creation of any law that discriminates on the basis of sex.¹¹¹ The Constitution of South Africa seeks to protect individuals from being directly or indirectly discriminated against on the basis of “sex, gender, pregnancy or marital status.”¹¹²

Certain constitutions take a further step by providing specific clauses with respect to women. The Constitution of the DRC provides for the elimination of “all forms of discrimination against women”.¹¹³ In particular, public authorities are mandated to “take measures to fight all forms of violence done to women in public and private life.”¹¹⁴ The Constitution of Ethiopia guarantees that “[w]omen shall, in the enjoyment of rights and protections provided for by this Constitution, have equal right with men.”¹¹⁵ In particular, “[t]he State shall enforce the right of women to eliminate the influences of harmful customs. Laws, customs and practices that oppress or cause bodily or mental harm to women are prohibited.”¹¹⁶

¹⁰⁴ Law No. 2003-04 of Jan. 24, 2003 (2003) art. 19 (Benin).

¹⁰⁵ *Constitution de la République Démocratique du Congo [Constitution of the Dem. Rep. Congo]* arts. 47, 42 (2005).

¹⁰⁶ *Constitution of the Republic of Benin* art. 8 (1990).

¹⁰⁷ *S. Afr. Const.* § 27.

¹⁰⁸ *Rwanda Const.* art. 41.

¹⁰⁹ *Constitution of the Federal Democratic Republic of Ethiopia* art. 35(8) (1994).

¹¹⁰ *Masiya v. Dir. of Pub. Prosecutions (Pretoria) and Others*, Case No. CCT 54/06 (May 10, 2007).

¹¹¹ *Constitution of the Republic of Mauritius* § 16 (1968).

¹¹² *S. Afr. Const.* § 9.

¹¹³ *Dem. Rep. Congo Const.* art. 14 (“Les pouvoirs publics veillent à l’élimination de toute forme de discrimination à l’égard de la femme et assurent la protection et la promotion de ses droits... Ils prennent des mesures pour lutter contre toute forme de violences faites à la femme dans la vie publique et dans la vie privée.”).

¹¹⁴ *Id.* art. 14 (“Les pouvoirs publics veillent à l’élimination de toute forme de discrimination à l’égard de la femme et assurent la protection et la promotion de ses droits... Ils prennent des mesures pour lutter contre toute forme de violences faites à la femme dans la vie publique et dans la vie privée.”).

¹¹⁵ *Eth. Const.* art. 35(1).

¹¹⁶ *Id.* art. 35(4).

The Ethiopian Constitution also establishes that women have equal rights as men with respect to marriage.¹¹⁷

The duty to combat sexual or domestic violence. Few constitutions mention sexual violence explicitly, and, to our knowledge, none address domestic violence. The DRC is one exception – Art. 15 of its Constitution provides that “public authorities ensure the elimination of sexual violence.”¹¹⁸ In addition, sexual violence against a person with the intention of destabilizing or dismantling a family and making an entire people disappear is considered a crime against humanity.¹¹⁹ The Constitution of Ethiopia also acknowledges the duty of the State to protect women from the influence of harmful customary practices, stating that all laws, stereotypes, ideas and customs which oppress women or otherwise adversely affect their physical and mental well-being are prohibited.¹²⁰

IV. *National Legislation on Sexual Violence*

A. Rape

As a form of sexual violence, rape is outlawed in the domestic law of the vast majority of States in the world. The universality of this prohibition demonstrates the existence of a shared understanding ingrained in the legal conscience of the international community to punish violations of a person’s bodily and sexual integrity. But this agreement does not translate directly into a shared understanding of what constitutes rape. The International Criminal Tribunal for Rwanda considered a range of national laws in the *Furundzija* decision before determining that “in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.”¹²¹ While there is at least some consensus on the nature of the physical act involved then, the concept of rape remains contentious.

In many countries, the very definition of rape set out in law precludes its acknowledgement and punishment by the judiciary, leaving the victims of the most egregious form of sexual violence without recourse to justice. For example, rape within marriage is often not taken account of in existing laws. In other States, victims face an uphill battle in establishing that all the elements of rape were, in fact, present in a particular instance of violence. In sub-Saharan Africa, as elsewhere, there is a generally accepted notion that rape is associated with force and an absence of consent to sexual intercourse, for example. Each country prohibits rape in a specific manner, as discussed below—some countries emphasize either compulsion or a lack of agreement, others weigh one to the exclusion of the other, and still others require proof of both, sometimes without clear provisions on what, exactly, must be proved.

¹¹⁷ *Id.* art. 35(2).

¹¹⁸ *Dem. Rep. Congo Const.* art. 15 (“Les pouvoirs publics veillent à l’élimination des violences sexuelles.”).

¹¹⁹ *Id.*

¹²⁰ *Eth. Const.* art. 35(4).

¹²¹ *See Furundzija*, IT-95-17/1 ¶ 185.

1. Substantive Definitions

Item 1. “Rape”

Recommendations:

- **National legislation on “rape” should be gender-neutral, and not limited solely to women.**
- **The legal definition of ‘rape’ should be as broad as possible and should encompass the elements of “penetration,” “lack of consent” and “force” / “violence” / “coercion”.**
- **“Compelled rape” should also be addressed.**

Sub-Saharan African countries protect their citizens against rape through a variety of legislative and other measures.¹²² In Liberia, the criminal law on rape was overhauled in 2005 with the passage of the Rape Amendment Act, which amended the Liberian Penal Code. The newly amended provisions of the Liberian Penal Code provide that sexual intercourse constitutes rape if the perpetrator “intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female) with his penis, without the victim’s consent” or “intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of his body ... without the victim’s consent.”¹²³ Sexual intercourse also constitutes rape if the victim is less than eighteen years old, provided that the actor is eighteen years of age or older.¹²⁴

The relevant law of the DRC, amended in 2006, defines rape as the “use of violence or serious threat or force against a person” accompanied by the penetration “even superficially” of any bodily orifice by any part of the body or any object, by either a man or a woman, as well as the introduction of any body part or object into the bodily orifice of another.¹²⁵ The new provisions of the DRC Penal Code also provide that “any person who has

¹²² Certain sub-Saharan African States’ definition of rape is specifically limited to instances of sexual violence against women only. For example, according to Ethiopia’s Criminal Code, “[w]hoever compels a woman to submit to sexual intercourse outside wedlock, whether by the use of violence or grave intimidation, or after having rendered her unconscious or incapable of resistance,” has committed rape. *Criminal Code*, art. 620 (Eth.). The Eritrean Transitional Penal Code similarly provides that: “1) force or violence must be present, 2) the victim must be a woman, 3) the intercourse must be between unmarried persons, and 4) force may be implied where the woman is unconscious or incapable of resisting the rape provides that the victim must be a woman and that the intercourse must be between unmarried persons.” Carin Benninger-Budel, Lucina O’Hanlon & Eric Sottas, World Org. Against Torture, *Violence Against Women: 10 Reports/Year 2003 For the Protection and Promotion of the Human Rights of Women* 211 (2003), available at http://www.omct.org/pdf/VAW/Publications/2003/VAW_reports2003_eng.pdf.

¹²³ Act to Amend the New Penal Code Chapter 14 Sections 14.70 and 14.71 and to Provide for Gang Rape (2005) § 2 (Pen. C. § 14.70.1(a)) (Liberia).

¹²⁴ Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.1(b)) (Liber.).

¹²⁵ *Loi no. 06/018 modifiant et complétant le Code Pénal [Law no. 06/019 Modifying and Amending the Penal Code]* (2006) art. 2 (C. Pén. arts. 170(a)-(c)) (Dem. Rep. Congo) (“Aura commis un viol ... [:] a) tout homme, quel que soit son âge, qui aura introduit son organe sexuel, même superficiellement dans celui d’une femme ou toute femme, quel que soit son âge, qui aura obligé un homme à introduire même superficiellement son organe sexuel dans le sien;

obliged a man or woman to penetrate, even superficially” any orifice of his or her body has committed rape.¹²⁶ The “mere fact of physical contact between sexual organs” committed on persons aged less than eighteen years old also constitutes rape with the use of force.¹²⁷

Kenya also passed the Sexual Offences Act in 2006, which provides that a person commits rape if “he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs; [and] the other person does not consent to the penetration; [or] the consent is obtained by force or by means of threats or intimidation of any kind.”¹²⁸

An act is intentional and unlawful if it is committed (a) in any coercive circumstance, including the use of force and threat of harm, (b) under false pretenses or by fraudulent means, or (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence.

This includes a child or a person who is mentally impaired, asleep, unconscious, or under the influence of a substance.¹²⁹ However, the statutory definition of “intentional and unlawful acts” states that it does not apply to persons who are lawfully married to each other, thereby excluding marital rape from the Act.¹³⁰

In order to address sexual violence against women in South Africa, the legislature has introduced the Criminal Law (Sexual Offences and Related Matters) Amendment Bill, which at the time of this Report was submitted for deliberation during the second Parliamentary term of 2007. This Bill introduces gender-neutral provisions to protect the victims of sexual offences and provides that a person commits rape if he or she “unlawfully and intentionally commits an act of

-
- b) tout homme qui aura pénétré, même superficiellement l’anus, la bouche ou tout autre orifice du corps d’une femme ou d’un homme par un organe sexuel, par toute autre partie du corps ou par un objet quelconque;
 - c) toute personne qui aura introduit, même superficiellement, toute autre partie du corps ou un objet quelconque dans le vagin;
 - d) toute personne qui aura obligé un homme ou une femme à pénétrer, même superficiellement son anus, sa bouche ou tout orifice de son corps par un organe sexuel, pour toute autre partie du corps ou par un objet quelconque.”).

¹²⁶ *Id.* (C. Pén. art. 170(d)). This provision can be traced to Article 7(1)(g)(6)(3)(6) of the *Elements of Crime* identified by the Rome Statute of International Criminal Justice, which defines rape, amongst other elements, in the following manner: “[t]he accused committed an act of a sexual nature against one or more persons or caused such a person . . . 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.” U.N. Preparatory Comm’n for the Int’l Criminal Ct., *Elements of Crimes*, art. 7(1)(g)(6)(3)(6), U.N. DOC PNICC/1999/L.5/Rev.1/Add.2 (Dec. 22, 1999).

¹²⁷ *Id.* (C. Pén. art. 170) (“Est réputé viol à l’aide de violences, le seul fait du rapprochement charnel de sexes commis sur les personnes [de moins de dix-huit ans].”).

¹²⁸ Sexual Offences Act, (2006) Cap. 80 § 3(1) (Kenya).

¹²⁹ Sexual Offences Act, (2006) Cap. 80 § 43 (Kenya).

¹³⁰ *Id.* § 43(5). The Attorney General of Kenya set up a task force in March 2007 to review the implementation and administration of the Act, with a final report due a year later. See Francis Openda, *Wako Sets Up Task Force to Review Sexual Offences Act*, *The East African Standard*, Mar. 17, 2007.

sexual penetration with another person ... without the consent of [such other person].”¹³¹ The Bill also provides for the offence of “compelled rape” when a person “unlawfully and intentionally compels” a third party, without that third party’s consent, to commit an act of sexual penetration with a complainant, without the complainant’s consent.¹³²

Botswana’s Penal Code already includes gender-neutral provisions for the protection of sexual violence victims; and provides that any person shall be guilty of rape if that person

Has unlawful carnal knowledge of another person, or who causes the penetration of a sexual organ or instrument, of whatever nature, into the person of another for the purposes of sexual gratification, or who causes the penetration of another person’s sexual organ into his or her person, without the consent of such other person, or with the such person’s consent if the consent is obtained by force or means of threats or intimidation of any kind, by fear of bodily harm, or by means of false pretenses as to the nature of the act, or, in the case of a married person, by [im]personating that person’s spouse¹³³

The Penal Code in Botswana also provides for conviction for attempted rape.¹³⁴

In Namibia, the Combating of Rape Act defines rape as the intentional commission of a sexual act under coercive circumstances. The definition of a “sexual act” includes, amongst others, the insertion of (i) the penis into the vagina of another person, to even the slightest degree, (ii) the penis into the mouth or anus of another person, (iii) any other part of the body into the vagina or anus, (iv) any part of the body of an animal into the vagina or anus, and (v) any object into the vagina or anus. The definition of coercive circumstances includes force, threats of force, and other situations that enable one person to take unfair advantage of another.¹³⁵

Item 2. “Penetration” / “Sexual Intercourse”

Recommendation :

- **The legal definition of “penetration” should be as broad as possible, encompassing penetration of any bodily orifice not only by the genital organs of one person but also by any foreign object.**

Some statutes define rape to include only the “penetration” of another person’s bodily orifice by the *penis* of another person. For example, the Kenyan legislation defines “penetration” as “[t]he partial or complete insertion of the genital organs of a person into the

¹³¹ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 3. (S. Afr.).

¹³² *Id.* § 4.

¹³³ *Penal Code* (1986) § 141 (Bots.).

¹³⁴ *Id.* § 143.

¹³⁵ Combating of Rape Act, No. 8 (2000) §§ 1-2(1) (Namib.).

genital organs of another person.”¹³⁶ Similarly, Liberia defines “sexual intercourse” as “penetration, however slight, of the vagina, anus or mouth, or any other opening of another person by the penis.”¹³⁷ This definition of penetration is insufficient because it fails to take into account the day to day reality of rape that do not involve a penetration by another person’s genital organs, but by other foreign objects. This Report recommends a broader definition.

South Africa’s Sexual Offences Bill provides a substantially more inclusive definition of penetration. Under the Bill, “sexual penetration” is defined to include

Any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the anus, mouth, or genital organs of another person; [or] (b) any object, including any part of the body of an animal, or other part of the body of one person, into or beyond the anus or genital organs of another person; or (c) the anus or genital organs of an animal ... into or beyond the mouth of another person.¹³⁸

This definition provides for sufficient protection against rape in cases that do not involve the sexual organs of the perpetrator but rather a foreign object, including any part of the body of an animal.

Although the South African Sexual Offences Bill contains a more comprehensive definition of penetration, the common law, which still applies in South Africa until the Bill is passed, contains a narrower definition. However, the Constitutional Court in South Africa has interpreted the common law in such a way as to allow a broader definition of penetration.¹³⁹

In Nigeria, although none of the codes¹⁴⁰ define “penetration,” the use of the terms “carnal knowledge” or “carnal connection” in the Criminal Code imply “that the offence, so far as regards that element of it, is complete upon penetration.”¹⁴¹ This definition is somewhat broader than the definition provided in the Penal Code, which provides only for “sexual intercourse,”¹⁴² since it may encompass penetration by a foreign object. A note of explanation to

¹³⁶ Sexual Offences Act, (2006) Cap. 80 § 2(1) (Kenya).

¹³⁷ Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.3(a)) (Liber.).

¹³⁸ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 1(1) (S. Afr.).

¹³⁹ The question before this Court concerned, firstly, whether the common law definition of rape needs to be developed to include “anal penetration of a person” and whether the conviction of the accused for rape ought to be upheld. The Constitutional Court, in agreeing to extend the definition of rape to include non-consensual sexual intercourse or penetration of the penis into the anus of a female, held that “there is no reason why the definition of rape, as currently understood, is unconstitutional in so far as the conduct is clearly morally and socially unacceptable,” but found that the definition does fall short of the spirit, purport and object of the Bill of Rights. See *Masiya v Dir. of Pub. Prosecution (Pretoria)*, (2006) 18, available at <http://www.constitutionalcourt.org.za/Archimages/9889.PDF>.

¹⁴⁰ Nigeria applies three penal codes concurrently in different regions of the country. The Criminal Code is used in the south, the Penal Code applies in the north, and Shari’ah Penal Law, first adopted by Zamfara State in 2000, is utilized in eleven additional states in the north.

¹⁴¹ Criminal Code Act (1990) § 6 (Nig.), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>.

¹⁴² Amnesty International, *Nigeria Rape the Silent Weapon* § 4.2.2 (2006), available at <http://web.amnesty.org/library/Index/ENGAFR440202006?open&of=ENG-NGA>.

this section of the Penal Code and in the Shari'ah Code acknowledges that "mere penetration is sufficient to constitute the sexual intercourse necessary to the offense of rape."¹⁴³

Item 3. "Consent"

Recommendations:

- **A clear definition of "consent" should be provided, to prevent ambiguity and subjective interpretations of the term.**
- **The burden of proving a lack of consent should not be placed on the complainant.**
- **Although both violence or coercion and lack consent are inherent to rape, legislation should not require that the victim demonstrate both of these elements in conjunction for the purposes of a legal definition.**

An emphasis on lack of consent is important in defining rape, since this approach focuses on the deprivation of a person's sexual freedom and on the denial of his or her individual autonomy. As will be more apparent from the discussion below, compulsion and lack of consent overlap and converge in acts of sexual violence, however. This Report recommends that both elements be taken into account in defining rape and that legislation provide a clear definition of "consent" to prevent ambiguity and subjective interpretations of the term.

Under Kenya's law, a person "consents" if "he or she agrees by choice, and has the freedom and capacity to make that choice."¹⁴⁴

Liberia's law also states that "a person consents if he or she agrees by choice and has freedom and capacity to make that choice."¹⁴⁵ Consent is presumed to be lacking when "any person, at the time of the relevant act or immediately before it began, was using violence ... against the victim or causing the victim to fear that immediate violence would be used against him or her" or "against another person."¹⁴⁶ In other words, there can be no valid consent when force or violence are utilized.

A presumed lack of consent also exists if the victim was detained at the time of the relevant act, or was asleep or otherwise unconscious,¹⁴⁷ or when "because of the victim's physical disability, he or she could not have been able ... to communicate to the perpetrator whether he or she consented" at the relevant time.¹⁴⁸ Two further grounds for assuming a lack of consent are when the "victim had been administered or caused to take, without his or her consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling him or her to be stupefied or overwhelmed at the time of the relevant act,"

¹⁴³ *Zamfara State of Nigeria Shari'ah Penal Code Law* (2000) § 128 (Nig.), <http://www.zamfaraonline.com/sharia/introduction.html>.

¹⁴⁴ Sexual Offences Act, (2006) Cap. 80 § 42. (Kenya).

¹⁴⁵ Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.3(b)(i)) (Liber.).

¹⁴⁶ *Id.* § 2 (Pen. C. §§ 14.70.3(b)(ii)(a)-(b)).

¹⁴⁷ *Id.* § 2 (Pen. C. §§ 14.70.3(ii)(c)-(d)).

¹⁴⁸ *Id.* § 2 (Pen. C. § 14.70.3(ii)(e)).

and when “the defendant intentionally induced the victim to consent to the relevant act by impersonating a person known personally to the victim.”¹⁴⁹

South Africa, in turn, defines consent as “free agreement.”¹⁵⁰ The Sexual Offences Bill also lists instances in respect of which a person (“B”) does not voluntarily or without coercion agree to an act of sexual penetration. These include, but are not limited to, (i) when B submits or is subjected to such a sexual act as a result of the use of force or intimidation by the accused against B or any other person or against their respective properties, or a threat of harm by the accused against B or any other person, or (ii) when there is an abuse of power or authority by the accused to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or (iii) when the sexual act is committed under false pretences or by fraudulent means, or (iv) when B is incapable in law of appreciating the nature of the sexual act. Clearly, any consent that is not freely given and informed cannot be considered valid.

No definition of consent is provided in the Criminal or Penal Codes of Nigeria, but the Shari’ah Law does define “invalid consent,” which is consent given “(a) by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or (b) by a person who, from unsoundness of mind or involuntary intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or (c) by a person who is under eighteen years of age or has not attained puberty.”¹⁵¹

In providing for a definition of consent, this Report recommends that the burden of proving a lack of consent should not be placed on the complainant. An example of legislation that explicitly places emphasis on the actions of the assailant is preferable, as in Namibia’s Combating of Rape Act. It provides that “[a]ny person (in this Act referred to as the perpetrator) who intentionally under coercive circumstances – commits or continues to commit a sexual act with another person; or causes another person to commit a sexual act with the perpetrator or with a third person, shall be guilty of the offence of rape.” In this situation, the use of coercion negates the possibility of consent. Proving the absence of a state of mind is notoriously difficult and may be an insurmountable obstacle to a complainant that has already been victimized. The definition of rape in Zimbabwe’s Criminal Law (Codification and Reform) Act is overly restrictive, for example: it not only requires a finding of lack of consent on the part of the complainant but also that the assailant knew that the complainant had not consented.¹⁵²

Item 4. “Force” / “Violence” / “Coercion”

Recommendations :

¹⁴⁹ *Id.* § 2 (Pen. C. §§ 14.70.3(ii)(f)-(g)).

¹⁵⁰ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 3(2) (S. Afr.).

¹⁵¹ *Zamfara State of Nigeria Shari’ah Penal Code Law* (2000) § 38 (Nig.), <http://www.zamfaraonline.com/sharia/introduction.html>.

¹⁵² Criminal Law (Codification and Reform) Act (2007) § 65 (Zimb.) (“If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse – the female person has not consented to it; and he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it, he shall be guilty of rape”).

- **Legal definitions of “rape” should explicitly include situations that do not involve the use of actual force, but do involve threat, coercion, fraud or incapacity.**
- **Although both violence or coercion and lack consent are inherent to rape, legislation should not require that the victim demonstrate both of these elements in conjunction for the purposes of a legal definition.**

Although the use of force and violence often accompanies rape, threats of violence or coercion may also be used to compel a person to submit to sexual intercourse. It is therefore important to explicitly include situations that do not involve the use of actual force, but do involve threat, coercion, fraud and incapacity in any definition of rape. An example of such explicit inclusion can be found in South Africa, where the Sexual Offences Bill addresses lack of consent in situations in which “force or intimidation” is used, “threat of harm” against the person or property is expressed, “abuse of power or authority [takes place] to the extent that [the complainant] is inhibited from indicating his or her unwillingness or resistance to the sexual act,” “false pretences or fraudulent means” are used or in which the complainant is “incapable in law of appreciating the nature of the sexual act.”¹⁵³ Kenya’s Sexual Offences Bill takes a further step in allowing a judicial body to make “conclusive presumptions” that there was a lack of consent in situations where it was fraudulently induced.¹⁵⁴

However, the law in force in the DRC requires that rape involve the “use or threat of violence or serious harm or force against a person, directly or through an intermediary or third party, either by surprise, by psychological pressure or in the context of a coercive environment or by abusing a person who, because of an illness, the impairment of his or her faculties or any other accidental reason has lost the use of his or her faculties or has been deprived of them by tricks.”¹⁵⁵ Similarly, the Transitional Penal Code for Eritrea requires the use of “force or violence,” which “may be implied where the woman is unconscious or incapable of resistance.”¹⁵⁶ These elements do not take into account the use of threats, not only against the person but also against their property or other persons, nor of fraud.

The discussion above indicates that some countries emphasize either compulsion or lack of agreement as the basis for penalizing rape, others weigh one to the relative exclusion of the other, while still others permit one or the other alternately or simultaneously;¹⁵⁷ many

¹⁵³ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 3 (S. Afr.).

¹⁵⁴ Sexual Offences Act (2006) Cap. 80 § 45. (Kenya).

¹⁵⁵ Law Amending the Penal Code (2006) art. 2 (*C. Pén.* art. 170) (Dem. Rep. Congo) (“[s]oit à l’aide de violences ou menaces graves ou par contrainte à l’encontre d’une personne, directement ou par l’intermédiaire d’un tiers, soit par surprise, par pression psychologique, soit à l’occasion d’un environnement coercitif, soit en abusant d’une personne qui, par le fait d’une maladie, par l’altération de ses facultés ou par toute autre cause accidentelle aurait perdu l’usage de ses sens ou en aurait été privé par quelques artifices.”).

¹⁵⁶ Benninger-Budel, et. al., *supra* note 122, at 211.

¹⁵⁷ Compare, for example, the language of the Penal Code in France, which defines rape as any act of sexual penetration committed against another person by “violence, contrainte, menace, ou surprise,” *Code Pénal* [*C. Pén.*] arts. 222-223 (Fr.), with that of the United Kingdom, which states that “[a] person (A) commits an offence [of rape] if he intentionally penetrates the vagina, anus or mouth of another person (B) with his

require proof of both.¹⁵⁸ Conceptually, emphasis on the use of force in legal definitions of rape views rape fundamentally as a crime of inequality, whether on the basis of status, relation or other factor. While these may all be relevant determinants, a definition of this kind turns on proof of physical acts, surrounding context, or the exploitation of relative position – in other words, social, contextual, and collective considerations. As such, it may ignore additional factors in correlation with lack of consent. Accordingly, definitions that focus on “consent” tend to frame the same events as ones that involve individuals, engaged in atomistic one-at-a-time interactions. It is important for sexual violence legislation to address both of these elements, since lack of agreement and compulsion often overlap and converge in acts of sexual violence.

2. Aggravating Circumstances

Recommendations:

- **Legislation may provide for aggravating circumstances, which should result in harsher sentences.**
- **Aggravating circumstances may include, but are not limited to, the age of the victim, the relationship of the perpetrator and the victim, the use or threat of violence, the presence of multiple perpetrators and grave physical or mental consequences of the attack on the victim.**

Most countries’ laws recognize aggravating circumstances in the context of rape, the presence of which mandate higher sentences. Aggravating circumstances typically include i) the characteristics of the victim, with special attention to capacity to issue consent to the acts involved, ii) the characteristics of the perpetrator, and iii) the circumstances of the offense. In circumstances when rape is found to have involved aggravating circumstances, harsher sentences are normally granted to the perpetrators. In the DRC, for example, the presence of aggravating circumstances results in a doubling of the sentences otherwise applied. In addition, any perpetrator with parental or legal guardianship of the victim will lose that authority.¹⁵⁹

Statutes that take into account the characteristics of the victim, especially those relevant for giving consent or for signaling to an alleged perpetrator that the victim is unable to consent to the act involved, identify the following as aggravating circumstances: minority under a specified age, the victim’s particular vulnerability due to their age, and illness, physical or mental deficiency. Most States take into account a particular age, and in some cases a sliding scale of age, as an aggravating circumstance. For example, Namibia recognizes harsher punishments for acts of rape with respect to first convictions committed where the complainant is under the age of thirteen or where the complainant is under the age of eighteen and the perpetrator is the complainant’s parent, guardian or caretaker.¹⁶⁰ Ethiopia’s Crimes Against Morals and the Family mandates a more severe sentence for sexual intercourse with a minor

penis, B does not consent to the penetration, and A does not reasonably believe that B consents.” Sexual Offences Act (2003) ch. 42, § 1 (U.K.).

¹⁵⁸ See Catherine A. MacKinnon, *Toward a Feminist Theory of the State* 172 (Harvard University Press) (1989) (criticizing the redundancy of requiring both coercion and non-consent, as most states in the United States do).

¹⁵⁹ Law Amending the Penal Code (2006) art. 2 (C. Pén. art. 171 bis) (Dem. Rep. Congo).

¹⁶⁰ Combating of Rape Act, No. 8 (2000) § 3(1)(a) (Namib.).

under the age of thirteen than for the commission of a crime against someone between the ages of thirteen and eighteen. A victim's lack of capacity to understand the nature of the consequences of the act due to old age, physical or mental illness, depression or any other reason is also considered an aggravating circumstance under Ethiopian law.¹⁶¹ The DRC considers a victim's handicap as an aggravating circumstance as well.¹⁶²

Circumstances of the offense that are taken into consideration as aggravating circumstances include the relationship of the perpetrator and the victim, the use or threat of violence, the presence of multiple perpetrators and the grave physical consequences of the attack on the victim. The DRC considers whether the perpetrator is an ancestor or descendant of the victim and whether the perpetrator is in a position of authority over the victim.¹⁶³ The DRC also considers whether the perpetrator is an instructor or paid servant of the victim, or a public agent or religious official who has abused his or her position to commit the attack, or medical or paramedical personnel, a social worker or traditional practitioner who has committed the attack against a person in his or her care, or a guard who has acted against persons in custody or captivity. The Sexual Offences Bill proposed to the Mauritius legislature in April 2007 considers the presence of a close blood relationship between the perpetrator and the victim an aggravating circumstance.

The use or threat of violence is commonly considered an aggravating circumstance. When the perpetrator renders a victim incapable of offering resistance,¹⁶⁴ or engages in rape involving the threat of a firearm or other deadly weapon at the time or immediately before the relevant act,¹⁶⁵ or when the rape is accompanied by the use or threat of a weapon,¹⁶⁶ more severe punishment is envisaged. For example, Botswana recognizes harsher penalties for acts of rape attended by violence resulting in injury to the victim, with a minimum sentence of fifteen years. Namibia recognizes harsher punishment for acts of rape in respect of first convictions committed where the complainant has suffered grievous bodily or mental harm as a result.¹⁶⁷

Liberia, Kenya, and the DRC also recognize gang rape or the assistance of others in the sexual offense committed as an aggravating circumstance.¹⁶⁸

The physical and mental consequences of the act are also considered as aggravating circumstances. For example, the DRC considers whether the attack resulted in serious impairment of the victim's health and/or has had serious physical and/or psychological consequences as aggravating circumstances.¹⁶⁹ Liberia recognizes that serious bodily injury or

¹⁶¹ *Amended Penal Code* arts. 620(2), 627 (Eth.).

¹⁶² Law Amending the Penal Code (2006) art. 2 (*C. Pén.* art. 171 bis(9)) (Dem. Rep. Congo).

¹⁶³ *Id.* (*C. Pén.* arts. 171 bis(1)-(2)).

¹⁶⁴ *Amended Penal Code* art. 622 (Eth.).

¹⁶⁵ Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.4(a)) (Liber.).

¹⁶⁶ Law Amending the Penal Code (2006) art. 2 (*C. Pén.* art. 171 bis(10)) (Dem. Rep. Congo).

¹⁶⁷ Combating of Rape Act, No. 8 (2000) § 3(1)(a) (Namib.).

¹⁶⁸ Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.4(a)) (Liber.); Sexual Offences Act (2006) Cap. 80 § 10 (Kenya); Law Amending the Penal Code (2006) art. 2 (*C. Pén.* art. 171bis(5)) (Dem. Rep. Congo).

¹⁶⁹ Law Amending the Penal Code (2006) art. 2 (*C. Pén.* art. 171 bis(8)) (Dem. Rep. Congo).

permanent disability as a result of rape is an aggravating circumstance;¹⁷⁰ and Ethiopia's Criminal Code considers situations in which the victim becomes pregnant, or when the perpetrator transmits to the victim a venereal disease with which he knows himself to be infected, or when the victim is driven to suicide by distress, anxiety, shame or despair, to be aggravating circumstances.¹⁷¹ The record of the perpetrator is taken into account as well. In Namibia, for example, harsher sentences are handed down in cases of second or subsequent convictions for rape.¹⁷²

Penalties for engaging in acts with aggravating circumstances entail a variety of different elements. In addition to being convicted for sexual offences against children and/or persons who are mentally disabled, South Africa's Sexual Offences Bill establishes a Register to maintain a record of persons who have been convicted of sexual offences against children and/or persons who are mentally disabled. The Bill also prohibits such persons from working with, or in any manner having access to children or persons with mental disabilities, either as an employer, an employee, a self-employed person, a foster parent, a kinship care-giver, a temporary safe care-giver, an adoptive parent or a curator of a person who is mentally disabled.¹⁷³

3. Defenses

Item 1. Marriage as a Defense to Rape

Recommendations:

- **The defense of rape within marriage should be abolished.**
- **The abolishment of this defense should be clear on the face of the legislation.**

Marital rape is a form of gender-based violence condemned in the United Nations Declaration on the Elimination of Violence Against Women.¹⁷⁴ Nonetheless, many countries have until recently recognized a marital exception to the crime of rape: in other words, rape within the marriage was not considered unlawful. In the past twenty-five years, this exception has been abolished in a growing number of countries, with the recognition that rape is a crime regardless of the relationship of the parties involved. Marital rape may now be prosecuted in at least 104 countries; 32 of these countries have made marital rape a specific criminal offence, while the rest do not allow the defense of marriage in cases of rape.¹⁷⁵ However, marital rape is still not a prosecutable offense in at least 53 countries.¹⁷⁶

Unfortunately, a number of sub-Saharan African countries are among those that still continue to recognize the defense of marriage in rape cases, including Kenya,¹⁷⁷ Nigeria¹⁷⁸

¹⁷⁰ Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.4(a)) (Liber.).

¹⁷¹ *Amended Penal Code* arts. 628, 630 (Eth.).

¹⁷² Combating of Rape Act, No. 8 (2000) § 3(1) (Namib.);

¹⁷³ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 41 (S. Afr.).

¹⁷⁴ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 2(a), U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

¹⁷⁵ The Secretary-General, *supra* note 9, ¶ 89.

¹⁷⁶ *Id.*

¹⁷⁷ Sexual Offences Act (2006) Cap. 80 § 43(5) (Kenya).

and the DRC. In fact, Kenya and the DRC considered and passed new legislation on sexual violence as recently as 2006, yet failed to abolish the marital rape defense.¹⁷⁹

This Report recommends that legislatures that have not already done so should explicitly abolish marriage as a defense in rape cases. For instance, South Africa's Sexual Offences Bill explicitly states that "[a] marital or other relationship, previous or existing, shall not be a defense" to a charge of rape.¹⁸⁰ Namibia's Combating of Rape Act similarly provides that "no marriage or other relationship shall constitute a defense to a charge of rape."¹⁸¹

It is important for the abolishment of the defense to be clear on its face – any ambiguity may result in confusion in countries where the marital rape defense has long been part of the legal framework. For instance, in England, it was not until 1994, when parliament enacted the Criminal Justice and Public Order Act and eliminated spousal immunity explicitly, that uncertainty as to the criminalization of marital rape was finally set to rest.

The explicit revocation or invalidation of the marital rape defense is also important to avoid inconsistencies in law. For example, in Ghana, a provision in the new Domestic Violence Act passed in February 2007 that arguably eliminates the marital rape defense has created a conflict with an existing criminal provision that has been interpreted to support the defense. A section of Ghana's criminal code from 1960 states that consent cannot be rescinded in marriage, "thus preventing a wife from prosecuting her husband for rape within marriage."¹⁸² The 2007 Domestic Violence Act failed to overturn that criminal provision – in fact, a clause overturning the provision was removed from the bill prior to its passage – but nonetheless contains a clause pertaining to consent in marriage, which states that "the use of violence in the domestic setting is not justified on the basis of consent."¹⁸³ The new law appears to undermine the marital rape defense contained in the existing criminal provision; so that it is now up to the courts in Ghana to determine how to resolve the conflict.¹⁸⁴

Likewise, the Rape Amendment Law in Liberia did not provide for an explicit clause on marital rape, resulting in confusion among practitioners as to whether marital rape may be prosecuted under the law. Similarly, the marital rape exemption may be implicitly contained in the definition of rape in Ethiopia because the Criminal Code does not clearly state that marriage is not a defense – only sexual intercourse *outside of wedlock* can amount to rape. In

¹⁷⁸ Under Nigerian law, "unlawful carnal knowledge" is defined as "carnal connection which takes place otherwise than between husband and wife." Criminal Code Act (1990) § 6 (Nig.), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>.

¹⁷⁹ Rosemary Okello, Commentary, *Sexual Offences Bill: Kenyan Women Are Smiling with One Eye, but Crying with the Other*, *Gender Links Opinion and Commentary Service*, June 30, 2006, http://www.genderlinks.org.za/article.php?a_id=572.

¹⁸⁰ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) § 3(4) (S. Afr.).

¹⁸¹ Combating of Rape Act, No. 8 (2000) § 2(3) (Namib.).

¹⁸² Annabel Charnock, *Confusion Over Marital Rape Following Passage of Domestic Violence Act*, *The Statesman*, Feb. 24, 2007, available at http://www.thestatesmanonline.com/pages/news_detail.php?newsid=2618§ion=1.

¹⁸³ *Id.*

¹⁸⁴ *See id.* ("The legal basis for prosecuting marital rape is therefore likely to be determined by initial landmark cases that will establish case law on the subject, which later prosecutions will then be able to rely upon.").

Tanzania's Sexual Offences Special Provisions Act, the definition of rape only provides for marital rape where the spouses are separated at the time. Ambiguities of this kind certainly do not help in eliminating sexual violence against women, and should be avoided.

Item 2. Marrying the Victim

Recommendations:

- **The defense of marrying the victim should be abolished.**
- **The abolishment of this defense should be clear on the face of the legislation.**

Another possible defense to a charge of rape arises when the rapist marries the victim. Some penal provisions in Africa provide that if an assailant agrees to marry the complainant, all charges will be dropped. For example, Cameroon allows for exoneration of the perpetrator if he marries the rape victim, so long as she is “over puberty at the time of the commission.”¹⁸⁵ This Report strongly recommends that the defense of marrying the victim be eliminated from rape laws. The defense may induce a rapist to marry the victim to escape the criminal consequences of his actions – and can even encourage rape to compel a marriage. In both instances, the victim is placed at risk of further sexual violence within the marriage. More broadly, the defense sends the erroneous message that sexual violence between spouses is tolerated. African countries should instead follow the example of Ethiopian legislation, which since 2005 no longer tolerates impunity for rape if the perpetrator marries the victim.¹⁸⁶

4. Penalties

Item 1. Imprisonment

Recommendations:

- **The introduction of guidelines for sentencing is recommended to reduce the possibility of abuse of judicial discretion.**
- **Especially onerous penalties, such as life imprisonment for a first time rape offence, may inadvertently lead to fewer convictions, and should be carefully evaluated.**
- **Corporal punishment, such as caning, should not be administered.**

The crime of rape is serious enough to warrant a prison sentence; and in fact most sub-Saharan African countries impose a prison term as at least one form of penalty for the offense of rape. The use of guidelines providing a reasonable range of both a minimum and maximum term is recommended in this regard to reduce the possibility of abuse of judicial discretion. Most sub-Saharan African laws already mandate at least a five year minimum term for rape: the DRC provides for imprisonment of five to twenty years as well as a minimum of 100,000 CDF (approximately 180 U.S. dollars) in fines for any person found guilty of rape;¹⁸⁷

¹⁸⁵ Benninger-Budel et. al., *supra* note 122, at 135.

¹⁸⁶ The Secretary-General, *supra* note 9, ¶ 87.

¹⁸⁷ Law Amending the Penal Code (2006) art. 2 (C. Pén. art. 170) (Dem. Rep. Congo). The Penal Code specifically provides that neither the fact of being a military officer nor of having followed the orders of a

and in Namibia, a person who commits rape is subject to a minimum sentence of five years and a maximum sentence of not less than fifteen years on first conviction. Ghana provides for a slightly higher minimum sentence of seven years and a maximum sentence of twenty-five years.¹⁸⁸

Some sub-Saharan African countries mandate a minimum imprisonment term of ten years or more for rape. In Kenya and Botswana, a person found guilty of rape faces a sentence of ten years to life imprisonment.¹⁸⁹ Ethiopia's Criminal Code provides for between five years and life imprisonment for rape, increased from previous maximum sentence of five years.¹⁹⁰

As abhorrent as rape is, the penalties imposed for it must comply with human rights standards. For instance, in the southern part of Nigeria, a person who commits rape "is liable to imprisonment for life, with or without caning."¹⁹¹ Tanzanian legislation subjects a person convicted of rape to a sentence of thirty years to life imprisonment, as well as corporal punishment and a fine for a first time rape conviction.¹⁹² Penalties of this kind, which may be deemed particularly harsh, are unlikely to be prescribed by tribunals in practice; rather, they may have the unintended effect of decreasing the rate of conviction. In addition, the use of corporal punishment, including caning, in sentencing is discouraged by this Report, since the practice contravenes human rights standards.

However, longer sentences and life imprisonment may be warranted for aggravated circumstances of rape, such as repeat offenses and the death of the victim. Thus, in Namibia, a second conviction for rape leads to a minimum sentence of ten years and a maximum sentence of forty-five years imprisonment. In the DRC, if rape causes the victim's death, the perpetrator is sentenced to life imprisonment.¹⁹³ Similarly, in Ethiopia, if rape causes grave physical or mental injury or death, the punishment is life imprisonment.¹⁹⁴

Item 2. Compensation

Recommendation:

- **Paying compensation to the victim may be an element of the penalty for rape, but should not be a substitute for imprisonment.**

military or civil superior exempts the perpetrator from responsibility. *See id.* art. 1 (*C. Pén.* arts. 42 bis, 42 ter).

¹⁸⁸ Annabel Charnock, *You Can Now Rape Your Wife: Parliamentary Stealth Makes Marital Rape a Crime*, *The Statesman*, Feb. 27, 2007, available at http://www.thestatesmanonline.com/pages/news_detail.php?section=1&newsid=2642.

¹⁸⁹ Sexual Offences Act (2006) Cap. 80 § 3(3) (Kenya); *Penal Code* (1986) § 142(1) (Bots.).

¹⁹⁰ *Criminal Code* arts. 620 and 628 (Eth.). *See also* Addis Ababa, *Amended Penal Code Puts Severe Punishments for Crimes of Rape, Child Rights Violation*, *The Ethiopian Herald*, (January 1, 2006), available at <http://allafrica.com/stories/200601010009.html>.

¹⁹¹ *Criminal Code Act* (1990) § 358 (Nig.), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>.

¹⁹² *Sexual Offences Special Provisions Act* (1998) § 6 (Tanz.).

¹⁹³ *Law Amending the Penal Code* (2006) art. 2 (*C. Pén.* art. 171) (Dem. Rep. Congo).

¹⁹⁴ *Criminal Code* art. 620(3) (Eth.).

- **Informal compensation arrangements between the victim’s family and the assailant should not replace the criminal justice process.**

Direct compensation by a rapist to the victim is another penalty that may be imposed in addition to imprisonment, and may constitute an additional remedy for the victim. To date, not many sub-Saharan African countries appear to utilize compensation as penalty for rape. Although the DRC and Tanzania mandate a fine, that fine may be paid to the State rather than the victim. The United States provides an example of legislation that requires a rapist to pay direct compensation to the victim. In the United States, under the Violence Against Women Act (VAWA), the defendant must pay to the victim “the full amount of the victim’s losses,” which includes any costs incurred by the victim for “(a) medical services relating to physical, psychiatric, or psychological care; (b) physical and occupational therapy or rehabilitation; (c) necessary transportation, temporary housing, and child care expenses; (d) lost income; (e) attorneys’ fees, plus any costs incurred in obtaining a civil protection order; and (f) any other losses suffered by the victim as a proximate result of the offense.”¹⁹⁵

As a general observation, it can be noted that civil laws meet their goals if they deter rape and/or sexual violence, hold the appropriate parties accountable for the damage done by the crime, and provide adequate compensation to victims. In specific instances, questions in relation to (i) whether and how compensation should be made more readily available; (ii) the apportionment of damages in cases where the charge of rape also involves an element of another crime, for example, where the victim dies and the action is brought by third parties; and (iii) how to protect the victim’s privacy and confidentiality during the civil trial, also come to mind. Numerous issues thus remain open-ended in determining whether civil actions are appropriate in instances of rape. It is this Report’s recommendation, however, that the introduction of compensation to victims should not be used as a defense route to escape imprisonment. States should avoid adopting provisions that allow a man to escape imprisonment for violently attacking a woman so long as he pays a fine. In addition, informal compensation arrangements between the victim’s family and the rapist should not take the place of judicial penalties.

B. *Sexual Assault*

Unlike rape, which is increasingly comprehensively regulated as an offense in the criminal laws of sub-Saharan African States, the place of “sexual assault” – generally defined as sexual aggression that does not involve penetration – is ambiguous. The elements of the offense, as well as the penalties meted out differ considerably from State to State. Of the sub-Saharan African countries that do recognize some form of “sexual assault”, many do so indirectly, through ambiguous offenses such as “gross indecency” or “attack on modesty”, often with penalties that are problematic from a human rights perspective. Only one State, South Africa, provides a comprehensive substantive definition, as well as sound penalties, in relation to the offence.

¹⁹⁵ See Violence Against Women Act of 1994, Pub. L. No. 103-322, § 2248, 108 Stat. 1796, 1904 (1994) (U.S.).

1. Substantive Definitions

Item 1. “Sexual Assault”

Recommendations:

- **Sexual assault should be recognized in law as an independent crime.**
- **Any definition of sexual assault should provide a clear distinction between “rape”, which involves penetration of any bodily orifice, and “assault”, which incorporates, *inter alia*, any unwanted “direct or indirect contact” and “masturbation”.**
- **Any definition should also be gender-neutral and provide that purposefully inspiring in a victim the belief that he or she will be sexually assaulted is punishable.**

A number of States recognize forms of sexual violence apart from rape, but use varied designations and standards. For example, the DRC has retained the offense of “attack on modesty” (“l’attentat à la pudeur”) in its Penal Code despite far-reaching amendments introduced in 2006. The offense is defined somewhat vaguely as “any act contrary to morals carried out intentionally and directly against a person without his or her valid consent.”¹⁹⁶ In effect, an “attack on modesty” encompasses all forms of sexual violence except for rape, from sexual harassment to sexual assault.

Nigeria, in turn, applies numerous standards for sexual assault, depending on the code used. None of the codes provide a usable definition of the offense, however. The Criminal Code states that any person “who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment for two years,”¹⁹⁷ but provides no guidance on what constitutes unlawful and indecent assault.

Additional provisions on sexual violence only add ambiguity. For example, Section 222 of the Criminal Code introduces the crime of “unlawfully or indecently deal[ing] with a girl under sixteen years of age.” Section 216 specifies that “the term ‘deal with’ includes doing any act which, if done without consent, would constitute an assault as hereinafter defined.” It would seem that this article provides for a statutory minimum age of sixteen for consent to any sexual activity, but it is still impossible to know what activity amounts to assault.

The Penal Code, in turn, recognizes the offense of sexual assault by men in positions of authority for children under the age of sixteen. Section 285 on “gross indecency” provides for seven years imprisonment and a fine, “provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section.”

¹⁹⁶ Law Amending the Penal Code (2006) art. 2 (*C. Pén.* art. 167) (Dem. Rep. of Congo) (“Tout acte contraire aux mœurs exercé intentionnellement et directement sur une personne sans le consentement valable de celle-ci constitue un attentat à la pudeur.”).

¹⁹⁷ Criminal Code Act (1990) § 360 (Nig.), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>.

Shari'ah Law also recognizes the crime of "gross indecency." It notes that "whoever commits an act of gross indecency upon the person of another without his consent or by the use of force or threats compels a person to join with him in the commission of such act shall be punished with caning of forty lashes and shall also be liable to imprisonment for a term of one year and may also be liable to fine; provided that a consent given by a person below the age of fifteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this section."¹⁹⁸ The same law also recognizes the crime of "assault or criminal force to women with intent to outrage modesty." Article 226 of the Shari'ah Law determines that "whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to one year and shall be liable to caning which may extend to forty lashes."

The ambiguity of such provisions is unfortunate – an act "contrary to morals" or activity "likely" to "outrage" the modesty of a woman could include a wide array of actions, depending on the subjective judgment of the tribunal or the community. Rather, it is the perception of the victim – male or female – that should be the focus of any definition.

In Kenya, on the other hand, the definition of "sexual assault" recently included in the Sexual Offences Act suffers from undue restriction. A person is guilty of "sexual assault" in Kenya if he or she unlawfully "(a) penetrates the genital organs of another person with (i) any part of the body of another or that person; or (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes; (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ by any part of the other person's body."¹⁹⁹ Because the offense of "rape" under Kenyan law includes only penetration with the sexual organ, all other forms of penetration – and only these – are considered to constitute "sexual assault." This approach leaves a wide array of unwanted conduct unaccounted for under law, leaving the victims of sexual violence that does not involve penetration without any legal remedy.

South Africa has adopted the most coherent provisions on sexual assault of the sub-Saharan African countries surveyed. A person is guilty of sexual assault in South Africa if that person unlawfully and intentionally sexually violates a complainant, without the complainant's consent. A person who unlawfully and intentionally inspires the belief in a complainant that he or she will be sexually violated is also guilty of sexual assault.

"Sexual violation" is defined to exclude sexual penetration but to include any act that causes:

- (a) direct or indirect contact between the –
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or

¹⁹⁸ *Zamfara State of Nigeria Shari'ah Penal Code Law* (2000) § 138 (Nig.), <http://www.zamfaraonline.com/sharia/introduction.html>.

¹⁹⁹ Sexual Offences Act, (2006) Cap. 80 § 5(1) (Kenya).

- any object, including any object resembling or representing the genital organs or anus of a person or an animal;
- (ii) mouth of one person and –
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (bb) the mouth of another person;
 - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could –
 - (aaa) be used in an act of sexual penetration; or
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) the mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person.²⁰⁰

The definition of “sexual violation” adopted by South Africa has numerous advantages. In the first place, it is gender-neutral (like that of Kenya); it recognizes that victims, like perpetrators, may be both men and women. Second, it accepts that purposefully inspiring in a victim the belief that he or she will be sexually assaulted should also be punishable. Third, it provides for a comprehensive list of actions that, if taken without the consent of the individual, constitute assault. Fourth, it provides a clear-line distinction between “rape”, which involves penetration of any bodily orifice, and “assault”, which incorporates, *inter alia*, any unwanted “direct or indirect contact” and “masturbation”.²⁰¹

One shortcoming can nonetheless be identified. The definition of “sexual assault” turns on the absence of consent, defined as “voluntary or uncoerced agreement.” As discussed above, it is important that definitions of sexual violence that appraise the victim’s lack of consent place emphasis on the actions of the assailant; this is something that seems to be missing from the South African law. “Sexual assault” is, by its nature, not consented to by the victim and accordingly unlawful. A better approach would note the existence of coercive circumstances, fraudulent means and false pretences and the possibility of victims incapable of appreciating the nature of the act that constitutes the offense. The focus of the Kenyan law on exactly these factors – despite its excessive limitation on the kinds of actions considered offensive – can be considered an example in this regard.

By way of further example, a person in the United States commits “sexual assault” if he or she engages in sexual abuse, aggravated sexual abuse, sexual abuse of a minor

²⁰⁰ Criminal Law (Sexual Offences) Amendment Bill, (2006), Bill 50-2003 (GA) § 11 (S. Afr.).

²⁰¹ *Id.*

or a ward, abusive sexual contact, and sexual abuse resulting in death.²⁰² A man or woman commits “sexual abuse” if he or she knowingly (a) causes another person to engage in a sexual act by threatening or placing that other person in fear; or (b) engages in a sexual act²⁰³ with someone who is “incapable of appraising the nature of the conduct,” “physically incapable of declining participation” or “communicating unwillingness to engage in that sexual act.”²⁰⁴ Any attempt at engaging in any of these activities is also punishable. In addition, sexual assault explicitly includes both assault committed by offenders who are strangers to the victim and assault committed by offenders who are known or related by blood or marriage to the victim.

Item 2. “Compelled Sexual Assault”

Recommendation:

- **Compelled sexual assault should be recognized in law as an independent crime.**

Since coercive environments may in some circumstances compel individuals to commit aggression against others in fear of their own safety – or may force persons to act in a manner they would not otherwise do – compelled sexual assault should also be recognized by law. Without a provision of this kind, the initiator of a sexual assault may escape punishment. In fact, a number of sub-Saharan African countries already recognize some form of this offense, although designations vary.

South Africa recognizes the offense of “compelled sexual assault.” A person is guilty of this crime if he or she unlawfully and intentionally compels a third person, without his or her consent, to commit an act of sexual violation against a complainant, without the consent of the complainant. In addition, a person is guilty of “compelled self-sexual assault” if he or she intentionally and unlawfully compels a complainant, without the consent of the complainant, to (i) engage in masturbation, any form of arousal or stimulation of a sexual nature of the female breast, or sexually suggestive or lewd acts with the complainant himself or herself; (ii) engage in any act which has or may have the effect of sexually arousing or sexually degrading the complainant; or (iii) cause the complainant to penetrate in any manner whatsoever his or her own genital organs or anus. Kenya has also introduced the offense of “compelled or induced indecent acts,” which includes the intentional and unlawful compulsion, inducement or causation of “any contact between the genital organs of a person, his or her breasts and buttocks with that of another person.”²⁰⁵

²⁰² See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 40002(a), 119 Stat. 2960, 2967 (2005); Sexual Abuse Act, 18 U.S.C. §§ 2241-2245 (1996).

²⁰³ “Sexual act” is defined as (a) “[c]ontact between the penis and the vulva or the penis and the anus; (b) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (c) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (d) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” Sexual Abuse Act, 18 U.S.C. § 2246(2) (1996).

²⁰⁴ *Id.* § 2242(2).

²⁰⁵ Sexual Offences Act, (2006) Cap. 80 §§ 2(1)(a), 6 (Kenya).

2. Penalties

Recommendations:

- **The introduction of guidelines for sentencing is recommended to reduce the possibility of abuse of judicial discretion.**
- **Especially onerous penalties may inadvertently lead to fewer convictions, and should be carefully evaluated.**
- **Corporal punishment, such as caning, should not be administered.**

Penalties for offenses that can be categorized as “sexual assault” vary considerably. In the DRC, any “attack on the modesty” of another person, committed with force, threat or ruse is punished by imprisonment of 6 months to five years; the same punishment applies for any “attack on modesty,” committed without force, if the victim or abettor is under eighteen years of age.²⁰⁶ If the victim or abettor of such an attack, committed with force, threat or ruse is under eighteen years of age, the punishment rises to imprisonment of between five and fifteen years; if the victim or abettor is under ten years of age, the punishment rises to between five and twenty years.²⁰⁷ Moreover, if any of the aggravating circumstances to sexual violence listed in Penal Code art. 171 bis are present in an “attack on modesty,” the sentences generally applied are doubled.²⁰⁸ In Kenya, a person found guilty of sexual assault faces a minimum sentence of ten years, “which may be enhanced to imprisonment for life.”²⁰⁹ This is exactly the same penalty as is applied in the context of “rape,” likely because of the close link between the two offences in this particular jurisdiction.

In Nigeria, the offense of unlawfully and indecently assaulting a girl under sixteen years of age results in “two years imprisonment, with or without caning”; in the case of victims under thirteen, the penalty rises to three years imprisonment, with or without caning.²¹⁰ As the United Nations and many human rights groups have repeatedly noted, caning is a form of cruel, inhuman or degrading punishment, and may even amount to torture.²¹¹ Moreover, the unlawful and indecent assault of a male under fourteen years of age warrants seven years imprisonment pursuant to art. 216 of the Criminal Code. In other words, the same crime results in wildly different prison terms, depending on whether the victim is a female or a male. A comparable inequality can be found in other provisions on assault. While the unlawful and indecent assault of

²⁰⁶ Law Amending the Penal Code (2006) art. 2 (C. Pén. arts. 167 and 168) (Dem. Rep. Congo).

²⁰⁷ *Id.* (C. Pén. art. 168).

²⁰⁸ *Id.* (C. Pén. art. 171 bis).

²⁰⁹ Sexual Offences Act (2006) Cap. 80 § 5(2) (Kenya).

²¹⁰ Criminal Code Act (1990) § 222 (Nig.), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>.

²¹¹ The UN Special Rapporteur on Torture has repeatedly emphasized that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. *See, e.g.,* The United Nations Special Rapporteur on Torture, *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 20, delivered to the General Assembly, U.N. Doc. A/56/156 (July 3, 2001) (prepared by Nigel Rodley); U.N. Comm’n on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc E/CN.4/RES/1997/38 (Apr. 11, 1997), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.1997.38.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.1997.38.En?Opendocument).

a woman or girl results in two years imprisonment (pursuant to art. 360 of the Criminal Code); the same crime merits three years if the victim is male (pursuant to art. 353). Such differences in sentencing, which are contingent only on the gender of the victim, contravene the constitutional and human right to both equal treatment and equality before the law. In setting different standards for the same crime, the legislature is effectively declaring that female victims are worth less than males.

With regard to the wide divergence in the prison terms dispensed from country to country – between six months and life imprisonment – it is important to consider the correlation of the penalty with the gravity of the sexual violence crime in question. As already noted in the context of rape, penalties deemed particularly harsh are unlikely to be prescribed by tribunals in practice; and may have the unintended effect of decreasing the rate of conviction.

C. *General Considerations & Good Practices*

Considerable variation in the overall structure of legal systems, including the incorporation of customary or religious law, as well as social or cultural barriers and limited financial resources may present particular challenges to the effective protection of women from gender-based violence in Africa. Despite the distinct hurdles faced in specific regions of the world, responses to violence against women nonetheless share a number of common issues and concerns everywhere. Legal reform with respect to gender-based violence must take into account not only the creation of new or amended legislation, but also questions of implementation and procedure. With this need in mind, the following common issues and principles of good practice can be identified in all countries.

1. **Evidentiary Procedures**

Recommendations:

- **Privacy and the protection of the victim should be paramount in procedural considerations.**
- **The judicial framework should accommodate the challenges of facing social pressure and stigma in setting evidentiary standards in rape and sexual assault cases.**
- **Rules as to collection and admissibility of testimony and evidence in rape and sexual assault cases should take into account the sensitive nature of the charges as well as the difficulty of collecting evidence in a timely manner.**

Victims of sexual violence encounter a number of challenges when they testify about the crime perpetrated against them. As most victims of rape and sexual assault are women, gender bias and societal stigma may affect perceptions of credibility. The victim's testimony may not be given proper weight by a judge or jury because it is assumed that she is motivated by improper reasons in bringing such a charge. In addition, it may be considered that her past sexual behavior should be taken into account when dealing with the prosecution of the crime. To limit

the effect of this kind of bias, certain mechanisms ought to be put in place to protect complainants in rape and sexual assault cases. These mechanisms include (i) *in camera* hearings and privacy precautions; (ii) standards for inferences that may be drawn from complainant’s testimony or lack of testimony; (iii) standards for consideration of evidence that may be submitted; (iv) rape shield laws that prevent the introduction of complainant’s sexual history into testimony; (v) procedural requirements related to timing in bringing a charge of sexual offense; and (vi) guarantees of timing in the context of the conduct of the trial. While few of these mechanisms are now used in sexual assault cases, they are increasingly applied in the context of rape. Specifically:

- (i) Liberia requires *in camera* hearings for all hearings in rape cases.²¹² The DRC also provides for closed hearings in all infractions relating to sexual violence (i.e. rape and “attack on modesty”) and requires that authorities take all measures necessary to protect the identity (and address) of the victim, including the use of pseudonyms. In addition, any measure “necessary to safeguard the security, the physical and psychological well-being, dignity, and respect for the private life of the victim or any other persons involved” must be taken by the authorities involved.²¹³
- (ii) The DRC provides that no inference of consent may under any circumstance be drawn from the words or behavior of a victim if his or her ability freely to give valid consent has been distorted by the use of force, threat or constraint, or through a coercive environment.²¹⁴ In addition, no such inference may be drawn if the victim is incapable of giving real consent.²¹⁵ No inference may under any circumstance be drawn from the silence or lack of resistance of the presumed victim.²¹⁶ South Africa’s Sexual Offences Bill provides for the admissibility of evidence relating to previous consistent statements by a complainant involving the alleged commission of a sexual offence, provided that the court may not draw any inferences only from the absence of such previous consistent statements. In addition, courts are prohibited from drawing any inference only from the length of any delay between the alleged commission of a sexual offence and the reporting thereof. Similarly, courts are prohibited from treating the evidence of a complainant in proceedings involving the alleged commission of a sexual offence with caution, on account of the nature of that offence.²¹⁷
- (iii) “The fact that rape trials are conducted in accordance with the normal procedures under the CP & E Act, which requires corroboration of the victim’s allegations that he/she has been raped, and is subject to the normal criminal standard of proof

²¹² Act to Amend the New Penal Code (2005) § 2 (Pen. C. § 14.70.5) (Liber.).

²¹³ *Loi no. 06/019 modifiant et complétant le Code de Procédure Pénale [Law no. 06/019 Modifying and Amending the Code of Penal Procedure]* (2006) art. 1 (*C. Proc. Pén.* art. 74 bis) (Dem. Rep. Congo) (“L’officier du Ministère Public ou le Juge saisi en matière de violences sexuelles prend les mesures nécessaires pour sauvegarder la sécurité, le bien-être physique et psychologique, la dignité et le respect de la vie privée des victimes ou de toute autre personne impliquée.”).

²¹⁴ *Id.* (*C. Proc. Pén.* art. 14 ter(1)).

²¹⁵ *Id.*

²¹⁶ *Id.* (*C. Proc. Pén.* art. 14 ter(2)).

²¹⁷ Criminal Law (Sexual Offences) Amendment Bill (2006), Bill 50-2003 (GA) §§ 58-60 (S. Afr.).

beyond reasonable doubt, causes some problems. Rape offences are committed in private and there are usually no witnesses to provide direct evidence to corroborate the victim's allegations. Courts therefore have to rely on circumstantial evidence such as medical reports, which show evidence of sexual intercourse, which is not always helpful because it means the victim should be examined immediately following the rape. Most women are not aware of these requirements and it is common for them to clean themselves thereby removing evidence (WAD 1998).²¹⁸ A person cannot be convicted of any of the sexual offences defined in section 218 or 221 of the Nigerian Criminal Code upon the uncorroborated testimony of one witness.²¹⁹

- (iv) In the DRC, the credibility, honor or sexual availability of a victim or witness may under no circumstances be inferred from their previous or later sexual behavior, and no proof regarding such behavior may be introduced to exonerate the accused.²²⁰ Kenya's Sexual Offences Act also contains a rape shield provision, which states that "[n]o evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court" unless the court has granted leave "to adduce such evidence or to put such questions."²²¹ The statute requires the court to grant such leave if the evidence or questioning "(a) relates to a specific instance of sexual activity relevant to a fact in issue; (b) is likely to rebut evidence previously adduced by the prosecution; (c) is likely 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; (d) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or (e) is fundamental to the accused's defense."²²² Further, the federal evidentiary rules of the United States include a rape shield provision, which provides that evidence offered to prove "any alleged victim's sexual predisposition" or to prove "that any alleged victim engaged in other sexual behavior" is "not admissible in any civil or criminal proceeding involving alleged sexual misconduct."²²³

²¹⁸ U.N. Asia & Far E. Inst. for the Prevention of Crime and the Treatment of Offenders, *Country Report: Botswana*, Nov. 2006, at 141-142, http://www.unafei.or.jp/english/pdf/PDF_rms/no70/no70index.pdf (prepared by Dimpho M. Mathumo).

²¹⁹ Criminal Code Act (1990) §§ 218, 221 (Nig.), <http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>.

²²⁰ Law Amending the Code of Penal Procedure (2006) art. 1 (*C. Proc. Pén.* art. 14 ter(3)-(4)) (Dem. Rep. of Congo).

²²¹ Sexual Offences Act (2006) Cap. 80 § 34(1) (Kenya).

²²² *Id.* § 34(3).

²²³ Fed. R. Evid. 412(a) (providing that "The following evidence is not admissible in any civil or criminal proceedings involving alleged sexual misconduct (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; (2) Evidence offered to prove any alleged victim's sexual predisposition.").

- (v) In Namibia, cautionary rules relating to offences of a sexual or indecent nature have been abolished. In addition, no inference may be drawn only from the fact that no previous consistent statements have been adduced by a complainant. Similarly, the courts may not draw negative inferences only from the length of delay between the commission of the sexual act and the complaint. Furthermore, evidence as to any previous sexual conduct or experience of a complainant may not be adduced in the proceedings.²²⁴
- (vi) Expedient progression of trials related to sexual offences without delay or interruption are provided for under the Sexual Offences Bill currently under consideration in the Mauritius legislature, where it is provided that “notwithstanding any other enactment, the hearing of a trial for an offence filed under [the Sexual Offences Bill] shall take place from day to day until it is over, or it may be adjourned from time to time where it is necessary or expedient to do so.” The DRC Code of Penal Procedure goes further in setting a strict limit on the timing of a criminal action related to sexual violence, requiring that any matter relating to a claim of sexual violence must move through the criminal system within a period of three months.²²⁵

2. The Rights of Victims

Recommendations:

- **Legislation should provide for prompt access to the quality medical care necessary after an incident of sexual assault or rape (such as emergency contraception and post-exposure prophylaxis for HIV).**
- **Policies and institutions should ensure easy and open access to the legislated legal process.**
- **National policy guidelines for medical professionals, police officers, prosecutorial staff, and welfare and correctional should be developed to help create uniform procedures for sexual violence cases.**
- **Barriers or disincentives to bringing claims of sexual violence should be removed.**

Aside from a right to speedy resolution of claims (see Evidentiary Procedures at Part IV.C.1. above), legislation asserting and protecting the rights of victims varies from country to country. Much of the emphasis in considering the rights of victims relates to ensuring (i) the privacy, informational and medical needs of the victim, while minimizing the trauma of the judicial proceedings; and (ii) access to full legal process regardless of the status of the alleged perpetrator.

²²⁴ Combating of Rape Act, No. 8 (2000) §§ 5-7 (Namib.).

²²⁵ Law Amending the Code of Penal Procedure (2006) art. 1 (*C. Proc. Pén.* art. 7 bis) (Dem. Rep. of Congo).

- (i) In the DRC, the relevant public official or judge must request that a doctor and a psychologist examine the victim to determine appropriate care.²²⁶

One of the objectives of the Sexual Offences Act in South Africa is to afford the complainants of sexual offences a maximum of legal protection and to minimize the trauma of the judicial process. The National Policy Guidelines for Victims of Sexual Offences, adopted in 1998, play a significant role in this respect.²²⁷ The guidelines were developed for medical professionals, police officers, prosecutorial staff, and welfare and correctional services and are aimed at creating uniform procedures for sexual violence cases. Among others, they provide for a duty on prosecutors to inform victims that they have a choice between having their hearing heard *in camera* or in public.

Namibia's Combating of Rape Act places special duties on prosecutors in rape cases to ensure that the complainant receives all relevant information pertaining to the case.²²⁸ Furthermore, the complainant has the right to attend at court personally, or to request that the prosecutor present the relevant information on her behalf if the accused has applied for bail.²²⁹ The Combating of Rape Act also places restrictions on publishing the identity of the complainant, so as to ensure that the complainant's privacy is protected.

The Sexual Offences Bill under consideration in Mauritius restricts dissemination of information about the victim, declaring it an offence to "publish, diffuse, reproduce, broadcast or disclose, by any means, particulars which lead, or are likely to lead, members of the public to identify the person against whom the offence is alleged to have been committed."²³⁰

- (ii) Claimants should be able to act to have charges brought against their alleged perpetrators regardless of the alleged perpetrator's status in society. The DRC Code of Penal Procedure provides that perpetrators with an official capacity or jurisdictional privileges are not exempt from investigation and arrest for sexual crimes.²³¹

Many sub-Saharan African States, like Nigeria and Sierra Leone, fail to provide legal assistance to rape victims, so that the burden of provision for such services falls to civil society. According to Amnesty International, however, NGOs are hindered in their delivery of

²²⁶ *Id.* (C. Proc. Pén. 14 bis).

²²⁷ National Policy Guidelines for Victims of Sexual Offences (1998) (S. Afr.) http://www.doj.gov.za/2004dojsite/policy/guide_sexoff/sexoff_guidelines1998.htm.

²²⁸ Combating of Rape Act, No. 8 (2000) § 9 (Namib.).

²²⁹ *Id.* § 60A.

²³⁰ Sexual Offences Bill (2007) § 22 (Mauritius).

²³¹ Law Amending the Penal Code (2006) art. 1 (C. Pén. art. 42bis, 42 ter). *See also* Law Amending the Code of Penal Procedure (2006) art. 2 (C. Proc. Pén. art. 10)) (Dem. Rep. of Congo).

such services due to the lack of State support for their activities.²³² Moreover, not only is publicly funded legal assistance unavailable in many African countries, but even access to the judicial system is difficult if not impossible to attain for women due to legal, structural and cultural limitations on access.²³³

A major challenge to the protection of the rights of victims is the persistence of legislation criminalizing the false declaration of a sexual offence, which may serve as a disincentive for victims to bring legal claims of rape or sexual assault.

For instance, Nigeria's Shari'ah Law recognizes the crime of *qadhif*, or falsely accusing another of 'adultery or fornication' (*zina*).²³⁴ In light of the often onerous evidentiary requirements in effect, women claiming that a rape or sexual assault has taken place may find it impossible to prove their claim; and may consequently find themselves accused of having, "by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations", made a "false imputation of *zina* or sodomy concerning a chaste person (*muhsin*)."²³⁵ The punishment meted out for this crime is eighty lashes of the cane, as well as a presumption that the individual's testimony is unreliable, unless she "repents before the court."²³⁵ In addition, the victim herself may be accused of extramarital sexual relations (for example, if she is pregnant as a result of the rape), which is punished with a sentence of death by stoning.

The Shari'ah Law of Kano State in Nigeria, in turn, requires that any claim of rape in respect of a married person fulfill the following conditions: "(a) Islam; (b) maturity; (c) sanity; (d) liberty; (e) valid marriage; (f) consummation of marriage; (g) four witnesses; or (h) confession."²³⁶ Although the law is unclear on how the strict conditions set out above can be met, if any have not been proved by the person alleging the offense, the person "shall be imprisoned for one year and shall also be liable for caning which may extend to one hundred lashes."²³⁷

This barrier and disincentive to bringing claims of sexual violence exists in other laws too. The proposed Sexual Offences Bill of Mauritius, despite its progressive nature in addressing rape and sexual assault, contains a provision criminalizing the false declaration of a sexual offence. "Any person, whether of his own free will or in the course of an interview, who makes a false declaration to any public officer on duty that any person has committed an offence

²³² Amnesty International, *Nigeria: The Stage Fails to Prevent, Investigate and Punish Violence Against Women* (2005), available at <http://web.amnesty.org/library/Index/ENGAFR440212005?open&of=ENG-NGA>.

²³³ Amnesty International, *No One to Turn to: Women's Lack of Access to Justice in Rural Sierra Leone* (2005), available at <http://web.amnesty.org/library/index/engaf1510112005>.

²³⁴ *Zamfara State of Nigeria Shari'ah Penal Code Law* (2000) § 139 (Nig.), <http://www.zamfaraonline.com/sharia/introduction.html>.

²³⁵ *Id.* § 140.

²³⁶ Amnesty International, *Nigeria Rape the Silent Weapon* § 5.3.1 (2006), available at <http://web.amnesty.org/library/Index/ENGAFR440202006?open&of=ENG-NGA>.

²³⁷ *Id.*

under the [Sexual Offences Bill] shall commit an offence and shall, on conviction, be liable to a term of penal servitude not exceeding 10 years.”²³⁸

Women seeking to bring claims of sexual violence face procedural, cultural and bureaucratic hurdles as well. For example, in Kenya, a woman must report the crime to the police and provide written details in the official police Occurrence Book for an investigation to be initiated. Police are rarely trained in handling sexual violence issues and often handle rape investigations as they would other private domestic matters. Once a claim is made, widespread corruption within the police system often delays the actual progression of the case and gives ample opportunity for the perpetrator, sometimes the husband of the claimant, to pay police to delay or drop the investigation.²³⁹

In addition to bringing the claim directly to the police, a victim of rape in Kenya must also obtain a Medical Examination Report from the police before she can be examined by a doctor. The form must be completed both by the police and by a doctor. Here, again, is an example of system that could work, thwarted by the realities of implementation. Amnesty International has found that the required Medical Examination Report form, intended by law to be free, is often only available to those willing to pay a bribe to the police. Thus, the unique control exercised over the reporting system by members of the police, who are untrained in the nuances of dealing with sexual violence, actively discourages many victims of sexual violence from coming forward to record their experiences for the purpose of prosecution. As would be expected, such discouragement is even more intense in the event that the perpetrator is himself a member of the police force.²⁴⁰ South Africa similarly requires that a victim of rape report the incident to the police as a precondition to receiving healthcare.²⁴¹

The health of rape victims is also considered in many laws. Although abortion laws in African countries tend to be restrictive, many sub-Saharan African States explicitly provide for access to abortion in cases of rape, in accordance with the Women’s Rights Protocol.²⁴² South Africa has permitted access to abortions when the pregnancy is a result of rape since 1975, under its 1975 Abortion and Sterilization Act. The Act provided that abortions may be performed lawfully when a pregnancy could seriously threaten a woman's life or her physical or mental health; could cause severe handicap to the child; or was the result of rape (which had to be proved), incest or other unlawful intercourse, such as with a woman with a permanent mental handicap.²⁴³ South Africa’s more recently updated 1996 Choice on Termination of Pregnancy Act permits abortion on request until 12 weeks of gestation for any reason. Under this law, when a fetus is between 13 weeks and 20 weeks of gestation; abortion is permitted if the doctor is of the opinion that there is a risk to the woman’s mental or physical health; there is a

²³⁸ See Sexual Offences Bill (2007) § 23 (Mauritius). See also Sexual Offences Act (2006) Cap. 80 § 38 (Kenya) (“Any person who makes false allegations against another person to the effect that the person has committed an offence under this Act is guilty of an offence and shall be liable to punishment equal to that for the offence complained of.”).

²³⁹ See Amnesty International, *Kenya Rape The Invisible Crime* § 5.1 (2006), available at <http://web.amnesty.org/library/Index/engaf320012002>.

²⁴⁰ See *id.* § 5.2.

²⁴¹ See Kerry Cullinan, *South Africa: Many Obstacles to Healthcare for Rape Survivors*, Health-E, Apr. 28, 2007, <http://allafrica.com/stories/200704280062.html>.

²⁴² Protocol to the African Charter on the Rights of Women in Africa, *supra* note 36, arts. 2(2), 5.

²⁴³ Abortion and Sterilization Act 2 of 1975 (1975) § 3 (S. Afr.).

substantial risk that the fetus would have a severe physical or mental abnormality; the pregnancy resulted from rape or incest; or the pregnancy would severely affect the social and economic status of the woman. After 20 weeks of gestation, South African law allows for termination only if the woman's life is in danger or in case of severe malformation of the fetus.²⁴⁴

Additionally, in December 2006, Togo legalized abortion if the pregnancy is a result of rape or an incestuous relationship.²⁴⁵

Benin, Burkina Faso, Cameroon, Ethiopia, Zimbabwe, Botswana, Ghana, Liberia, Namibia and Swaziland also permit abortions in the event that the pregnancy arose from rape.²⁴⁶ Although many of these countries have quite burdensome evidentiary standards, some, such as Ethiopia, require only an assertion by the woman that her pregnancy resulted from rape.²⁴⁷

South Africa also allows for women to receive nevirapine, an antiretroviral drug that prevents the transmission of HIV from pregnant mothers to their babies. Although the availability of nevirapine was initially restricted to certain kinds of pregnancies, such as those resulting from rape, South Africa currently offers nevirapine to all women who have tested as HIV positive through the public hospital system.²⁴⁸

Despite pressure on the government from international and local NGOs to provide emergency contraception²⁴⁹ and post-exposure prophylaxis (PEP) drugs as a public service to rape victims, laws and policies in many sub-Saharan African countries, including South Africa, do not explicitly obligate health care providers to provide rape victims with treatment for sexually transmitted diseases, emergency contraception to prevent possible pregnancy, or medical treatment for injuries sustained as a result of the rape.²⁵⁰ Kenya and Zambia lead other sub-Saharan African countries in their policy developments in the realm of emergency contraception. The Kenyan Ministry of Health, for example, has issued National Guidelines on the Medical Management of Sexual Violence calling for the provision of both emergency contraception and PEP to victims of rape.²⁵¹ Zambia has also started a pilot program with support

²⁴⁴ Choice on Termination of Pregnancy Act 92 of 1996 (1996) § 2(c)(i) (S. Afr.).

²⁴⁵ *Togo: Abortion Legalized In Rape And Incest*, The N.Y. Times (2006), available at <http://query.nytimes.com/gst/fullpage.html?res=9C07E2D71F31F93AA15751C1A9609C8B63&n=Top/>. See also *Burundi: Focus on Rape*, IRIN, Jan. 15, 2004, <http://www.irinnews.org/report.aspx?reportid=48081> (citing Burundi as an example of an African country with a blanket prohibition on abortion).

²⁴⁶ Center for Reproductive Rights Fact Sheet, http://www.reproductiverights.org/pdf/pub_fac_abortionlaws.pdf (last visited June 19, 2007).

²⁴⁷ *Criminal Code* art. 551 (Eth.).

²⁴⁸ Sarah Left, *South Africa Announces Aids Policy Turnaround*, Guardian Unlimited, Apr. 18, 2002, <http://www.guardian.co.uk/aids/story/0,7369,686500,00.html>.

²⁴⁹ Emergency contraception prevents pregnancy after unprotected sex via a course of hormonal contraceptive pills taken in one- or two-dose regimens. It is most effective if taken within 24 hours after unprotected sex; however, it can be effective for up to five days.

²⁵⁰ See Bronwyn Pithey, Lillian Artz, Heléne Combrinck & Nicolette Naylor, *Legal Aspects of Rape in South Africa* ch. 15(2) (1999), available at <http://web.uct.ac.za/depts/sjrp/publicat/legalrape.pdf>.

²⁵¹ Division of Reproductive Health, Government of Kenya, *National Guidelines Medical Management of Rape/Sexual Violence* (2004), available at

from the Population Council, in which police, as the first institutional contact for victims of sexual assault, provide emergency contraception to rape victims.²⁵²

3. Human Rights of the Accused and of Perpetrators

Recommendations:

- **The punishment applied to crimes of sexual violence should not itself amount to a human rights violation.**
- **In particular, the death penalty and corporal punishment should not be administered.**
- **The constitutional rights of the accused to a fair and speedy trial, and to privacy should be respected.**

States must comply with their duty to respect the human rights of all individuals in their jurisdiction, including those convicted of crimes.

For this reason, consideration should be given to ensuring that the punishment applied to crimes of sexual violence does not amount to a human rights violation itself. The most problematic applicable penalties are those that provide for a mandatory death penalty, or other forms of torture and cruel, inhuman or degrading punishment, such as stoning and caning. As discussed above, many sub-Saharan African States provide for these punishments in their legislation on sexual violence – and consequently contravene the provisions of numerous international human rights instruments of which they are signatories.²⁵³

As a practical matter, there is no conclusive evidence to suggest that these forms of punishment are more effective deterrents against sexual violence (and other crimes) than less severe penalties. Rather, law that provides for punishment proportionate to the gravity of the crime and the circumstances of the offender has the best chance of actually being applied. Especially harsh sentences – and particularly ones that provide for the death penalty or corporal punishment – may lead to fewer convictions for sexual violence, as the judiciary often proves reluctant to apply punishment deemed inappropriate.

In addition, any punishment provided for by law should only be imposed after the individual has been charged with an offense at a trial that meets generally accepted standards of

http://www.drh.go.ke/documents/Guidelines_for%20medical%20management%20of%20rape%20and%20sexual%20violenc.pdf.

²⁵² Comprehensive Care for Survivors of Sexual Violence in Zambia, Feb. 26, 2007,

http://www.popcouncil.net/projects/RH_ZambiaSexualViolence.html.

²⁵³ See, e.g., Universal Declaration of Human Rights, *supra* note 19, art. 5; International Covenant on Civil and Political Rights, *supra* note 18, arts. 6(2), 7; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 3452 (XXX), U.N. Doc. A/RES/3452 (XXX) (Dec. 9, 1975); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 21, arts. 1-2; Convention on the Rights of the Child, *supra* note 24, art. 37(a); World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶¶ 30, 54-61, U.N. Doc. A/CONF.157/23.

fairness. Namibia's example of protecting the constitutional rights of the accused to a fair and speedy trial in rape cases is laudable in this regard.

On the other hand, the provision in Botswana's Penal Code that denies the possibility of bail for persons charged with rape may be dubious from a human rights point of view, since it violates the accused person's constitutional right of being presumed innocent until proven guilty. Despite numerous claims of exactly this human rights violation, the courts of the country have thus far refused to accept this argument.

4. HIV and Sexual Violence

Recommendations:

- **Governments should ensure prompt and easy access to PEP for victims of sexual violence, as part of a comprehensive package of services. Governments should also ensure access to antiretrovirals when necessary.**
- **Criminal legislation related to HIV should respect human rights standards, including principles related to informed consent for testing and the protection of confidentiality.**
- **Governments should ensure that laws criminalizing HIV transmission do not further stigmatize people living with HIV.**

In light of growing concern in many sub-Saharan African States regarding the interaction of HIV/ Aids and sexual violence, some countries are introducing mandatory testing measures for suspects and enhancing penalties based on HIV transmission. A number of sub-Saharan African countries impose more severe penalties on persons who commit rape while knowing that they are infected with the HIV virus or another sexually transmitted disease.²⁵⁴ However, there are serious concerns about whether these types of measures achieve their desired result or comply with human rights standards.²⁵⁵ For example, Kenya's provision criminalizing

²⁵⁴ Benin has a provision pertaining to HIV/AIDS, pursuant to which a person who knows that he or she is infected with the AIDS virus and who, "using violence, constraint or surprise," has unprotected "sexual relations of any kind" with another person will be penalized with a prison term of 5 to 20 years and a fine of 3 to 10 million CFA. Law No. 2005-31 of Apr. 5, 2006 (2006) art. 30 (Benin) ("Toute personne se sachant infectée par le virus du SIDA qui, usant de la violence, contrainte ou surprise, entretient des relations sexuelles non protégées de quelle que nature qu'elles soient avec une personne, sera punie de la réclusion criminelle à temps de cinq à vingt ans et d'une amende de trois millions de francs à dix millions de francs CFA."). Moreover, even where there was no "violence, constraint or surprise," an HIV positive person who is conscious of his or her status and has unprotected sexual relations with an uninformed person is subject to five to ten years imprisonment and a fine of one to five million CFA. *See also* Sexual Offences Act (2006) Cap. 80 § 27 (Kenya). In Botswana, a person who is convicted of rape is required to undergo an HIV/AIDS test before he or she is sentenced, and if he or she tests positive, receives a minimum sentence of 15 years (5 years more than the minimum term for standard rape). If it is shown that the rapist was aware of being HIV positive at the time of the rape, he or she is sentenced to a minimum term of 20 years with corporal punishment. *Penal Code* (1986) §§ 141(4) and (4) (Bots.)

²⁵⁵ Concerns about accordance with human rights principles are particularly strong in the case of legislation that imposes the death penalty in such instances. Unfortunately, a number of sub-Saharan African laws have been developing in this direction. For example, Uganda's parliament passed a bill in April 2007 amending its Penal Code to impose the death penalty on individuals who are aware of their HIV positive status and have sex with a child under the age of 14, with or without consent. *Rape Law Amended*, New

transmission is so broadly drawn that a woman with HIV who has unwanted sexual intercourse with a man, but cannot prove rape, may be found guilty of the crime.²⁵⁶

Issues around testing abound in the context of HIV and sexual violence.²⁵⁷ Criminal penalties for “knowingly” transmitting HIV can serve as a disincentive to testing, an unintended consequence that runs directly contrary to most governments objectives encouraging HIV testing.²⁵⁸ Laws that call for the mandatory HIV testing of persons *suspected* of committing sexual violence risk violating the human rights of the suspects and may be of little use to victims. As the UNAIDS publication, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, outlines:

*[T]esting a person for HIV without their consent, on the basis of a criminal accusation raises serious human rights concerns associated with liberty, security of the person and privacy. Most obviously and immediately, such a practice would violate bodily integrity to obtain information about a person’s health status—information that should, as a general rule, be subject to strict confidentiality. International law recognizes these rights as fundamental human rights.... Aside from these human rights concerns, imposing compulsory testing on persons accused of HIV transmission/exposure, after the acts that are alleged to have transmitted or risked transmitting the virus, will be of little benefit. Testing after the fact will not conclusively prove that the accused was HIV-positive at the time of the offence; it will only establish the accused’s HIV status at the time of the test.*²⁵⁹

To minimize the risk of HIV transmission through sexual violence, governments should ensure that victims have prompt access to PEP. PEP is a course of antiretroviral drugs that can reduce the risk of contracting HIV/AIDS by as much as 80 percent if started within 72 hours of exposure.²⁶⁰ In South Africa, for instance, victims of sexual offence have access to PEP at State

Vision, Apr. 19, 2007, <http://www.newvision.co.ug/D/8/13/560848>; *Uganda: Death Penalty for HIV-Positive Child Sex Offenders*, IRIN, Apr. 19, 2007, <http://www.plusnews.org/report.aspx?ReportId=71713>. Swaziland’s parliament is also expected to debate a bill in 2007 that imposes the death penalty on HIV-positive men who “infected women they raped while knowing their medical condition.” *Swaziland: AIDS Activists Call for Death Penalty for HIV Infection by Rape*, IRIN, Apr. 23, 2007, <http://allafrica.com/stories/printable/200704231087.html>.

²⁵⁶ In Kenya, a person is guilty of an offense if, “having actual knowledge that he or she is infected with HIV or any other life threatening sexually transmitted disease intentionally, knowingly and willfully does anything or permits the doing of anything which he or she knows or ought to reasonably know (a) will infect another person with HIV or any other life threatening sexually transmitted disease; (b) is likely to lead to another person being infected with HIV or any other life threatening sexually transmitted disease; (c) will infect another person with any other sexually transmitted disease.” The penalty for this offense is a minimum sentence of 15 years (5 years more than the minimum term for standard rape) to a maximum of life imprisonment. Sexual Offences Act (2006) Cap. 80 § 26(1) (Kenya). This provision should also be noted for its level of detail and inclusiveness – for instance, it employs both subjective and objective standards of knowledge, as well as active (“does anything”) and more passive (“permits the doing of anything”) states of action.

²⁵⁷ For a detailed discussion of some of these issues, see UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, Geneva, Switzerland (June 2002).

²⁵⁸ *Id.* at 7.

²⁵⁹ *Id.* at 22.

²⁶⁰ *South Africa: New Sexual Offences Bill Fails to Protect Rape Survivors*, IRIN, May 10, 2006, <http://www.irinnews.org/PrintReport.aspx?ReportId=58988>.

expense, but only if they report the sexual offence “within 72 hours after the alleged sexual offence took place.”²⁶¹ One concern with making the victim’s access to PEP conditional upon her reporting of the offence, however, is that it may “either coerce ... women into laying charges or prevent ... them from accessing PEP altogether.”²⁶² Furthermore, it is advisable that PEP be made available to victims along with other related support services, like counseling; the South African bill does not appear to require such additional services to be made available to victims along with PEP.²⁶³ The Kenyan Ministry of Health, on the other hand, has issued National Guidelines on the Medical Management of Sexual Violence that call on public hospitals to provide PEP to victims of rape without charge, along with emergency contraception and other necessary services.²⁶⁴

V. *National Legislation on Domestic Violence*

Domestic violence is widely recognized as a worldwide problem that transcends cultural boundaries and mores. Studies examining domestic violence reveal that its effects outlive generations, creating a cyclical pattern of crime that has widespread social implications.²⁶⁵ This consensus is embodied in the framework for model legislation on domestic violence developed by the U.N. Special Rapporteur on Violence Against Women (“U.N. Model Framework” or “Framework”),²⁶⁶ which, among other objectives, charges domestic violence legislation to:

- (i) Recognize that domestic violence is gender-specific violence directed against women, occurring within the family and within interpersonal relationships;
- (ii) Recognize that domestic violence constitutes a serious crime against the individual and society which will not be excused or tolerated;

²⁶¹ Criminal Law (Sexual Offences and Related Matters) Amendment Bill (2003) § 28(2)(b) (S. Afr.).

²⁶² See *South Africa: New Sexual Offences Bill Fails to Protect Rape Survivors*, IRIN, July 19, 2007, <http://www.irinnews.org/report.aspx?reportid=58988> (“The bill now means you can’t walk into a health facility and say you’ve been raped and ask for PEP and just be assessed on a medical basis.”).

²⁶³ *Id.* (“PEP needs to be located within a package of care for survivors ... protecting yourself from HIV is only one of the problems for rape survivors.”).

²⁶⁴ Division of Reproductive Health, Government of Kenya, *National Guidelines Medical Management of Rape/Sexual Violence* (2004), available at http://www.drh.go.ke/documents/Guidelines_for%20medical%20management%20of%20rape%20and%20sexual%20violenc.pdf.

²⁶⁵ A recent report by the American Psychological Association indicates that children who witness domestic violence are at a higher risk for anxiety, depression, and difficulty expressing emotion. L. F. Katz & B. Windecker-Nelson, Abstract, *Domestic Violence, Emotion Coaching, and Child Adjustment*, J. Fam. Psychol., available at http://www.apa.org/pi/preventviolence/domestic_violenc.html. See also Patricia Tjaden & Nancy Thoennes, National Institute of Justice, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey 34* (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf> (indicating that children who witness domestic abuse are more likely to grow up to become either abusers or future victims of domestic abuse).

²⁶⁶ In particular, “States should not permit religious or cultural practices to form an impediment to offering all women ... [protection from domestic violence].” See The U.N. Special Rapporteur on Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, A Framework for Model Legislation on Domestic Violence*, ¶ 8, delivered to the Economic and Social Council, U.N. Doc. E/CN.4/1996/53/Add.2 (Feb. 2, 1996) (prepared by Radhika Coomaraswamy).

- (iii) Create a wide range of flexible and speedy remedies (including remedies under special domestic violence legislation, and penal and civil remedies) to discourage domestic violence and harassment of women within interpersonal relationships and within the family and protect women where such violence has taken place;
- (iv) Expand the ability of law enforcement officers to assist victims and to enforce the law effectively in cases of domestic violence and to prevent further incidents of abuse;
- (v) Train judges to be aware of the issues relating to child custody, economic support and security for the victims in cases of domestic violence by establishing guidelines for protection orders and sentencing guidelines which do not trivialize domestic violence;
- (vi) Provide for and train counselors to support police, judges and the victims of domestic violence and to rehabilitate perpetrators of domestic violence;
- (vii) Establish departments, programs, services, protocols and duties, including but not limited to shelters, counseling programs and job-training programs to aid victims of domestic violence;
- (viii) Enumerate and provide by law comprehensive support services, including but not limited to:
 - (a) Emergency services for victims of abuse and their families;
 - (b) Support programs that meet the specific needs of victims of abuse and their families;
 - (c) Education, counseling and therapeutic programs for the abuser and the victim; and
 - (d) Programs to assist in raising public awareness and public education on the subject.^{267, 268}

Even compared to sexual assault – and certainly compared to the widespread statutes against rape – domestic violence is the subject of little sub-Saharan African legislation. One survey of the legislation in force in 2002 found that only two States in the region – South Africa and Mauritius – had enacted specific domestic violence statutes.²⁶⁹ After experience with

²⁶⁷ See *id.* ¶ 2.

²⁶⁸ While we recognize that domestic violence can occur when a woman abuses a man, or a person of the same sex abuses another, this Report follows the U.N. Special Rapporteur on Violence Against Women and focuses on the most prevalent form of abuse, in which a man abuses a woman. The terminology used in this Report is consistent with that focus.

²⁶⁹ Cynthia Grant Bowman, *Theories of Domestic Violence in the African Context*, 11 Am. U. J. Gender Soc. Pol’y & L. 847, 848 (2002-03). We note that domestic violence often overlaps with the criminal statutes concerning rape and sexual assault discussed above – e.g., a husband raping his wife could be addressed by

initial legislation enacted in 1993, South Africa passed a new Domestic Violence Act in 1998.²⁷⁰ Mauritius enacted its Protection from Domestic Violence Act in 1997.²⁷¹

There has been increasing legislative activity, however, as civil society and international organizations have called attention to domestic violence; in turn, governments have begun taking up the issue.²⁷² In Namibia, the Combating of Domestic Violence Act came into force in 2003,²⁷³ granting extensive legal protections against domestic violence. In 2006, the legislature of Zimbabwe passed similar legislation after years of campaigns by NGOs and civil organizations.²⁷⁴ Most recently, in May 2007, Ghana enacted a new statute to supplement existing provisions under its criminal code, which failed to provide victims of domestic violence with an effective legal remedy.²⁷⁵

This Report focuses on the domestic violence legislation enacted by these five countries, together with the recommendations of the U.N. Model Framework and selected portions of legislation from outside Africa. Although these sources of law serve as a useful starting point, we expect that the landscape of laws in sub-Saharan Africa dealing specifically with domestic violence will change substantially as legislative activity continues to accelerate.

A. Domestic Violence

1. Substantive Definitions

One of the most persistent challenges in crafting domestic violence legislation is settling on a substantive definition of what constitutes “domestic violence” in a “domestic

a statute prohibiting rape. This portion of the Report focuses on legislation specific to domestic violence; the relationship of such legislation to the legal responses to rape and sexual assault is addressed in Section V.B.3 below. This is consistent with the U.N. recommendation that States “enact comprehensive domestic violence legislation which integrates criminal and civil remedies rather than making marginal amendments to existing penal and civil laws.” The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 4.

²⁷⁰ Domestic Violence Act 116 of 1998 (1998) (S. Afr.).

²⁷¹ Protection from Domestic Violence Act, No. 6 (1997) (Mauritius). The statute was amended in 2004 to address, *inter alia*, the scope of the domestic relationship, application time limits, and penalties.

²⁷² In addition to the legislation identified in the text, we are aware of secondary sources discussing legislation enacted by Lesotho (Sexual Offences Act of 2003) and Malawi (Prevention of Domestic Violence Act of 2006). However, we have been unable to obtain copies of this legislation. In addition, we are aware of a bill that was proposed in Kenya, Domestic Violence (Family Protection) Bill, in 2002, but to our knowledge that bill has not been enacted.

²⁷³ Combating of Domestic Violence Act, No. 4 (2003) (Namib.).

²⁷⁴ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) (Zimb.). Press reports indicate that this bill was signed by the President in early 2007, making it operative. *See, e.g.*, Patience Zirima, *SADC Anticipates Strengthening Commitments on Gender Violence*, The GAD Exchange (2007), available at <http://www.sardc.net/widsaa/gad/view.asp?vol=64&pubno=41>. Both the Zimbabwean and Namibian laws appear to be modeled at least in part on South Africa’s.

²⁷⁵ Domestic Violence Act (2003) (Ghana). Ghana’s Criminal Code of 1960 (Act 29) provided for imprisonment and fines regarding abuse suffered in the domestic setting, but was seen by many as an inadequate response to domestic violence. Activists, such as the Women’s Manifesto Coalition and the Domestic Violence Bill Coalition, pressed for passage of the new legislation, which press reports indicate was signed by the president after lengthy debate in parliament. *See, e.g.*, Sheilla Sackey, *Domestic Violence Bill Passed*, The Daily Guide, May 4, 2007, <http://www.dailyguideghana.com/portal/modules/news/article.php?storyid=2240>.

relationship”. Domestic violence occurs in the most intimate of relationships, and “violence” often extends beyond physical acts, encompassing economic and social forms of abuse that may be less obvious than “stranger violence” to police officers, judges, social workers, or even family members and friends. The U.N. Model Framework responds to this challenge by recommending that States adopt the broadest possible definitions of both the acts of domestic violence and the types of relationships that are covered, at least in part to ensure the international uniformity of these laws.²⁷⁶ The Framework recommends that legislation clearly state that violence against women both in the family and within interpersonal relationships constitutes domestic violence, and that the language be clear and unambiguous in protecting female victims from gender-specific violence within the family and intimate relationships. Moreover, domestic violence should be distinguished from intra-family violence.²⁷⁷

Item 1. “Domestic Violence”

Recommendations:

- **The legal definition of domestic violence should be as broad as possible, encompassing physical, psychological, economic, and social abuse.**
- **Attempted abuse should also be addressed.**
- **General “catchall” provisions may be useful to allow judicial discretion and provide protection for the largest pool of potential victims.**

“Domestic violence” can encompass many forms of violence – not just physical violence – as part of a pattern of abusive or controlling behavior by one person toward another. The U.N. Model Framework recommends that “all acts of gender-based physical, psychological and sexual abuse” that are “within interpersonal relationships should be included.”²⁷⁸ The Framework indicates that such violence includes each of the elements discussed below, as well as, *inter alia*, arson, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, and violence against household workers. The Framework also specifies that attempts to commit any of these acts should be covered.

While the statutes reviewed here are not as comprehensive as the Framework, they generally cover the most significant types of domestic violence:

Physical abuse. The definitions of domestic violence in all of the statutes reviewed include physical abuse. Ghana, Mauritius, South Africa and Zimbabwe each generally define physical abuse as physical assault or force used against another person.²⁷⁹ Namibia’s

²⁷⁶ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 3.

²⁷⁷ *Id.* ¶ 6. Intra-family violence is understood as any direct or indirect action or act of omission that causes injury, physical, sexual or psychological suffering, or death to a family member.

²⁷⁸ *Id.* ¶¶ 5, 11.

²⁷⁹ Domestic Violence Act (2003) § 1(b)(i) (Ghana); Protection from Domestic Violence Act, No. 6 (1997) § 2(a) (Mauritius); Domestic Violence Act 116 of 1998 § 1(xvi) (S. Afr.). *See also* Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(a)(i) (Namib.).

definition of physical abuse is somewhat broader, incorporating forcibly confining or detaining the complainant or physically depriving the complainant of access to basic necessities.²⁸⁰

Sexual abuse. The definitions of domestic violence in all of the statutes surveyed also include sexual abuse. Each country defines sexual abuse broadly to include any kind of sexual contact or conduct, but Mauritius' definition of sexual abuse extends to compelling the victim to commit any act, including non-sexual acts, from which the victim has the right to abstain.²⁸¹ Both Ghana and Mauritius focus on the requirement of some kind of force,²⁸² while South Africa and Zimbabwe focus on the effect of the conduct on the victim (as opposed to whether or not it was forceful).²⁸³ Namibia defines sexual abuse to include both forceful conduct and conduct that has the effects described above; it also broadens the definition of sexual abuse to include exposing the victim to sexual material that humiliates or degrades the victim, and to engaging in sexual conduct with a person with whom the victim has emotional ties.²⁸⁴

Emotional, verbal & psychological abuse. Ghana, Namibia, South Africa and Zimbabwe include emotional, verbal and psychological abuse in their definitions of domestic violence.²⁸⁵ Ghana defines such abuse as "any conduct that makes another person feel constantly unhappy, miserable, humiliated, ridiculed, afraid, jittery or depressed or to feel inadequate or worthless."²⁸⁶ Namibia's definition encompasses "any pattern of conduct which seriously degrades or humiliates the complainant, or a family member or dependent of the complainant, or deprives such person of privacy, liberty, integrity or security."²⁸⁷ South Africa and Zimbabwe both define such abuse in similar terms, but give a list of behaviors that would constitute emotional abuse, focusing on repetitive conduct. Such behaviors include repeated insults, repeated threats to cause emotional pain, or repeated exhibition of obsessive possessiveness or jealousy that constitutes a serious invasion of the complainant's privacy.²⁸⁸

Economic abuse & damage to property. Ghana, South Africa, Zimbabwe, and Namibia each include economic abuse in their definitions of domestic violence. All four provisions focus on economic deprivation of property to which the complainant is entitled by

²⁸⁰ Combating of Domestic Violence Act, No. 4 (2003) §§ 2(1)(a)(ii)-(iii) (Namib.). South Africa and Zimbabwe incorporate some form of the basic needs provision under a separate part of the definition of domestic violence (see economic abuse below). See *infra* note 293. Mauritius incorporates the forcible confinement provision. Protection from Domestic Violence Act, No. 6 (1997) § 2(e) (Mauritius).

²⁸¹ Protection from Domestic Violence Act, No. 6 (1997) § 2(d) (Mauritius).

²⁸² *Id.* ("compelling ... by force or threat"); Domestic Violence Act (2003) § 1(b)(ii) ("forceful engagement") (Ghana).

²⁸³ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.); See also Domestic Violence Act 116 of 1998 § 1(xxi) (S. Afr.) ("abuses, humiliates, degrades, or otherwise violates the sexual integrity").

²⁸⁴ Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(b) (Namib.).

²⁸⁵ Mauritius omits emotional abuse from its definition, but does include intimidation, as described below; this provision could be extended to cover at least some forms of emotional abuse.

²⁸⁶ Domestic Violence Act (2003) § 1(b)(iv) (Ghana).

²⁸⁷ Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(g) (Namib.).

²⁸⁸ Domestic Violence Act 116 of 1998 § 1(xi) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.).

law, and some include specific references to economic necessities.²⁸⁹ Some provisions explicitly include damage to property.²⁹⁰ Mauritius does not include economic abuse in its definition of domestic abuse, but addresses actual and attempted damage to property separately.²⁹¹

Intimidation & harassment. All of the legislation reviewed includes intimidation and harassment as “domestic violence”; while Ghana and Mauritius include them together,²⁹² Namibia, South Africa and Zimbabwe define the two terms separately.²⁹³ Where definitions of these terms are provided, “intimidation” is defined to mean threats that induce fear, whereas “harassment” is defined to cover repetitive patterns of conduct.

Stalking. South Africa and Zimbabwe both include “stalking” in their definitions of domestic abuse, defined as repeatedly following, pursuing or accosting the complainant.²⁹⁴

Threats & attempts. The reviewed statutes address threat and attempts of “domestic violence” in different ways. Namibia makes a blanket provision for “where applicable, threats or attempts to do any of the [defined] acts”²⁹⁵ By contrast, Mauritius specifically includes threats of all of the aforementioned forms of abuse,²⁹⁶ but includes attempts only in certain substantive provisions.

Patterns & isolated incidents. Namibia’s statute contains two provisions that recognize the unique nature of domestic violence.²⁹⁷ First, it allows that “any single act” can constitute “domestic violence”, with the exception of harassment and emotional, verbal or psychological abuse. Second, and perhaps more importantly, it notes that a “number of acts that form part of a pattern of behaviour may amount to domestic violence, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.” The Ghanaian law also deals explicitly with the pattern of abuse that characterizes domestic violence.²⁹⁸

Additional forms of abuse. Each statute surveyed also includes various provisions that appear to be singular when compared to other laws. For example, Mauritius specifically

²⁸⁹ Domestic Violence Act (2003) § 1(b)(iii) (Ghana); Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(c) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 1(ix) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.).

²⁹⁰ Domestic Violence Act (2003) § 1(b)(iii) (Ghana); Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(c)(iii) (Namib.).

²⁹¹ Protection from Domestic Violence Act, No. 6 (1997) § 2(g) (Mauritius).

²⁹² Domestic Violence Act (2003) § 1(c) (Ghana); Protection from Domestic Violence Act, No. 6 (1997) § 2(c) (Mauritius).

²⁹³ Combating of Domestic Violence Act, No. 4 (2003) §§ 2(1)(d), (e) (Namib.); Domestic Violence Act 116 of 1998 (1998) §§ 1(xii)-(xiii) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.).

²⁹⁴ Domestic Violence Act 116 of 1998 (1998) § 1(xxiii) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.). Ghana, Mauritius and Namibia do not include such a provision, although “stalking” may be covered under the provisions for intimidation and harassment discussed above.

²⁹⁵ Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(h) (Namib.).

²⁹⁶ Protection from Domestic Violence Act, No. 6 (1997) § 2(h) (Mauritius).

²⁹⁷ Combating of Domestic Violence Act, No. 4 (2003) §§ 2(3)-(4) (Namib.).

²⁹⁸ Domestic Violence Act (2003) § 4 (Ghana).

includes harming a child of the spouse.²⁹⁹ South Africa, among others, includes entry into the complainant's residence without consent (if the parties do not share that residence) as a form of abuse.³⁰⁰

South Africa appears to approach the seemingly limitless varieties of abuse by using a catchall provision that covers "any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant."³⁰¹ Other countries attempt an exhaustive catalogue. Zimbabwe, for example, includes deprivation of access to the complainant's place of residence or to a reasonable share of the use of the facilities associated with it, abuse derived from discriminatory cultural or customary rites and practices (such as virginity testing, genital mutilation, pledging women and girls for the purpose of appeasing spirits, abduction while married, forced marriage, and forced wife inheritance), and abuse perpetrated by virtue of the complainant's age, physical capacity or mental capacity if the perpetrator and complainant have some sort of legal status relationship.³⁰²

Item 2. "Domestic Relationship"

Recommendations:

- **National legislation should refer to "intimate partners" or use similar terminology that encompasses non-familial relationships.**
- **Same-sex relationships and romantic relationships outside of marriage should be explicitly included.**

Domestic violence occurs in many contexts, requiring a comprehensive definition of the relationship between abuser and victim. Many recent studies have used the term "intimate partners" to define the relevant relationship.³⁰³ Such a characterization removes the implied requirement that domestic violence be "of or relating to the household or the family,"³⁰⁴ and emphasizes the intimate nature of the relationship instead. In order to encompass the spectrum of human relationships in which there is potential for abuse, the U.N. Model Framework takes a different, "list-based" approach and recommends that domestic violence legislation include the

²⁹⁹ Protection from Domestic Violence Act, No. 6 (1997) § 2(f) (Mauritius).

³⁰⁰ Domestic Violence Act 116 of 1998 (1998) § 1(viii)(i) (S. Afr.). *See also* Combating of Domestic Violence Act, No. 4 (2003) § 2(1)(f) (Namib.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.).

³⁰¹ Domestic Violence Act 116 of 1998 (1998) § 1(viii)(j) (S. Afr.). *See also* Domestic Violence Act (2003) § 1(d) (Ghana).

³⁰² The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 3 (Zimb.).

³⁰³ *See, e.g.*, Center for Disease Control and Prevention, Intimate Partner Violence Surveillance: Uniform Definitions For Sexual Violence, (2006), available at http://www.cdc.gov/ncipc/pub-res/ipv_surveillance/intimate.htm; Callie Marie Rennison & Sarah Welchans, U. S. Dep't of Justice, *Special Report: Intimate Partner Violence* (2000) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf>; EG Krug et. al., World Health Organization, World Report on Violence and Health 5 (2002), available at http://www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf. In the World Health Report, intimate violence is specifically defined as violence within family or between intimate partners that takes place "usually, though not exclusively, taking place in the home."

³⁰⁴ Webster's New College Dictionary 337 (2d ed. 2001).

following types of relationships: wives, live-in partners, former wives or partners, girlfriends (including those not living with their boyfriends), female relatives (including sisters, daughters and mothers) and female household workers.³⁰⁵ Notably missing from the U.N. Model Framework is any explicit discussion of same-sex relationships, which should be a part of any domestic violence legislation.³⁰⁶

Marriage. Each of the statutes surveyed includes marriage in its definition of a domestic relationship; former spouses are also included in this definition.³⁰⁷ Namibia and South Africa further specify that the term “marriage” includes all marriage according to any law, custom or religion. Mauritius also specifies that the definition of marriage includes any civil or religious marriage.

Cohabitation. Each of the reviewed statutes includes some form of cohabitation in its definition of domestic relationship, with varying degrees of broadness. With respect to same-sex relationships, South Africa is the only country that explicitly states that they are covered.³⁰⁸ Ghana and Zimbabwe do not specify whether parties living together may include both same sex and opposite sex couples, although Zimbabwe’s definition includes “any person who is or has been living with the respondent.”³⁰⁹ Mauritius and Namibia explicitly exclude same-sex couples from their definitions.³¹⁰ Failure to include same-sex couples in these categories is problematic, especially since some recent studies indicate that domestic violence among same-sex cohabitants may occur at a higher rate than between heterosexual cohabitants.³¹¹

The countries surveyed also differ on whether the nature of the cohabitation must be romantic. Ghana’s definition specifically includes parties living together as a married couple, as co-tenants or in a domestic servant relationship. Mauritius limits its definition to a man and woman who are living or have lived together as husband and wife.³¹² South Africa, Zimbabwe and Namibia include (i) parties living together in a relationship in the nature of marriage although they are not married, and (ii) parties who share or have recently shared a residence, seemingly without regard to the nature of their relationship. Additionally, Namibia includes parties who have some connection of a domestic nature, such as if one party is financially dependent on the other.

³⁰⁵ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 7.

³⁰⁶ *Id.*

³⁰⁷ Domestic Violence Act (2003) § 2(1)(a) (Ghana); Protection from Domestic Violence Act, No. 6 (1997) § 2 (Mauritius); Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(a) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 1(vii)(a) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.).

³⁰⁸ Domestic Violence Act 116 of 1998 (1998) § 1(vii)(b) (S. Afr.).

³⁰⁹ Domestic Violence Act (2003) § 2(1)(b) (Ghana); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.).

³¹⁰ Protection from Domestic Violence Act, No. 6 (1997) § 2 (Mauritius); Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(b) (Namib.).

³¹¹ Tjaden et.al., *supra* note 265, at 30.

³¹² It is unclear whether this means they must actually be married, or must live together only in a relationship similar to that of a husband and wife. The former interpretation would make the provision superfluous, as parties who are or have been married are already covered.

Parties who have children together. Each of the statutes reviewed appears to have a provision covering parties who have a biological child together.³¹³ Namibia explicitly includes couples who have an adopted child and couples who are expecting a child, excluding children conceived as a result of rape or where parties contributed gametes for artificial insemination.³¹⁴ Zimbabwe does not have a provision that explicitly covers couples that have a child, but does include “any person who has or had an intimate relationship with respondent ... in a sexual or intimate relationship,” which would necessarily cover any couple with a biological child.³¹⁵

Family members. Although the U.N. Model Framework recommends that domestic violence should be considered separate from intra-family violence,³¹⁶ several countries have broadened their respective definitions to include children and other family members. Ghana, South Africa and Namibia each have a provision including family members in the definition of a domestic relationship, and Namibia has a separate provision including parties in a parent-child relationship.³¹⁷ Zimbabwe has a provision including parties in parent-child relationships.³¹⁸ Ghana’s provision simply includes “family members,” but gives no indication of how broadly this term is to be defined. South Africa limits its definition of family members to those related by consanguinity, affinity or adoption. Zimbabwe includes a biological, adopted or step child, born in and out of wedlock, but does not have a provision including other family members. Namibia’s definition of a family member includes parties who are related by sanguinity, affinity or adoption or who have such relationships through a foster relationship.

Other romantic relationships. Ghana, Namibia, South Africa, and Zimbabwe have also included a provision that covers romantic relationships other than marriage or cohabitation.³¹⁹ Each of these countries includes parties who are engaged or who are involved in an intimate or romantic relationship, and Ghana’s statute explicitly states that the relationship need not be sexual. Namibia and South Africa also specify that the relationship can be actual or perceived, and South Africa specifies that the relationship may be of any duration.

Other provisions. Distinct from the other reviewed statutes, Namibia’s definition of domestic relationship also includes a provision stating that any domestic relationship continues for two years after the dissolution of that relationship (dissolution of marriage or

³¹³ Domestic Violence Act (2003) § 2(1)(d) (Ghana); Protection from Domestic Violence Act, No. 6 (1997) § 2 (Mauritius); Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(c)-(d) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 1(vii)(c) (S. Afr.).

³¹⁴ Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(c) (Namib.).

³¹⁵ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.) (This provision would not cover adopted children, however.)

³¹⁶ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 6.

³¹⁷ Domestic Violence Act (2003) § 2(1)(e) (Ghana); Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(c)-(e) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 1(vii)(d) (S. Afr.). Mauritius does not have a provision including family members other than those previously discussed.

³¹⁸ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.).

³¹⁹ Domestic Violence Act (2003) § 2(1)(c) (Ghana); Combating of Domestic Violence Act, No. 4 (2003) § 3(1)(f) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 1(vii)(e) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 2 (Zimb.). Mauritius does not have a provision covering any of these other types of romantic relationships.

engagement, or cessation of cohabitation), unless a court rules that the two-year restriction should not apply or should be extended.³²⁰

2. Duties of Police & Enforcement Officers

Recommendations:

- **States should provide training to police and security forces to assist in recognizing patterns of behavior associated with domestic violence.**
- **Police should inform victims of their rights to protection under the law.**
- **Police should be required to take all necessary measures to protect the victim (i.e. arrange for transportation, assist in obtaining a protective order, etc.).**

Police officers face unique challenges responding to reports of domestic violence. On arriving at a scene, police often do not encounter an “ordinary” perpetrator/victim situation in which the aggressor is clear – it may look like “just a fight”. Indeed, some abusers may have been through a police call many times before, be skilled at deflecting attention, and may even be using the call to police to manipulate the abused. This problem is further complicated by the fact that the abused may not be forthright about what has happened. In fact, he or she may blame himself or herself about the altercation, and may question any decision to call the police.

These challenges require clear police procedures when responding to domestic violence calls. The U.N. Model Framework suggests that legislation require officers to respond to a call, *inter alia*, when the person reporting indicates violence is imminent, when a protective order is in effect and likely to be breached, or when domestic violence has occurred previously.³²¹ The Framework then describes the specific steps an investigation must take, including interviewing parties and witnesses in separate rooms, recording the complaint in detail, advising the victim of his or her rights, filling out a domestic violence report, providing transportation to the nearest hospital if required, providing transportation for the victim and any children to a safe place or shelter, providing protection to the person who reported the violence, and arranging for the removal of the offender from the home, as well as for his or her arrest if necessary.³²² The Framework is particularly detailed as to the police’s explanation of legal rights to the victim.³²³

³²⁰ Combating of Domestic Violence Act, No. 4 (2003) § 3(2)-(3) (Namib.);

³²¹ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 15.

³²² *Id.* ¶ 17.

³²³ “The officer must provide the victim with a written statement of the legal procedures available to her, in a language that she understands. The statement must indicate that:

- (i) The law provides that the victim may seek an *ex parte* restraining court order and/or a court order prohibiting further abuse against the victim, her dependants, anyone in her household or anyone from whom she requests assistance and refuge;
- (ii) The restraining order and/or court order shall protect the victim’s property or property held in common from destruction;
- (iii) The restraining order may order the offender to vacate the family home;
- (iv) In the event of the violence taking place during the night, at weekends or on public holidays, the victim must be informed of emergency relief measures to obtain a restraining order by calling the judge on duty;

The legislation reviewed generally makes special provision for the investigation of domestic violence calls, but addresses the investigative stages and police duties described by the U.N. Model Framework in somewhat less detail.³²⁴ The Mauritius statute requires that an officer who reasonably suspects domestic violence investigate the matter as soon as possible; and also requires that records of domestic violence reports be kept and investigations be made into the matters recorded there.³²⁵ If the officer “reasonably believes that action should be taken to protect the victim of an act of domestic violence from any further violence,” the officer must:

- (i) Explain to the victim his or her rights to protection against domestic violence;
- (ii) Provide or arrange transportation for the victim to an alternative residence or a safe place of shelter;
- (iii) Provide or arrange transportation for the victim to the nearest hospital or medical facility for the treatment of injuries;
- (iv) Assist the victim in filing a complaint regarding the domestic violence;
- (v) Accompany and assist the victim to his or her residence or previous residence for the collection of his or her personal belongings; and
- (vi) File for a protective order on behalf of the victim with his or her consent.

The South African legislation takes an even more general approach, requiring the police to attend “at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported”.³²⁶

- (i) Render such assistance to the victim as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
- (ii) If it is reasonably possible to do so, hand a notice containing information about his or her rights to the victim; and

-
- (v) The victim need not hire a lawyer to get an *ex parte* restraining order or court order;
 - (vi) The offices of the clerk of the court shall provide forms and non-legal assistance to persons seeking to proceed with *ex parte* restraining orders or court orders. To obtain a court order, the victim must be advised to apply to the court in the prescribed district/jurisdiction;
 - (vii) The police shall serve the *ex parte* restraining order on the offender.” The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 21(e).

³²⁴ Other countries make the task administrative. For example, the Namibian statute requires the Inspector-General to “issue directives on the duties of police officers in respect of matters pertaining to domestic violence” and provides general guidance as to the possible contents of such order. Combating of Domestic Violence Act, No. 4 (2003) § 26 (Namib.).

³²⁵ Protection from Domestic Violence Act, No. 6 (1997) § 11 (Mauritius).

³²⁶ Domestic Violence Act 116 of 1998 (1998) § 2 (S. Afr.).

- (iii) If it is reasonably possible to do so, explain to the victim the content of such notice, including the remedies at his or her disposal and the right to lodge a criminal complaint, if applicable.

Zimbabwe also imposes a general duty of assistance and advice (including advice as to the right to apply for a protective order and lodge a criminal complaint), and includes a term that provides “where a complainant so desires, the statement on the nature of domestic violence shall be taken by a police officer of the same sex as that of the complainant.”³²⁷

Both South Africa and Zimbabwe also allow officers to arrest, without a warrant, a person they reasonably suspect has committed or is threatening to commit an act of domestic violence, although the South African statute limits these arrests to the scene of the incident.³²⁸ The Zimbabwe statute also requires that all reasonable measures be taken to bring the suspected person before a magistrate within 48 hours.

3. Protective Orders

Recommendation:

- **Third parties should be able to bring a complaint of domestic violence.**
- **Complaints should be handled expeditiously, with the aid of measures such as after-hours filing locations.**
- **A “balance of the probabilities” standard for issuing a protective order should be used by the court.**
- **Both complainant and respondent should have the opportunity to apply for a change or termination of a protective order, subject to a requirement that such applications be deemed voluntary by the court.**

The protective order is the core of an immediate response to domestic violence in most jurisdictions. While the ultimate solution to an abusive relationship often lies in permanent measures (*i.e.*, divorce, separation, custody order, etc.), protective orders are the mechanism by which the State attempts to stop further abuse immediately. The protective order is usually an action brought by a private “complainant” to stop the abusive actions of the “respondent” abuser.³²⁹ In many jurisdictions, the complainant may obtain a temporary order *ex parte*, pending a full hearing at which the respondent is present. If a protective order is deemed appropriate after such a hearing, the judge may then craft an order to protect the complainant from the abuser, generally with significant flexibility as to the actual terms.

³²⁷ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 4 (Zimb.).

³²⁸ Domestic Violence Act 116 of 1998 (1998) § 3 (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 5 (Zimb.).

³²⁹ We note that this terminology differs across jurisdictions, but we use “complainant” and “respondent” for consistency. For similar reasons, the court official is termed a “judge”.

Item 1. Initiation

Who may bring a complaint. In all the legislation reviewed, any complainant who has been the victim of domestic violence may file a complaint seeking a protective order.³³⁰ Differences arise, however, as to when an order may be brought on behalf of another. Most legislation allows complaints to be brought by parties other than the complainant, sometimes with and sometimes without the victim's consent. Ghana, with perhaps the most lenient legislation, allows any person with information about domestic violence to file a complaint, seemingly with or without consent, and *requires* a social worker, probation officer or health care provider to file a complaint when doing so would be in the interest of a victim.³³¹ Ghana also allows family members to file a complaint when the complainant is unable to do so, and allows certain parties to file on behalf of a deceased representative. Namibia, South Africa, and Zimbabwe also make broad provision for complaints filed on behalf of another, albeit in more limited circumstances than Ghana. All allow any person, such as a family member, police officer, social worker, health care provider, teacher, religious leader or employer, to file a complaint with the complainant's consent.³³² In addition, South Africa allows any person to file a complaint without consent where the complainant is a minor, mentally retarded, unconscious, or someone who the court is satisfied cannot give consent. Namibia makes similar provisions, and also allows complaints filed on behalf of those regularly under drug or alcohol influence or at risk of serious physical harm. Perhaps the narrowest legislation is that of Mauritius, which allows a complaint to be filed only by the complainant herself or by an enforcement officer with the complainant's consent.³³³

The U.N. Model Framework also recommends that domestic violence legislation provide for victims, witnesses of domestic violence, family members, close associates, medical service providers, and domestic violence assistance centers to complain of incidents of domestic violence to the police, or to file a complaint in court.³³⁴ As noted above, most of the statutes surveyed allow the victims, as well as family members or close associates to file complaints regarding domestic violence. However, none of the laws considered explicitly allows complaints to be filed by domestic violence assistance centers; and the consent requirements imposed by the reviewed statutes may significantly limit the protective orders that may have otherwise been sought. In addition, the U.N. Model Framework suggests that victims be allowed to file

³³⁰ Mauritius limits this to complainants who reasonably believe their spouses are likely to commit further acts of domestic violence. Protection from Domestic Violence Act, No. 6 (1997) § 3(1) (Mauritius). South Africa and Namibia specify that a minor is able to apply without the assistance of a parent, although Namibia limits this to situations in which the court is satisfied that the minor has sufficient understanding and when the alleged violence is of a serious nature. Combating of Domestic Violence Act, No. 4 (2003) § 4(5) (Namib.); Domestic Violence Act 116 of 1998 (1998) § 4(4) (S. Afr.).

³³¹ Domestic Violence Act (2003) § 5 (Ghana).

³³² Combating of Domestic Violence Act, No. 4 (2003) § 4 (Namib.); Domestic Violence Act 116 of 1998 (1998) § 4 (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6 (Zimb.). In addition to allowing the complainant or a person with her consent to file, Zimbabwe also allows a person acting as the complainant's representative, a person with care or custody of a minor complainant, or, with the court's consent, a person acting as the complainant's representative in his or her official capacity to file without the consent of the complainant.

³³³ Protection from Domestic Violence Act, No. 6 (1997) §§ 3(1), 11(4) (Mauritius).

³³⁴ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶12. *Cf. Id.* ¶ 33 (The same document, however, allows that the ambit may be narrower).

complaints with a private health care facility, which can then direct them to the police or a judicial division. In recognition of the intimidation that often affects victims of domestic violence, this Report concurs with the U.N. Model Framework and recommends that national legislation enable third parties to act on the victim's behalf to ensure the most comprehensive prosecution of these crimes.

When a complaint may be brought. Although all of the legislation reviewed allows a complaint to be brought at any time, Mauritius limits complaints to situations where the complainant reasonably believes that his or her spouse is likely to commit a further act of domestic violence.³³⁵ South Africa and Zimbabwe extend the times when a complaint may be brought to allow filings outside of normal court days and hours where the court is satisfied that the complainant may otherwise suffer undue hardship.³³⁶

Where a complaint may be brought. With the exception of Ghana and Namibia, none of the laws reviewed explicitly places limits on where a complaint may be filed, but it is possible that jurisdictional rules in these countries may serve as a limitation. Ghana specifically limits where a complaint may be filed to the places where the offender resides, where the victim resides, where the domestic violence occurred, or where the victim is temporarily resident.³³⁷ Namibia has a similar requirement, but notes that “no minimum period of residence is required.”³³⁸

What must be included in a complaint. Of the reviewed legislation, only Namibia's statute incorporates a detailed list of what a complainant should include in a complaint, requiring that it be accompanied by an affidavit that states the facts on which the application is based, the nature of the order applied for, and the police station where any breach of the protective order is likely to be reported.³³⁹ Both Namibia and South Africa allow supporting affidavits from people with knowledge of the matter, while Zimbabwe *requires* such affidavits.³⁴⁰ In addition, Zimbabwe allows courts to call for evidence, including medical evidence, and to examine witnesses before the court to supplement the information included in the complaint.³⁴¹

Duties of the clerk receiving a complaint. Several of the statutes reviewed impose certain duties on the court or officers of the court when complaints are filed. In Namibia, South Africa and Zimbabwe the court clerk must inform the complainant of certain specified information. In Namibia, the clerk must inform the complainant of the relief available and must assist in preparing the application.³⁴² In South Africa, the clerk must inform the complainant of the relief available and the right to lodge an additional criminal complaint, but must do so only if

³³⁵ Protection from Domestic Violence Act, No. 6 (1997) § 3(1) (Mauritius).

³³⁶ Domestic Violence Act 116 of 1998 (1998) § 4(5) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6(6) (Zimb.).

³³⁷ Domestic Violence Act (2003) § 5(6) (Ghana).

³³⁸ Combating of Domestic Violence Act, No. 4 (2003) § 5 (Namib.).

³³⁹ *Id.* § 6(2).

³⁴⁰ *Compare* Domestic Violence Act 116 of 1998 (1998) § 4(6) (S. Afr.) *to* The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6(3) (Zimb.).

³⁴¹ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6(7) (Zimb.).

³⁴² Combating of Domestic Violence Act, No. 4 (2003) § 6(4) (Namib.).

the complainant is not represented by legal counsel.³⁴³ In Namibia and Zimbabwe, the clerk is statutorily required to submit the claim to the court as quickly as is reasonably possible; Zimbabwe further requires that the claim be filed within 48 hours.³⁴⁴

Item 2. Interim Procedures & Orders

Because a domestic abuse situation often threatens continued violence, many jurisdictions allow a victim to seek an *ex parte* order pending a hearing for a full protective order.³⁴⁵ In addition, “[a]n *ex parte* order may be issued on the application of a victim of violence in circumstances where the [respondent] chooses not to appear in court or cannot be summoned because he is in hiding. An *ex parte* order may contain a preliminary injunction against further violence and/or preventing the [respondent] from disturbing the victim/plaintiff’s use of essential property, including the common home.”³⁴⁶

When an interim order may be issued. In South Africa and Zimbabwe, a court determining whether to issue a protective order considers both whether the respondent has committed or is committing an act of domestic violence and whether undue hardship will be suffered if a protection order is not issued immediately.³⁴⁷ Courts in Zimbabwe are also instructed to consider whether the respondent has threatened to commit an act of domestic violence. In these two countries, if the court finds prima facie evidence of each element, the court is *required* to issue an interim order. By contrast, in Mauritius the court need only satisfy itself that there is a serious risk of harm being caused to the applicant before the application may be heard, and need not necessarily find that domestic violence has been or is occurring.³⁴⁸ However, if a court in Mauritius finds that there is a serious risk of harm occurring the court *may* issue a protective order and provide the complainant with police protection; but is not required to do so. Under the Namibian statute, the court *must* issue an order “if it is satisfied that there is evidence that the respondent is committing, or has committed domestic violence.”³⁴⁹ This Report recommends that legislation require the automatic issuance of an interim order upon the satisfaction of a baseline evidentiary standard.

Procedural protection for the respondent. All of the reviewed statutes provide that notice must be given summoning the respondent to appear before the court on a fixed date

³⁴³ Domestic Violence Act 116 of 1998 (1998) § 4(2) (S. Afr.). *See also* The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6(4) (Zimb.) (if legal counsel does not represent the complainant, charging the clerk to inform the complainant of the relief available, the effect of any order that may be granted and the means provided for enforcement, the right to lodge a criminal complaint, and the right to compensation for any loss or injury suffered).

³⁴⁴ Combating of Domestic Violence Act, No. 4 (2003) § 6(6) (Namib.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 6(5) (Zimb.).

³⁴⁵ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 28.

³⁴⁶ *Id.* ¶ 26.

³⁴⁷ Domestic Violence Act 116 of 1998 (1998) § 5(2) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 8(1) (Zimb.).

³⁴⁸ Protection from Domestic Violence Act, No. 6 (1997) § 3(8) (Mauritius).

³⁴⁹ Combating of Domestic Violence Act, No. 4 (2003) § 7(1) (Namib.).

for a hearing on whether a protective order should be issued or whether the interim order should be varied or discharged.³⁵⁰

When the order is in force. In Mauritius and Zimbabwe, the domestic violence statutes specify that the interim order remains in force until the court makes a decision to grant the protective order or revokes the interim order.³⁵¹ The South African statute does not specify how long an interim order remains in force, but does state that an interim order does not enter into force until notice of the order is served on the respondent as described above.³⁵²

Item 3. Order Procedures

(a) *Conversion of Interim Orders*

South Africa and Zimbabwe each provide a court with the ability to convert an interim order into a permanent order in particular circumstances, despite the fact that the respondent is not present.³⁵³ In South Africa the court must be satisfied that proper service has been effected, while in Zimbabwe the court need only be sure that the defendant has been served or has otherwise had notice of the application. Likewise, in Namibia, the court *must* confirm the interim protective order if the respondent was served and does not appear.³⁵⁴ In South Africa the court must, in addition, be satisfied that the application contains prima facie evidence that the respondent has committed or is committing an act of domestic violence.

(b) *Evidentiary Considerations & Standards*

The establishment of reasonable evidentiary standards is an important consideration when drafting and enforcing domestic violence legislation. Protective orders restrict an abuser's freedom of movement, often removing him from his home and/or limiting contact with his children. Such remedies should not be imposed by a protective order without appropriate evidence.

Standard for granting a protective order. In South Africa and Zimbabwe, the court must satisfy itself that, on a balance of probabilities, the respondent has committed or is committing an act of domestic violence.³⁵⁵ If the court finds that this standard is met, a South African court is *required* to issue a protective order, while a Zimbabwean court *may* choose to do so. In Namibia, the court need only be satisfied that there is "evidence that the respondent is committing, or has committed domestic violence".³⁵⁶

³⁵⁰ See, e.g., Domestic Violence Act (2003) § 13(4) (Ghana).

³⁵¹ Protection from Domestic Violence Act, No. 6 (1997) § 3(10) (Mauritius); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 8(8) (Zimb.). In Zimbabwe, whenever an interim protection order is issued the court is also required to issue an arrest warrant, which is attached to the order and suspended on the condition that the respondent complies.

³⁵² Domestic Violence Act 116 of 1998 (1998) § 5(6) (S. Afr.).

³⁵³ *Id.* § 6(1); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 9(2) (Zimb.).

³⁵⁴ Combating of Domestic Violence Act, No. 4 (2003) § 10 (Namib.).

³⁵⁵ Domestic Violence Act 116 of 1998 (1998) § 6(4) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 9(1) (Zimb.).

³⁵⁶ Combating of Domestic Violence Act, No. 4 (2003) § 7(1) (Namib.).

What the court considers when granting a protective order. In listing evidence the court may or must consider in deciding whether to grant a protective order, the reviewed statutes vary both with respect to specificity and to whether the court is required to consider it. Namibia and Mauritius provide very specific lists of things that courts are required to consider in deciding whether or not to grant an order.³⁵⁷ In Namibia, courts *must* consider the history of domestic violence between the parties, its nature, the existence of immediate danger to persons or property, the complainant’s perception of the seriousness of the respondent’s behavior, and the need to preserve the health, safety and well-being of the complainant and any child or person in his or her care. Under Mauritius’s statute, courts *must* consider the need to ensure protection for the complainant, the welfare of any child affected or likely to be affected, the accommodation needs of both the complainant and respondent and their respective children, any hardship the order may cause to the respondent or his children, and any other matter the court deems relevant.

South Africa and Zimbabwe, on the other hand, give courts much broader discretion in determining what evidence to consider.³⁵⁸ In South Africa the court must consider any evidence offered to support an application for an interim protective order, while courts in Zimbabwe may choose to consider this evidence. In both jurisdictions, courts may call for and consider further affidavits or oral evidence as they feel necessary.

Duration of protective order. There is also considerable variety in how long a protective order can last. South Africa specifies that a protective order remains in force until set aside, and is not automatically suspended upon the noting of an appeal.³⁵⁹ Namibia varies the duration of the protective order depending on its content.³⁶⁰ In Mauritius, a protective order may endure a maximum of 24 months.³⁶¹

(c) *Procedural Protections*

A protective order hearing requires certain procedural protections to ensure that the cycle of violence outside the courtroom does not find its way inside. In addition, as with other forms of gender-based violence, protecting the identity of the complainant is necessary both to encourage complainants to come forward and to protect them from further violence.

Closed hearings. In Ghana, protective order proceedings “shall be heard in private in the presence of the parties, their lawyers and any other person permitted by the court to be present.”³⁶² The South African statute lists the specific parties who may be present at a protective order hearing: officers of the court, the parties, any person bringing an application for an order on behalf of another, legal representatives, witnesses, up to three persons “for the purpose of providing support” for each party, and “any other person whom the court permits to

³⁵⁷ Protection from Domestic Violence Act, No. 6 (1997) § 3(4) (Maurit); Combating of Domestic Violence Act, No. 4 (2003) § 7(4) (Namib.).

³⁵⁸ Domestic Violence Act 116 of 1998 (1998) § 6(2) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 9(4) (Zimb.).

³⁵⁹ Domestic Violence Act 116 of 1998 (1998) § 6(7) (S. Afr.).

³⁶⁰ Combating of Domestic Violence Act, No. 4 (2003) § 15 (Namib.).

³⁶¹ Protection from Domestic Violence Act, No. 6 (1997) § 3(6) (Mauritius).

³⁶² Domestic Violence Act (2003) § 12(1) (Ghana).

be present”.³⁶³ Mauritius provides that any hearings for a protective order must be held *in camera* subject to certain constitutional protections.³⁶⁴

Most of the reviewed statutes also allow a court to exclude certain persons it deems to be a problem in the proceedings – even if such persons are ordinarily allowed in proceedings. In South Africa, “the court may, if it is satisfied that it is in the interests of justice, exclude any person from attending any part of the proceedings” and retains other powers “to hear proceedings *in camera* or to exclude any person from attending such proceedings.”³⁶⁵

Publication. In Ghana, “a person shall not publish any report of the [protective order] proceedings.”³⁶⁶ Namibia prohibits such information “which reveals or might reveal the identity of an applicant, a complainant or any child or other person involved in [protective order] proceedings.”³⁶⁷ While the law in South Africa contains a similar injunction, it also allows a court “if it is satisfied that it is in the interests of justice” to “direct that any further information relating to proceedings ... shall not be published.”³⁶⁸ Namibia and South Africa both require the physical address of the complainant to be omitted from the protective order.

(d) *Prejudice in Other Proceedings*

Another procedural concern in the context of the protective order is the possible prejudice such a proceeding might create in another action. While the issue will be more or less urgent depending on the legal system, most common law legislation provides that a protective order will not have any bearing on concurrent civil or criminal action. For example, the South African statute provides that a court may not refuse to issue a protective order or impose conditions on such an order “merely on the grounds that other legal remedies are available to the complainant.”³⁶⁹ Ghana provides that “a criminal charge arising from the acts of domestic violence shall be in addition to and shall not affect the rights of [a complainant] to seek a protection order Any [protective order] proceedings ... shall be in addition and shall not derogate from the right of a person to institute civil action for damages.”³⁷⁰

³⁶³ Domestic Violence Act 116 of 1998 (1998) § 11(1) (S. Afr.).

³⁶⁴ Protection from Domestic Violence Act, No. 6 (1997) § 9 (Mauritius).

³⁶⁵ Domestic Violence Act 116 of 1998 (1998) § 11(1) (S. Afr.).

³⁶⁶ Domestic Violence Act (2003) §§ 24(1)-(2) (Ghana).

³⁶⁷ Combating of Domestic Violence Act, No. 4 (2003) § 30 (Namib.).

³⁶⁸ Domestic Violence Act 116 of 1998 (1998) § 11(2) (S. Afr.).

³⁶⁹ *Id.* § 7(7).

³⁷⁰ Domestic Violence Act (2003) §§ 25-26 (Ghana).

Item 4. Order Contents

The contents of an issued protective order depend on all the facts and circumstances of the abusive situation; and legislation should allow the judge issuing the order to tailor the order accordingly. Relief often extends beyond enjoining the respondent from further abuse of the complainant; for example, an order ejecting the respondent from a shared residence or granting custody of children to the complainant may be appropriate. Such flexibility is essential if an order is to adequately protect complainants in vastly different abusive situations.

Generally, protective order contents may be divided into: (i) “substantive” relief that prohibits the respondent from certain actions or grants the complainant certain rights; and (ii) “procedural” relief that links the protective order to further civil or criminal proceedings. As to the first, the U.N. Model Framework proposes that a protective order may contain “any or all” of nine separate forms of immediate substantive relief:³⁷¹

- (i) Restrain the respondent from causing further violence to the victim/plaintiff, his or her dependents, other relatives and persons who give him or her assistance from domestic abuse;
- (ii) Instruct the respondent to vacate the family home, without in any way ruling on the ownership of such property;
- (iii) Instruct the respondent to continue to pay the rent or mortgage and to pay maintenance to the plaintiff and their common dependents;
- (iv) Instruct the respondent to hand over the use of an automobile and/or other essential personal effects to the plaintiff;
- (v) Regulate the respondent’s access to dependent children;
- (vi) Restrain the respondent from contacting the plaintiff at work or other places frequented by the plaintiff;
- (vii) Upon finding that the respondent’s use or possession of a weapon may pose a serious threat of harm to the complainant, prohibit the respondent from purchasing, using or possessing a firearm or any such weapon specified by the court;
- (viii) Instruct the respondent to pay the complainant’s medical bills, counseling fees or shelter fees; and
- (ix) Prohibit the unilateral disposition of joint assets.

Most African domestic violence legislation includes substantially similar relief.

³⁷¹ The U.N. Special Rapporteur on Violence Against Women , *supra* note 266, ¶¶ 38(a)-(i).

Protection from further violence. All the reviewed legislation restrains the respondent (or associates) from committing further acts of violence, usually through a general prohibition on further domestic violence by the respondent. South African orders may prohibit the respondent from “committing any act of domestic violence [or] enlisting the help of another person to commit any such act”.³⁷² Zimbabwean, Mauritian, and Ghanaian orders contain similar provisions.³⁷³ Namibian orders *must* “include a provision restraining the respondent from subjecting the complainant to domestic violence.”³⁷⁴ Consistent with the U.N. Model Framework, some legislation also makes provision for seizing firearms or other dangerous weapons as needed to prevent further violence.³⁷⁵

Certain legislation also explicitly prohibits the respondent from damaging the complainant’s property. Ghana’s law is perhaps the broadest, allowing a protective order, *inter alia*, to prevent a respondent from “disposing of or threatening to dispose of moveable or immovable property”, “destroying or damaging, or threatening to destroy or damage”, or “hiding or hindering the use of property” in which the complainant has a material interest.³⁷⁶

No-contact provisions. Each of the reviewed legislative provisions contains “no contact” provisions designed to keep the respondent away from the complainant, primarily through prohibiting the respondent from entering certain locations. Some legislation enhances the location-based prohibitions by allowing a judge to enjoin the respondent from certain communications with the complainant. The Namibian legislation demonstrates a broad implementation of “no contact” rules; under its terms, a protective order may:

- (i) forbid the respondent to be, except under conditions specified in the order, at or near specified places frequented by the complainant or by any child or other person in the care of the complainant, including but not limited to:
 - (aa) the residence, workplace or educational institution of the complainant, or any child or other person in the care of the complainant;

³⁷² Domestic Violence Act 116 of 1998 (1998) §§ 7(1)(a)-(b) (S. Afr.).

³⁷³ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 10(1)(a) (Zimb.); Protection from Domestic Violence Act, No. 6 (1997) § 3(1) (Mauritius); Domestic Violence Act (2003) § 14(1) (Ghana). The Ghanaian legislation makes further provision for specific prohibitions against “physically assaulting or using physical force against the applicant or any relation or friend of the applicant” or “forcibly confining or detaining the applicant or any relation or friend of the applicant,” as well as other prohibitions against forcible, abusive, humiliating, or degrading sexual contact with the complainant and against depriving the complainant of certain economic necessities. *Id.* §§ 14(2)(a)-(f).

³⁷⁴ Combating of Domestic Violence Act, No. 4 (2003) § 14(1) (Namib.).

³⁷⁵ *See, e.g.*, Domestic Violence Act 116 of 1998 (1998) § 7(2)(a) (S. Afr.); Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(a) (Namib.).

³⁷⁶ Domestic Violence Act (2003) §§ 14(2)(i)-(k) (Ghana). *See also* Protection from Domestic Violence Act, No. 6 (1997) § 3(5)(e) (Mauritius); Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(g) (Namib.). While the South African and Zimbabwean laws do not contain such explicit terms, the general provisions discussed below, together with the broad definitions of “domestic violence” mean that an order could probably contain such items.

- (bb) a shelter or other residence where the complainant is temporarily living; or
 - (cc) the residences of specified family members;
- (ii) forbid the respondent from making, except under conditions specified in the order, any communication to the complainant, any child or other person in the care of the complainant or specified members of the complainant’s family, including direct or indirect personal, written, telephonic or electronic contact, but a “no-contact” provision may be extended to a person other than the complainant or any child or other person in the care of the complainant, only where consent has been given by that person, and in the case of any other child, only where consent has been given by a parent of that child or by a person under whose care that child is.³⁷⁷

Similarly, other legislation contains provisions that focus on prohibiting the respondent from locations the complainant (i) resides at, (ii) works at, and (iii) frequents.³⁷⁸ Notably, most laws enable a protective order to eject the respondent from a shared residence, but require him or her to continue paying rent or making mortgage payments as economic means permit.³⁷⁹ While only the Ghanaian and Mauritian legislation contain explicit terms allowing a protective order to prohibit communications as in the Namibian legislation,³⁸⁰ the general provisions of the Zimbabwean and South African legislation discussed below could allow orders in these countries to contain similar terms.

Temporary custody of children. Most of the legislation reviewed allows the protective order to prohibit contact between the respondent and any children, effectively awarding temporary custody to the complainant. For example, in South Africa, if the court is satisfied that it is in the best interests of any child it may “refuse the respondent contact with

³⁷⁷ Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(b) (Namib.).

³⁷⁸ Domestic Violence Act 116 of 1998 (1998) §§ 7(1)(c)-(g) (S. Afr.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) §§ 10(1)(b)-(c) (Zimb.); Protection from Domestic Violence Act, No. 6 (1997) §§ 3(5)(a)-(c), (g) (Zimb.); Domestic Violence Act (2003) §§ 14(2)(n), (p) (Ghana). In addition to protective orders, Mauritian law provides for separate “occupation orders” and “tenancy orders” in instances where “[a]ny spouse who has been the victim of an act of domestic violence and who reasonably believes that his spouse is likely to commit any further act of domestic violence against him” seeks exclusive use of a residence. Procedurally, these orders are similar to protective orders – including allowing the court to issue interim orders – but relief is limited, in the case of an occupation order, to “exclusive right to live in the residence belonging to him”, or, in the case of a tenancy order, to vesting of “tenancy of the residence occupied by [the complainant].” See Protection from Domestic Violence Act, No. 6 (1997) §§ 4-8 (Mauritius).

³⁷⁹ See, e.g., Domestic Violence Act 116 of 1998 (1998) § 7(3) (S. Afr.). (“[T]he court may impose on the respondent obligations as to the discharge of rent or mortgage payments having regard to the financial needs and resources of the complainant and the respondent.”) See also Domestic Violence Act (2003) § 16(1)(c) (Ghana) (A protection order may “direct the respondent to relocate and continue to pay any rent, mortgage payment and maintenance to the applicant.”); Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(d) (Namib.).

³⁸⁰ Protection from Domestic Violence Act, No. 6 (1997) § 3(5)(d) (Mauritius); Domestic Violence Act (2003) §§ 14(2)(g)-(h), (l)-(m) (Ghana).

such child” or “order contact with such child on such conditions as it may consider appropriate.”³⁸¹ Zimbabwe and Namibia have similar legislation, but without the explicit prerequisite “best interests” determination.³⁸² Generally, such provisions are limited until the court issuing the order or another tribunal makes a more enduring order.³⁸³ Indeed, the Ghanaian legislation provides that “[w]here there is a need for special protection for a child”, a court may refer temporary custody matters to a Family Tribunal constituted under the 1998 Children’s Act.³⁸⁴

Emergency economic relief. In most domestic violence situations, the female victim is dependent upon the male abuser for food, shelter, and the provision of goods for the family. Therefore, domestic violence legislation should provide for emergency economic relief in some form. In South Africa, the court may order the respondent “to pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent”.³⁸⁵ In Zimbabwe, an order may be made “in respect of the complainant's needs or that of any child or dependent of the respondent including household necessities, medical expenses, school fees or mortgage bond or rent payment”.³⁸⁶ Ghanaian law allows a court to order the respondent to “relinquish property” to the complainant or “pay for medical expenses incurred by the [complainant] as a result of the domestic violence”.³⁸⁷ In Namibia, a court may order numerous forms of relief, including maintenance for dependents and the disposal of personal property.³⁸⁸ As noted above, under most legislation an order can include provisions requiring the respondent to continue rent or mortgage payments on a residence, even if the order prohibits the respondent from living there.³⁸⁹

Additional powers of the court. Almost all of the legislation contains a general term allowing a court to include in a protective order other terms as it sees fit. For example, an order in Zimbabwe can “[g]enerally direct the respondent to do or omit to do any act or thing which the court considers necessary or desirable for the well being of the complainant or any child or dependent of the complainant.”³⁹⁰ South African, Namibian, and Ghanaian legislation make similar provisions.³⁹¹

³⁸¹ Domestic Violence Act 116 of 1998 (1998) § 7(6) (S. Afr.).

³⁸² The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 10(1)(e) (Zimb.); Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(j) (Namib.).

³⁸³ See, e.g., Combating of Domestic Violence Act, No. 4 (2003) § 15(d) (Namib.); The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 10(3) (Zimb.).

³⁸⁴ Domestic Violence Act (2003) § 17 (Ghana).

³⁸⁵ Domestic Violence Act 116 of 1998 (1998) § 7(4) (S. Afr.).

³⁸⁶ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 10(1)(d) (Zimb.). “Any direction to pay emergency monetary relief ... shall remain in force for such period not exceeding six months as the court may specify unless prior to the expiry of that period the award is revoked or extended by the court ...” *Id.* § 10(3).

³⁸⁷ Domestic Violence Act (2003) §§ 16(d)-(e) (Ghana).

³⁸⁸ Combating of Domestic Violence Act, No. 4 (2003) §§ 14(2)(f), (h) (Namib.).

³⁸⁹ Domestic Violence Act 116 of 1998 § 7(4) (S. Afr.).

³⁹⁰ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 10(1)(g) (Zimb.).

³⁹¹ Domestic Violence Act 116 of 1998 (1998) §§ 7(1)(h) & (2) (S. Afr.); Combating of Domestic Violence Act, No. 4 (2003) § 14(2)(k) (Namib.); Domestic Violence Act (2003) §§ 14(2)(q), 16(2) (Ghana).

In addition to this “substantive” relief, the U.N. Model Framework recommends that a protective order provide certain “procedural” relief that links the order to further civil or criminal proceedings. In particular, the Framework suggests the order may:

- (i) Inform the complainant and the respondent that, if the respondent violates the restraining order, he or she may be arrested with or without a warrant and criminal charges brought against him or her;
- (ii) Inform the complainant that, notwithstanding the protective order under domestic violence legislation, he or she can request the prosecutor to file a criminal complaint against the respondent; and
- (iii) Inform the complainant that, notwithstanding the protective order under domestic violence legislation, he or she can activate the civil process and sue for divorce, separation, damages or compensation.³⁹²

The legislation reviewed is less consistent in explicitly addressing such relief, but in many cases it could be deemed within the court’s ordinary discretion.

Item 5. Order Termination

This Report recommends that legislation grant some recourse to a respondent against whom a protective order has been issued. In fact, the majority of the legislation surveyed mirrors that of Mauritius, which states that “either party may apply to the court for a variation or revocation” of a protective order.³⁹³ Due to the nature of abusive relationships, there is always some concern that a complainant seeking a variation or revocation may not be acting freely. Some of the reviewed statutes account for this concern by making a proviso “that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.”³⁹⁴

4. Penalties

Recommendations:

- **National legislation should mandate that crimes committed in the context of domestic violence or in violation of a protective order be prosecuted to the full extent of the law.**
- **Domestic violence statutes should clearly provide for civil remedies without significant limitations on the types of damages that can be awarded.**

Item 1. Violation of Protective Order

³⁹² The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶¶ 38(j)-(l).

³⁹³ Protection from Domestic Violence Act, No. 6 (1997) § 3(7) (Mauritius).

³⁹⁴ Domestic Violence Act 116 of 1998 (1998) § 10 (S. Afr.).

“Violation of a protection order is a crime. Non-compliance shall result in a fine, contempt of court proceedings and imprisonment.”³⁹⁵ The reviewed statutes universally subscribe to this recommendation of the U.N. Model Framework. For example, in Mauritius, any person “who willfully fails to comply with any interim or permanent [protective order] shall, on conviction, be liable to a fine not exceeding 25,000 rupees and imprisonment for a period not exceeding 2 years.”³⁹⁶ In Zimbabwe, any person “who fails to comply with the terms and conditions of an interim protection order or a protection order shall be guilty of an offence and liable to a fine ... or imprisonment for a period not exceeding five years or both such fine and such imprisonment.”³⁹⁷ The Zimbabwean statute also considers it “an aggravating factor for any person to continuously breach a valid protection order whether or not such person has been prosecuted under the protection order.”³⁹⁸

The practical enforcement of a protective order is heavily dependent on the nature of the national legal system. However, the South African statute is illustrative of one approach that enables automatic enforcement of protective orders by providing for “hanging” arrest warrants when such an order is issued. Upon issuing a protective order, the South African court *must* make another order:

- (i) Authorizing the issue of a warrant for the arrest of the respondent; and
- (ii) Suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order of the protective order.³⁹⁹

If there is a violation of the protective order, the complainant may hand the warrant of arrest together with an affidavit stating that the respondent contravened a prohibition, condition, obligation or order contained in the protective order, to any member of the South African Police Service.⁴⁰⁰ The member of the police service then “must forthwith”:

- (i) Arrest the respondent if it appears that there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent by reference to:
 - (a) The risk to the safety, health or wellbeing of the complainant;
 - (b) The seriousness of the conduct comprising an alleged breach of the protective order; and
 - (c) The length of time since the alleged breach occurred.

³⁹⁵ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 41.

³⁹⁶ Protection from Domestic Violence Act, No. 6 (1997) § 13 (Mauritius). The fine was increased from 10,000 rupees in the 2004 amendment.

³⁹⁷ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 16 (Zimb.). *See also* Combating of Domestic Violence Act, No. 4 (2003) § 16 (Namib.).

³⁹⁸ The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 16 (Zimb.).

³⁹⁹ Domestic Violence Act 116 of 1998 (1998) § 8(1) (S. Afr.).

⁴⁰⁰ *Id.* § 8(4)(a).

- (ii) If he or she is of the opinion that there are insufficient grounds for arresting the respondent immediately under (i), hand a written notice to the respondent calling the respondent to appear in court,
- (iii) In any case, inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

South Africa’s legislation also contains a section providing that “[n]o prosecutor shall refuse to institute a prosecution [or] withdraw a charge, in respect of a [violation of a protective order].”⁴⁰¹ Like provisions requiring the police to respond to domestic violence calls, this language appears to be aimed at encouraging prosecutors to treat domestic abuse with a seriousness comparable to crimes like rape by a stranger.

Item 2. Separate Criminal Action

While criminal action may be taken to enforce a protective order, it is important that legislation also reinforce the essentially criminal nature of most domestic abuse. Accordingly, while specific domestic violence legislation centers on the issuance of protective orders and other civil remedies, these solutions cannot substitute for State action. The only reviewed statute that appears to explicitly state that an act of domestic violence is also a criminal offense is Zimbabwe’s. That legislation provides that where an “act of domestic violence constitutes a criminal offence, the respondent shall be dealt with under the relevant law providing for such criminal offence.”⁴⁰²

The U.N. Model Framework provides considerably more detail, stating, *inter alia*, that the “prosecuting attorney or attorney-general shall develop, adopt and put into effect written procedures for officials prosecuting crimes of domestic violence.”⁴⁰³ The Framework also recommends several safeguards in proceedings comparable to those recommended for rape and sexual assault trials. For example, it suggests “the victim’s testimony shall be sufficient for prosecution” and that a complaint shall not be dismissed “solely on the grounds of uncorroborated evidence.”⁴⁰⁴ Nor should the “issue of a restraining order or protection order ... be introduced as a material fact in subsequent criminal proceedings.”⁴⁰⁵ Moreover, “[e]nhanced penalties are recommended in cases of domestic violence involving repeat offences, aggravated assault and the use of weapons.”⁴⁰⁶

Item 3. Separate Civil Action

In addition to the emergency monetary relief that may be provided by a protective order, some domestic violence statutes provide a cause of action for civil damages to the victims of domestic violence. For example, under Section 26 of the Ghanaian Domestic Violence Act:

⁴⁰¹ *Id.* § 18(1).

⁴⁰² The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 16 (Zimb.).

⁴⁰³ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 44.

⁴⁰⁴ *Id.* ¶ 47.

⁴⁰⁵ *Id.* ¶ 50.

⁴⁰⁶ *Id.* ¶ 53.

any proceedings under this Act shall be in addition and shall not derogate from the right of a person to institute civil action for damages.⁴⁰⁷

Other reviewed statutes do not provide an explicit civil cause of action for damages, but the statutes do not preclude such an action. We believe that legislatures can best serve the interests of the abused by providing an explicit civil cause of action that is clear and not open to an interpretation that the protective order precludes such action. This Report recommends that:

- The statute should clearly and unambiguously provide civil remedies for victims.
- The statute should be explicit as to the types of damages a victim can seek (e.g., pain and suffering, compensation, etc.). The list should not be exhaustive, but function as a starting point permitting judges to provide for additional types of damages.

B. General Considerations & Good Practices

Recommendations:

- **Victims of domestic violence should be permitted and encouraged to seek redress based upon general concepts of constitutional and human rights.**
- **Rehabilitation and behavior modification initiatives should be incorporated into treatment programs for abusers, but should not substitute for criminal penalties.**

1. Survivor Rights

In addition to the rights a victim is afforded by statute against an abuser, legislatures may also create certain rights against the State. Several sets of rights may apply. First, the human rights protections that should be afforded the accused and the victim in rape or sexual assault situations are often applicable in domestic violence settings as well.⁴⁰⁸ Second, many of the constitutional rights discussed above – and perhaps rights afforded by other legislation – may already grant victims some rights *vis-à-vis* the State for seeking redress when the State fails to properly enforce domestic violence legislation.⁴⁰⁹ Third, domestic violence

⁴⁰⁷ Domestic Violence Act (2003) §§ 16(c), (e) (Ghana).

⁴⁰⁸ See Askin, *supra* note 59.

⁴⁰⁹ One example is the invocation of general constitutional rights in the United States to enforce certain domestic violence legislation. In one case, a plaintiff brought a civil suit against a municipality, arguing that the failure of the municipality's police officers to respond to her repeated reports over several hours that her estranged husband had taken their three children in violation of her protective order against him violated her constitutional rights. Ultimately, the husband murdered the children. See *Gonzales v. Castle Rock*, 366 F.3d 1093, 1095 (10th Cir. 2004) (en banc). In another case, a plaintiff sued a city because police officers repeatedly ignored her complaints about violence by her estranged husband and even stood by and watched as he savagely beat her. See *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1524-1526 (D. Conn. 1984).

legislation *itself* may grant victims rights against the State. For example, Ghana’s statute creates an entitlement to free medical treatment for victims of domestic violence.⁴¹⁰

2. Rehabilitation

Some of the more controversial responses to domestic violence have been efforts focused on the rehabilitation of abusers. Proponents of such programs argue that domestic violence is a function of dependencies that result in part from the dysfunctional behavior of the abuser. They say that protective orders and support services such as shelters are of limited use in solving the source of violence that is, by its nature, systemic. One example of this approach is the Austrian Protection Against Violence Bill, which provides for anti-violence training for men upon order by the court. Abusers are integrated into a system of interventions that includes the support of the partner and is carried out in weekly group sessions supervised by a team of two trainers, a woman and a man, for at least 32 weeks.

Rehabilitation of abusers is also contemplated by certain elements of the U.N. Model Framework. One of the “non-emergency” services it suggests States supply is a service to assist in the “long-term rehabilitation of abusers through counselling.”⁴¹¹ With respect to criminal proceedings, depending on the offense and where the respondent is criminally “charged for the first time with a minor domestic violence offence and pleads guilty, [the Framework also calls for] a deferred sentence and counseling . . . , along with a protection order, provided that the consent of the victim is obtained.”⁴¹² The Framework also provides several principles for establishing abuser rehabilitation programs:⁴¹³

- (i) The law shall mandate counseling programs for perpetrators as a supplement to and not as an alternative to the criminal justice system;
- (ii) Counseling programs must be designed to (a) help the perpetrator take responsibility for his violence and make a commitment not to inflict further violence and (b) educate the perpetrator on the illegality of violence; and
- (iii) Funding for counseling and perpetrator programs should not be taken from resources assigned to victims of violence.

3. Relationship to Rape & Sexual Assault

Although this Report addresses domestic violence, rape, and sexual assault separately, it is important to note that the crimes of rape and sexual assault can constitute some of the most severe acts of domestic violence.⁴¹⁴ These transgressions have often been treated

⁴¹⁰ Domestic Violence Act (2003) § 7(3) (Ghana).

⁴¹¹ See The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 61(b).

⁴¹² *Id.* ¶ 51.

⁴¹³ *Id.* ¶¶ 70-72.

⁴¹⁴ Similar statistics have also been reported in Mozambique, where 33% of surveyed victims reported that they were raped by their husbands. Eunice M. Lipinge & Debie Lebeau, University of Namibia and Southern African Research and Documentation Centre, *Beyond Inequalities 2005: Women in Namibia* 11, (Windhoek and Harare) (2005).

more leniently by the criminal justice system when committed within the domestic sphere, however. Far from being mutually exclusive, domestic violence and sexual assault are closely linked, rendering any legislative regime that focuses solely on one or the other incomplete.

Statistics demonstrate the pervasiveness of rape by spouses and intimate partners. For example, in a recent study of Tanzanian women, over 90% of rape victims interviewed identified their attackers as non-strangers, and 46% were attacked by their “intimate partner.”⁴¹⁵ Complicating matters is the tendency to under report crimes (such as rape) committed within the home because of a widespread perception that such problems are a private matter.⁴¹⁶ Once reported, rape and sexual assault incidents committed by a spouse are often ignored because of cultural beliefs about a man’s need to control his household and its members.⁴¹⁷ This problem exists in many countries. For example, four years after Namibia’s passage of comprehensive and progressive domestic violence legislation in 2003, many Namibian citizens still report confusion and conflicting opinions about whether it is legal for a man to force his wife to have intercourse.⁴¹⁸ Some scholars also suggest that rape and sexual assault within the home may have a more serious effect on victims than when the same crimes are committed by strangers because of the betrayal and repetitive nature of abuse.⁴¹⁹

In light of these observations, this Report recommends that lawmakers employ far-reaching and culturally sensitive education campaigns to change the attitudes of both citizens and enforcement bodies concerning acceptable spousal behavior. The codification of legal rights alone will not bring about social change if such rights are not enforced both inside and outside the domestic environment.

VI. *Implementation and Raising Awareness*

Addressing the failure of a legal system to effectively investigate, prosecute and charge claims for gender-based violence – whether rape, sexual assault, domestic violence, or in another form – requires action on numerous fronts. Introducing legislation that appears good on paper will not suffice to bring about a change of approach without political and social initiatives designed to implement that legislation.⁴²⁰ Thus, while the good practices described in this Report are necessary components of a comprehensive program to end gender-based violence, they are not sufficient in and of themselves. Legislation to improve education and employment

⁴¹⁵ Projestine S. Muganyizi, Charles Kilewo & Candida Moshiro, *Rape Against Women: The Magnitude, Perpetrators, and Patterns of Disclosure of Events in Dar es Salaam, Tanzania*, 8 Afr. J. of Reprod. Health 137, 137 (2004). See also *Namibia: Most Rape Victims Know the Rapist*, IRIN, June 4, 2007, <http://www.irinnews.org/Report.aspx?ReportId=72535>.

⁴¹⁶ Lipinge et. al., *supra* note 414.

⁴¹⁷ *Id.*

⁴¹⁸ The problem is worse in rural areas; the majority of rural women reported that they did not think marital rape was possible. *Id.* at 12.

⁴¹⁹ Muganyizi et al., *supra* note 415, at 144.

⁴²⁰ However, legislation can often be the best place to begin such efforts. For example, Zimbabwe’s domestic violence statute established a minister-level committee with the goal of monitoring the domestic violence problem, raising awareness, promoting relevant research and services (including safe houses), and encouraging enforcement of the statute. It also created the position of Domestic Violence Counselor to carry out the directions of the committee. The Prevention of Domestic Violence and Protection of Victims of Domestic Violence Act (2007) § 14-15 (Zimb.).

opportunities, general AIDS-awareness campaigns, and property rights reform are also essential for women to take full advantage of their rights and for States to break the vicious cycle of gender-based violence.

A. **Training Public Officials**

Recommendation:

- **National governments should incorporate standardized training of police, judges, prosecutors, and health-care workers to improve their ability to recognize and treat victims of sexual and domestic violence.**

Measures must be taken to familiarize relevant public officials – police officers, judges, lawyers, health care workers, etc. – with the content of legislation and policies pertaining to gender-based violence. In the United States, for example, a training curriculum on rape and sexual assault has been prepared for judges, prosecutors and other legal personnel by the National Judicial Education Program to Promote Equality for Women and Men in Courts.⁴²¹ The Council of Europe has produced a self-training manual for police officers (the VIP Guide),⁴²² which is used in over forty countries. Since victims of sexual violence generally require assistance from additional State agencies, most often health services, specialist training for workers in sectors outside the judicial is also vital. For example, South Africa’s National Policy Guidelines, discussed above,⁴²³ are aimed at providing uniform rules for medical professionals, police officers, prosecutorial staff and welfare and correctional services officials in dealing with victims of sexual violence.

Other countries, including South Africa, have introduced sexual offenses courts, which deal exclusively with crimes of sexual violence. Giving priority to sexual offenses within the court system not only raises the profile of the issue, but also allows for better consideration of the needs of victims. Sexual offenses courts are generally viewed as highly effective, as reflected in higher conviction rates.⁴²⁴

In countries where members of the armed or police forces regularly engage in acts of sexual violence, training and awareness-raising must be specially tailored to convey the message that the State will not condone such acts. The laws of some sub-Saharan African States, like the DRC, have taken a first step in this regard by specifying that no official capacity exempts a perpetrator from punishment.

⁴²¹ U.N. Div. for the Advancement of Women Expert Group Meeting, Vienna, Austria, May 17-20, 2005, *Good Practices in Combating and Eliminating Violence Against Women: Report of the Expert Group Meeting*, at 16, <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/FINALREPORT.goodpractices.pdf>.

⁴²² Liz Kelly, Council of Europe, *Vision, Innovation and Professionalism in Policing Violence Against Women and Children* (2000), available at http://www.coe.int/t/e/human_rights/police/2._publications/2.2_vip_guide/PDF_VIP%20Guide-December%202001.pdf.

⁴²³ National Policy Guidelines for Victims of Sexual Offences (S. Afr.), *supra* note 228.

⁴²⁴ See Ashley J. Moore, *Endangered Species: Examining South Africa’s National Rape Crisis and its Legislative Attempt to Protect its Most Vulnerable Citizens*, 38 Vand. J. Transnat’l L. 1469, 1488-1489 (2005).

Training is also important for police officers and judges dealing with domestic violence. The U.N. Model Framework recommends that police departments establish a training program for officers to “acquaint them” with, *inter alia*: the nature, extent, causes and consequences of domestic violence; the legal rights and remedies available to victims of domestic violence; and the legal duties of police officers to make arrests and to offer protection and assistance.⁴²⁵ Training and guidance on proper investigation and reporting of domestic violence incidents is particularly important for police officers. Ghana has developed a comprehensive list of investigation steps, as has the U.N. Model Framework (both of which are included in the Annex). Training programs should also be introduced for judges handling domestic violence cases and may include guidelines on: the issuance of *ex parte* protective orders and protective orders, and the guidance to be given to victims on available legal remedies.⁴²⁶

B. Provision of Services to Victims

Recommendation:

- **National legislation and funding should include victim support services that address short- and long-term medical, psychological, and practical needs.**

States have a duty to provide adequate support measures for victims of gender-based violence, including access to medical and psychological support. In addition, coordination and integration of services provided by different sectors and stakeholders in society is crucial to any plan to combat gender-based violence.

A number of States, including Canada, Malaysia and South Africa have established sexual violence centers – often called “one stop” centers – to provide comprehensive care for anyone who has experienced sexual assault or rape.⁴²⁷ These centers often attend to immediate medical, psychological and social needs, and also function as referral centers. Whatever constellation of service provision is put in place, services for victims of sexual violence should have as their fundamental goals to address practical needs and to provide a safe and supportive environment in which individuals can begin to rebuild their lives. The principles of accessibility, confidentiality, respect and self-determination should guide service providers and State agencies. In addition, service providers play an especially important role in underlining the fact that victims are never responsible for the violence they have endured.

Incorporating many of the same principles, it is important for States to provide domestic violence victims with a service infrastructure that addresses the unique challenges of such violence. Many States have enacted legislation to offer victims support. For example, “Finland, Sweden, and Switzerland have enacted ‘victim support laws’ that aim to counteract the weak position of victims ...” and entitle victims to free legal advice and representation, in

⁴²⁵ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 62.

⁴²⁶ *Id.* ¶ 66.

⁴²⁷ See, e.g., Muganyizi et al., *supra* note 415, at 26; UNICEF, *Thuthuzela Care Centers*, http://www.unicef.org/southafrica/hiv_aids_998.html (last visited July 18, 2007); Krug et. al., *supra* note 303, at 167-168.

addition to access to other forms of advocacy and support.⁴²⁸ In Namibia, the Ministry of Safety and Security has created women and child protection units to promote successful implementation of the domestic violence statute.⁴²⁹ Such services are also addressed in detail by the U.N. Model Framework, which divides services to domestic violence victims into “emergency” and “non-emergency” obligations. As to the former, the Framework recommends that States provide services such as:⁴³⁰

- (i) Seventy-two hour crisis intervention services;
- (ii) Constant access and intake to services;
- (iii) Immediate transportation from the victim’s home to a medical center, shelter or safe haven;
- (iv) Immediate medical attention;
- (v) Emergency legal counseling and referrals;
- (vi) Crisis counseling to provide support and assurance of safety; and
- (vii) Confidential handling of all contacts with victims of domestic violence and their families.

The Framework is more general with respect to recommendations for “non-emergency” services, suggesting that States deliver, *inter alia*, “services to assist in the long-term rehabilitation of victims of domestic violence through counseling, job training and referrals” and “programs for domestic violence ... administered independently of welfare assistance programs.”⁴³¹

C. Monitoring Effectiveness

Recommendation:

- **States should monitor the effectiveness of existing laws and measures to ensure effective implementation and facilitate any necessary reform.**

Ongoing efforts are required to monitor the effectiveness of existing legislation, to ensure its implementation and to assist in identifying areas in which further reform is needed. For example, most States collect data on at least some forms of gender-based violence. In order to ensure ongoing and independent institutional mechanisms for oversight, a number of States also provide for special monitoring bodies. Zimbabwe and Mozambique, for example, have

⁴²⁸ U.N. Div. for the Advancement of Women Expert Group Meeting, *supra* note 421, at 18.

⁴²⁹ U.N. Anti-Discrimination Comm. Experts, *Minister of Gender Equality and Child Welfare Presents Report, National Gender Policy, Domestic Violence Act*, (Jan. 17, 2007), available at <http://www.un.org/News/Press/docs//2007/wom1592.doc.htm>.

⁴³⁰ The U.N. Special Rapporteur on Violence Against Women, *supra* note 266, ¶ 60.

⁴³¹ *Id.* ¶ 61.

established Women's Rights Commissions to perform this function; other States provide for a national rapporteur or ombudsperson.

D. **Raising Awareness**

Recommendation:

- **Awareness programs should be gender- and age-inclusive to mobilize entire communities against gender-based violence.**

Raising awareness is crucial in eliminating gender-based violence. In fact, measures aimed at modifying harmful social and cultural practices are required by a number of international conventions, so that they rise to the level of a State duty.⁴³² Most countries have recognized the importance of raising awareness and have responded with a variety of methods. Particularly innovative strategies have emerged from co-operative efforts between governments, international organizations and NGOs.

An ongoing campaign against gender-based violence in Liberia brings together an international NGO (Oxfam), the Forum for African Women Educationalists and schools in several parts of the country to raise awareness about the new law against sexual violence.⁴³³ A range of effective approaches also rely on public media, including television, radio and newspapers. For example, recent campaigns in Bolivia and India have relied on pop songs and music videos.

Community mobilization and local activism is also known to be effective. In Uganda, the Center for Domestic Violence Prevention works with a group of volunteers who attend training sessions and organize violence prevention activities, including door-to-door visits, participatory theater, impromptu discussions and booklet clubs, in their communities.⁴³⁴

A number of States, including Egypt, have seen significant progress from so-called social contracts and public collective commitments, whereby particular groups of people (*e.g.*, entire villages) commit to ending particular practices. This approach has had particularly high rates of success in the context of eliminating female genital mutilation.⁴³⁵

Recent analyses have drawn particular attention to the importance of involving men in awareness-raising efforts. The most famous example of a campaign focused on men is the White Ribbon Campaign,⁴³⁶ started in Canada: men who participate in educational workshops, fund-raising and general awareness-raising wear a white ribbon as a personal pledge never to commit, condone or remain silent about violence against women. The rationale behind such heightened interest is the fact that men commit the vast majority of sexual violence, and are thus

⁴³² See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 25, arts. 2(f), 5(a); Protocol to the African Charter on the Rights of Women in Africa, *supra* note 36, arts. 2(2), 5.

⁴³³ *Liberia: Gender Violence Campaign Rages*, The Analyst, Apr. 9, 2007, <http://allafrica.com/stories/printable/200704090595.html>.

⁴³⁴ U.N. Div. for the Advancement of Women Expert Group Meeting, *supra* note 421, at 35.

⁴³⁵ *Id.* at 34.

⁴³⁶ See The White Ribbon Campaign, <http://www.whiteribbon.ca> (last visited June 13, 2007).

in a powerful position to generate change. Involvement of this kind is especially important in societies where sexual and domestic violence by men against their wives is viewed as acceptable.

VII. *Conclusions*

In spite of the challenges faced by African States in enacting and implementing reforms to combat gender-based violence, the continent has made significant progress in recent years. Today, both governmental and non-governmental entities have identified gender-based violence as an issue deserving immediate legislative attention and general public awareness. In the twelve years since the 1995 Beijing Declaration and Platform for Action, grass-roots efforts, such as the “All Against Violence” campaign in Zimbabwe and the passage of the 2005 Act amending the Penal Code in Liberia, have put combating gender-based violence on the political and social agenda.⁴³⁷ Unfortunately, many legislatures in sub-Saharan Africa have yet to pass laws against gender-based violence; in other States, such as Namibia, progress made in the legislative sphere has not yet translated into tangible gains for women. In time, however, legislatures must realize that their failure to pass laws addressing gender-based violence not only furthers injustice and inequity in society, but also shows a lack of respect for women no matter their age, class or color.

Moreover, there must be clear commitment on the part of the State for any new legislation or other measure addressing gender-based violence to be effective. If a State lacks the political will to protect women from violence or to provide institutional support for such protection, all measures, no matter how good they look on paper, are likely to fail.

States must mobilize to improve the institutional response to gender-based violence by developing training programs, implementing sexual harassment policies, sponsoring antiviolence awareness campaigns, and fostering cooperation among government agencies, private parties, and NGOs to end violence against women.

⁴³⁷ Chemonics International, Inc., *Women’s Legal Rights Initiative: Regional Center for Africa (RCSA) Assessment and Analysis Report August 19-September 11, 2003*, Jan. 14, 2004, at 14, available at http://www.usaid.gov/our_work/cross-cutting_programs/wid/pubs/wlr_rcsa.pdf.

VIII. *Annex of Procedural Guidance*

- VIP Guide (Council of Europe self-training manual for police officers), available at http://www.coe.int/t/e/human_rights/police/2._publications/2.2_vip_guide/PDF_VIP%20Guide-December%202001.pdf
- South Africa's National Policy Guide, available at http://www.doj.gov.za/2004dojsite/policy/guide_sexoff/sexoff_guidelines1998.htm
- U.N. Model Domestic Violence Framework (excerpts on police investigations), available at <http://www1.umn.edu/humanrts/commission/thematic52/53-add2.htm>
- Domestic Violence Law of Ghana (excerpts on police investigations), available at http://www.wildaf-ao.org/eng/print.php3?id_article=406