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## Note – Toward Effective Access to Justice in Haiti: Eliminating the Medical Certificate Requirement in Rape Prosecution

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# Toward Effective Access to Justice in Haiti: Eliminating the Medical Certificate Requirement in Rape Prosecutions

SHANNON D. LANKENAU\*

*In Haiti, the overwhelming majority of rapes go unpunished. To date, the Haitian government has failed to promulgate a working legal framework in which it can effectively prosecute crimes of sexual violence. Women, in particular, are disproportionately burdened by these inadequacies. This Note explores one of the most problematic aspects of the current legal system: the de facto requirement that a woman obtain a medical certificate to corroborate her claim of rape. Although not mandated by Haitian law, medical certificates are regarded as the foundation of any prosecution because deficient investigations often fail to produce any additional evidence for use at trial and a woman's own testimony is routinely discredited. By requiring a medical certificate in all rape prosecutions, the Haitian government is reinforcing a deep-seated cultural belief that a woman's testimony is inherently untrustworthy. Worse yet, victims of sexual violence are deprived of their right to an effective remedy under domestic and international law.*

*This Note suggests that the law should be amended to affirmatively state that a woman's credible testimony regarding her attack can be legally sufficient to secure a conviction in a rape case, thereby eliminating the de facto medical requirement. Still, enacting legal reform will not be enough. Until Haitian society addresses the root causes of gender discrimination in Haiti, distrust of a woman's testimony will remain a significant barrier to rape prosecutions.*

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## INTRODUCTION

The catastrophic earthquake that struck Haiti on January 12, 2010 drew domestic and international attention to the status and practical realities of Haiti's laws governing the prosecution and punishment of rape and other forms of sexual violence. Violence against women remains one of the greatest impediments to the empowerment and full participation of women in Haitian society and, as a consequence, reconstruction of the

country.<sup>1</sup> As this Note explains, entrenched “social norms both perpetuate and justify discrimination and violence against women and deprive women of a multitude of legal rights that men enjoy.”<sup>2</sup> Victims of sexual violence are frequently re-victimized by a wholly dysfunctional system in which women are silenced and denied equal access to justice.<sup>3</sup>

To date, the government of Haiti has failed to promulgate a working legal framework in which the State can effectively prosecute crimes of sexual violence. In particular, women face a number of obstacles along the road to justice. Nowhere is this more apparent than with the requirement that a woman obtain a medical certificate to substantiate her claim of rape. Although not mandated by Haitian law, medical certificates to corroborate an attack are a *de facto* requirement for pursuing a legal complaint.<sup>4</sup> Medical certificates form the foundation of most prosecutions because deficient investigations often fail to produce any additional evidence to be used at trial and a woman’s own testimony is routinely discredited. By requiring a medical certificate in rape prosecutions, the Haitian government reinforces a deep-seated cultural belief that a woman’s testimony is inherently untrustworthy and violates a victim’s right to an effective remedy under domestic and international law. As a result, victims of sexual violence justifiably lack confidence that the Haitian government will afford them justice.

Legal practitioners and human rights advocates recognize that the requirement of medical certificates as verification of sexual violence is deeply discriminatory.<sup>5</sup> This Note suggests that the law should be amended to state positively that a woman’s credible testimony regarding her attack can be legally sufficient to secure a conviction against her attacker, thereby eliminating the *de facto* medical certificate requirement. Nevertheless,

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1. For purposes of this Note, the term “women” shall be understood to include adults as well as minor children. Reports indicate that more than half of all rape victims in Haiti are young girls. See Amnesty Int’l, *Aftershocks: Women Speak out Against Sexual Violence in Haiti’s Camps*, at 7, AI Index AMR 36/001/2011 (Jan. 2011) [hereinafter *Aftershocks*]. The Author also recognizes that men may be victims of sexual violence in Haiti. The changes advocated in this Note should apply equally to men. Nevertheless, this Note focuses primarily on the particular struggles that women and girls face in the aftermath of a sexually violent encounter.

2. United Nations, Econ. & Soc. Council, Comm. on the Status of Women for the 56th Sess. (Feb. 29–Mar. 9, 2012), Concerning the Empowerment of Rural Women and Their Role in Poverty and Hunger Eradication, Development and Current Challenges in Haiti, Statement submitted by MADRE et al. (Nov. 21, 2011) [hereinafter 56th Sess. Statement].

3. CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE & GLOBAL JUSTICE CLINIC, YON JE LOUVRI: REDUCING VULNERABILITY TO SEXUAL VIOLENCE IN HAITI’S IDP CAMPS 139 (2012) [hereinafter CHRGJ].

4. “[I]n practice, a medical certificate is treated as a legal requirement for pursuing a complaint [of sexual violence].” KOFIVIV ET AL., WOMEN AND GIRLS IN HAITI’S RECONSTRUCTION: A DIALOGUE ON THE LINKAGE BETWEEN HEALTH SERVICES AND LEGAL REMEDIES FOR VICTIMS OF VIOLENCE 16 (2012).

5. United Nations, Human Rights Council, Universal Periodic Review: 12th Sess. of the Working Group on the UPR (Oct. 3–14, 2011), Gender-Based Violence Against Haitian Women & Girls in International Displacement Camps, Submission by MADRE et al. (2011) [hereinafter 12th Sess. Working Group].

amending Haiti's rape laws will not be enough. Until Haitian society addresses the root causes of gender discrimination, distrust of a woman's testimony will remain a significant barrier to rape prosecutions.

This Note focuses on the issue of medical certificates as both an example of the deeply ingrained tradition of gender discrimination in Haiti and as the single greatest impediment to justice for survivors of sexual violence. It seeks to identify the most problematic aspects of the medical certificate requirement: legally as a required evidentiary element of any prosecution, and practically for the victims who must obtain them immediately following an attack. It proposes essential legal and medical reforms that will reduce the burden on victims of sexual violence and facilitate greater gender sensitivity throughout Haiti. Finally, this Note suggests that grassroots women's organizations in Haiti play an especially important role in ensuring that the government undertakes reform and proper implementation.

The women of Haiti desperately need a functioning and accessible justice system with the capacity to vindicate their rights. The Haitian government's systematic failure to effectively investigate crimes of sexual violence and punish offenders ultimately emboldens aggressors to act without fear of consequence. The current rape crisis underscores the fact that legal reform must be undertaken to end Haiti's cycle of impunity.

#### I. HAITI'S CURRENT RAPE CRISIS IN CONTEXT

An appreciation of the historical context in which the current rape crisis arose is crucial to understanding why the government has failed to address the numerous impediments to prosecuting rape and the cyclical effects of impunity. Gender discrimination in Haiti is rooted in a profoundly patriarchal culture that continues to saturate the threads of society.<sup>6</sup> Women bear the brunt of the poverty that has long been characteristic of Haiti,<sup>7</sup> and this poverty "strongly influences how women experience violence and limits their ability to respond to it."<sup>8</sup>

As evidence of this deeply rooted gender discrimination, Haitian women have suffered and continue to suffer from widespread sexual violence.<sup>9</sup> During recent periods of political instability, the rates of violence against women in Haiti increased dramatically.<sup>10</sup> For example, beginning with the 1991 military coup that overthrew Haiti's first democratically elected president, Jean-Bertrand Aristide, women were systematically victimized "because of their political support for democracy,

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6. Lisa Davis & Blaine Bookey, *Fanm Ayisyen Pap Kase: Respecting the Right to Health of Haitian Women and Girls*, 13 HEALTH & HUM. RTS., 1, 3 (2011).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

their intimate association with other activists, their class, and their gender.”<sup>11</sup> One study found that in the two-year period following the second ouster of President Aristide in February 2004, as many as 35,000 women were raped in Port-au-Prince alone.<sup>12</sup> These periods of instability were marked with “[i]ncreasing poverty, deep-rooted class divisions, the proliferation of arms, rise in violent crime, and the absence of adequate crime prevention and judicial mechanisms to respond to the violence.”<sup>13</sup> Ultimately, rape has been and continues to be a mechanism through which the economic, political, and social inequalities in Haiti survive.<sup>14</sup>

Although rape and other forms of sexual violence were prevalent in Haiti before the 2010 earthquake,<sup>15</sup> post-disaster displacement has created “conditions under which women and girls are at a heightened risk of sexual violence.”<sup>16</sup> The international community characterizes post-earthquake internally displaced person (“IDP”) camps as abysmal—lacking even the most basic necessities such as access to clean water, food, sanitation, and shelter.<sup>17</sup> In particular, women are more vulnerable to sexual violence in a post-disaster context due to the “collapse of social infrastructure, inequitable access to social services, absence of law and order, . . . loss of autonomy[,] . . . and limited access to resources and participation in decision making.”<sup>18</sup> Haitian women’s rights groups report that the prevalence of sexual violence has increased significantly following the earthquake.<sup>19</sup> In a recent study conducted by the Instituto Igarapé, researchers Athena Kolbe and Robert Muggah found that the relative risk of sexual assault was twenty times greater for camp residents than for residents in other areas of Port-au-Prince.<sup>20</sup> In addition to increasing the vulnerability of women to sexual violence, the earthquake has impacted public institutions, thereby compounding “chronic long-term weaknesses in government efforts to protect and promote human rights.”<sup>21</sup> Thus, in Port-au-Prince and the surrounding areas, post-disaster displacement and political instability have underscored the dire need to address the medical certificate issue as a significant barrier to prosecuting rapes.

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Amnesty Int’l, *Amnesty International Submission to the U.N. Universal Periodic Review 12th Session of the UPR Working Group, October 2011*, at 2, AI Index AMR 36/005/2011 (Mar. 21, 2011).

16. Davis & Bookey, *supra* note 6, at 2.

17. MADRE ET AL., *OUR BODIES ARE STILL TREMBLING: HAITIAN WOMEN CONTINUE TO FIGHT AGAINST RAPE: ONE YEAR UPDATE 7* (2011).

18. Davis & Bookey, *supra* note 6, at 2.

19. Anastasia Moloney, *Haiti Eyes Tougher Law to Tackle Sexual Violence*, TRUSTLAW (Feb. 16, 2012 12:32 PM), <http://www.trust.org/trustlaw/news/haiti-eyes-tougher-law-to-tackle-sexual-violence>.

20. Athena R. Kolbe & Robert MUGGAH, *Haiti’s Urban Crime Wave? Results from Monthly Household Surveys, August 2011 – February 2012*, I IGARAPÉ INSTITUTE STRATEGIC BRIEF 5 (2012).

21. *Aftershocks*, *supra* note 1, at 13.

## II. THE USES AND LIMITS OF MEDICAL CERTIFICATES AS PROBATIVE EVIDENCE OF RAPE

Medical certificates typically serve to corroborate a woman's account of a sexual violence in a court of law.<sup>22</sup> Following an attack, it is critical that a woman seek medical attention for HIV prophylaxis, emergency contraception, and treatment of any injuries.<sup>23</sup> In addition to providing such treatment, medical professionals use medical certificates to document and collect any available evidence solely for legal purposes.<sup>24</sup> Forensic evidence (including semen, blood, hair, genital and bodily injury, clothing, foreign debris, and emotional presentation) tends to substantiate or disprove a physical connection between individuals, objects, and places.<sup>25</sup> Specifically, medical certificates may be useful "in determining the occurrence of recent sexual activity, identifying the assailant, establishing the use of force, and indicating an inability to consent due to the influence of alcohol and drugs or an otherwise diminished mental capacity."<sup>26</sup>

While medical certificates may be pivotal in documenting sexual penetration or signs of injury that could indicate a lack of consent, medical certificates should never be dispositive on the issue of whether a rape occurred. Nevertheless, they are frequently treated as such in Haiti. For example, one Haitian prosecutor suggested that the most probative evidence of rape is a medical certificate indicating that a victim's hymen was recently broken.<sup>27</sup> However, evidence that a victim's hymen is no longer intact does not necessarily indicate that a rape did not occur or that a woman consented to sex. Moreover, when a victim is unable to seek immediate medical attention, a medical certificate will render little in the way of useful evidence. In fact, the evidentiary value of a medical certificate diminishes significantly after seventy-two hours.<sup>28</sup> Beyond that, "sometimes even the best medical examination may not produce any relevant evidence" to support a claim of rape.<sup>29</sup> Unless there are physical signs of sexual penetration or other trauma, a medical certificate may not provide the demanded corroboration for a victim's own account of a rape.

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22. JANICE DU MONT & DEBORAH WHITE, *THE USES AND IMPACTS OF MEDICO-LEGAL EVIDENCE IN SEXUAL ASSAULT CASES: A GLOBAL REVIEW* 9 (2007).

23. *Id.* at 11.

24. *Id.* at 10.

25. *Id.* at 9–10.

26. *Id.* at 9 (citations omitted).

27. MADRE ET AL., *STRUGGLING TO SURVIVE: SEXUAL EXPLOITATION OF DISPLACED WOMEN AND GIRLS IN PORT AU PRINCE, HAITI* 17 (2012).

28. Letter from Inst. for Justice & Democracy in Haiti et al. to Dr. Santiago A Canton, IACHR Exec. Sec'y, Inter-American Comm'n on Human Rights, *RE: PM 340/10—Women and Girls Residing in Twenty-Two Camps for Internally Displaced Persons in Port au Prince, Haiti* (Jan. 3, 2012), at 8 [hereinafter Letter to Dr. Canton].

29. Meena Jagannath, *Barriers to Women's Access to Justice in Haiti*, 15 CUNY L. REV. 27 (2011).

In theory, the medical certificate should serve as an *aid* in the investigation and prosecution of an alleged perpetrator.<sup>30</sup> In Haiti, however, medical certificates frequently serve as an *impediment* to further investigation and prosecution. This Note critiques the *requirement* that a woman provide a medical certificate that corroborates her account of rape as a prerequisite to further investigation and legal proceedings. Every woman certainly has the right to obtain, and the State has an obligation to put forth, the best available evidence to support a claim of rape. To the extent that a woman in Haiti is able to obtain a medical certificate, forensic evidence may serve to bolster the State's case against her alleged attacker. To that end, medical certificates should be routinely provided for free to women who seek medical attention following sexual violence. However, a woman should not be precluded from pursuing a viable claim of rape just because she is unable to obtain a medical certificate or it does not provide sufficient corroboration of her account.

A comparative evaluation of other countries' rape law demonstrates that historically, "rape prosecutions were often hampered by extraordinary corroboration requirements, which reflected not only the unique nature of sexual crimes, but also a distrust of women's accounts of rape."<sup>31</sup> According to recent studies, however, the majority of countries have eliminated these requirements, which indicates that a victim's uncorroborated testimony can be sufficient to secure a conviction for rape.<sup>32</sup> In Canada, for example, the criminal code explicitly specifies that no corroboration is required for a conviction under sexual assault law.<sup>33</sup> In other jurisdictions, such as the United States, many judges interpret rape statutes so as to eliminate corroboration requirements.<sup>34</sup> Brazil requires a forensic examination for conviction; however, "if the rape is reported at a time when it is no longer possible to perform a forensic examination, [the] testimony of the victim and witnesses can suffice for conviction."<sup>35</sup> South African law directs that a "delay in reporting a rape cannot be the basis of any negative inference."<sup>36</sup> Finally, in the Philippines, "presentation of the medical certificate is not essential to prove the commission of rape as the testimony of the victim alone, if credible, is sufficient to convict the accused of the crime. The medical examination of the victim as well as the medical certificate is merely corroborative in character."<sup>37</sup>

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30. DU MONT & WHITE, *supra* note 22, at 9.

31. TRUSTLAW, *ACHIEVING JUSTICE FOR VICTIMS OF RAPE AND ADVANCING WOMEN'S RIGHTS: A COMPARATIVE STUDY OF LEGAL REFORM* 25 (2012).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *People vs. Dion*, G.R. No. 181035 (S.C., July 4, 2011) (Phil.).

Nevertheless, many nations with histories of pervasive gender discrimination similar to Haiti retain the requirement of medical certificate corroboration as a matter of law or practice. For example, in Argentina, “while the courts formally specify that a victim need not be physically injured in order to prove rape, in practice, medical documentation of physical trauma is generally expected.”<sup>38</sup> Additionally, a demonstration of resistance is a common element of rape law in many parts of the world,<sup>39</sup> which implies that women frequently must authenticate her claim of rape with physical evidence, such as a medical certificate.

### III. THE STRUCTURAL ORIGINS OF HAITI’S MEDICAL CERTIFICATE REQUIREMENT

A number of factors in Haiti guarantee that medical certificates are “the most commonly sought piece of material evidence” in cases of sexual aggression.<sup>40</sup> First, because the Haitian Penal Code does not expound on the definition of rape, judges must develop their own construction of the elements of rape. This lack of clarity permits judges and prosecutors to enforce a de facto medical certificate requirement in rape prosecutions by imposing a force or aggression element. Second, severely deficient criminal investigations render a woman’s medical certificate the only reliable evidence beyond a woman’s presumptively discredited testimony. Third, the absence of any rape shield provisions discourages many victims from testifying in court. As a result, medical certificates are frequently regarded as an indispensable piece of any rape prosecution.

#### A. THE EVOLUTION OF RAPE LAW IN HAITI

Prior to 2005, “rape was officially classified in Haiti as an ‘assault on morals’ and understood as an attack upon the victim’s honor as opposed to a crime against [a woman’s] right to physical integrity.”<sup>41</sup> The Haitian Penal Code of 1835 mirrored nineteenth century French law and failed to provide criminal sanction for what was seen as a crime “against the honour of the family.”<sup>42</sup> Historically, judges in Haiti negotiated a sum of money to be paid by the perpetrator to the victim’s family.<sup>43</sup> This practice may explain the tendency amongst the police, prosecutors, and judges to

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38. DU MONT & WHITE, *supra* note 22, at 35. Specifically, resistance requirements are commonly found in Eastern Europe, Africa, and several South American states. *Id.*

39. *Id.*

40. Jagannath, *supra* note 29, at 42.

41. Lisa Davis, *Still Trembling: State Obligation Under International Law to End Post-Earthquake Rape in Haiti*, 65 U. MIAMI L. REV. 867, 873 (2011).

42. Moloney, *supra* note 19.

43. *Rape Looms Large over Haiti Slums*, BBC NEWS (Nov. 27, 2008, 19:34) <http://news.bbc.co.uk/2/hi/americas/7750568.stm>.

believe that women falsely report rapes in order to obtain money from their alleged perpetrators.<sup>44</sup>

Driven largely by a strong Haitian women's movement committed to addressing the issue of gender-based violence, the government officially recognized rape as a crime against the person in 2005.<sup>45</sup> The Haitian Penal Code now classifies rape as follows:

Article 278: Whoever commits the crime of rape, or sexual aggression, perpetrated or attempted with violence, threats, surprise or psychological pressure, against a person of either sex, will be punished by ten years of hard labor.

Article 279: If the crime was committed against a child below the age of fifteen years, the offender shall be punished by fifteen years of hard labor.<sup>46</sup>

Although the Haitian Penal Code does not plainly define the term "rape," the law does state that the crimes of rape and sexual aggression are punishable when perpetrated through "violence, threats, surprise or psychological pressure."<sup>47</sup> This provision effectively states that physical force or violence is *not* a required element of rape. Rather, the presence of coercive factors such as threat, surprise, or psychological pressure evidences a victim's lack of consent.<sup>48</sup> Nevertheless, because there is no explicit element-by-element analysis of rape under Article 278, judges have been left with the task of developing their own definition of rape. Accordingly, judges in Port-au-Prince have generally adopted a legal definition whereby (1) sexual penetration, (2) absence of consent, and (3) criminal intent constitute the elements of rape.<sup>49</sup> Unfortunately, the absence of an explicit definition leaves the law vulnerable to misinterpretation and misapplication.

Finally, Haiti lacks a comprehensive evidence code that governs the special circumstances involved in cases of rape. Most significantly for purposes of this Note, corroborating evidence, including a medical certificate, is not explicitly required under Haitian law in order to secure a conviction.<sup>50</sup> Thus, a victim's credible testimony should be legally sufficient.<sup>51</sup> This *de facto* requirement of a medical certificate in all rape cases reflects a misconstruction of the evidentiary requirements and the ultimate purpose of medical certificates at all levels of the criminal justice system.

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44. Interview with Legal Team, KOFIV, in Port-au-Prince, Haiti (Feb. 10, 2012).

45. Davis, *supra* note 41, at 873.

46. MADRE ET AL., UTILIZING HUMANITARIAN MECHANISMS TO ADDRESS GENDER-BASED VIOLENCE IN HAITI: DOMESTIC MECHANISMS: TRAINING MANUAL 23 (2012).

47. *Id.* (emphasis added).

48. CHRJJ, *supra* note 3, at 89.

49. MADRE ET AL., *supra* note 46, at 2.

50. TRUSTLAW, *supra* note 31, at 25.

51. *Id.* at 12.

B. DEFICIENT INVESTIGATIONS RENDER MEDICAL CERTIFICATES  
INDISPENSABLE

Haitian police are tasked with receiving and diligently investigating complaints of criminal activity from the public, but frequently lack the political will and resources to do so.<sup>52</sup> For instance, police commonly respond to complaints by claiming that they are incapable of arriving at the scene of the alleged crime because they do not have a vehicle or cannot afford the gas to get there.<sup>53</sup> As a result, critical evidence is lost from the alleged crime scene and suspected perpetrators are given an opportunity to flee.<sup>54</sup> Even where political will and lack of resources do not completely obstruct an investigation, the convoluted and over-burdened criminal justice system nevertheless leads to delays in gathering evidence.

According to the Haitian Criminal Procedure Code (*code d'instruction criminelle*), the police and prosecutors may only arrest a suspected perpetrator without a judicial warrant during the period of "flagrancy."<sup>55</sup> Articles 10 and 31 of the Criminal Procedure Code define "*flagrants délits*" as recently committed offenses that have been discovered during the act or immediately thereafter.<sup>56</sup> Generally, the period of flagrancy endures for forty-eight hours after the alleged offense occurs.<sup>57</sup> After this time, police and prosecutors are required to obtain a judicial warrant in order to legally arrest a suspected perpetrator.<sup>58</sup> In order to establish the requisite level of suspicion to secure a warrant, victims are often asked to provide a medical certificate documenting evidence of sexual aggression.<sup>59</sup> Police and prosecutors are more willing to seek a warrant without a medical certificate in cases involving child victims.<sup>60</sup>

Once a formal complaint is lodged, sequential investigations by the prosecutor's office (the *parquet*) and then the investigating judge (*juge d'instruction*) ensue, but often produce conflicting accounts of a case.<sup>61</sup> During the investigative phase of a case, each entity seeks "to work as an individual institution, not necessarily a component of a single system."<sup>62</sup> Both offices retain the authority to dismiss a case due to lack of evidence

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52. Jagannath, *supra* note 29, at 37.

53. The Author takes no position as to whether the police response is genuine (indicating a significant lack of resources), or merely pretext (indicating widespread indifference to claims of rape). Nevertheless, both lack of resources and lack of political will impact the manner in which an investigation proceeds. *Id.*

54. *Id.*

55. INT'L CRISIS GRP., LATIN AMERICA/CARIBBEAN BRIEFING N°27: KEEPING HAITI SAFE: JUSTICE REFORM 3 (Oct. 27, 2011).

56. *Id.* at 3 n.10.

57. Jagannath, *supra* note 29, at 36 n.50.

58. Interview with Legal Team, *supra* note 44.

59. *Id.*

60. *Id.*

61. INT'L CRISIS GRP., *supra* note 55, at 4.

62. *Id.* at 11.

at all times.<sup>63</sup> When a victim lodges a complaint directly with the office of the prosecutor, the prosecutor is required to initiate a public action if the crime occurred in his territorial jurisdiction.<sup>64</sup> Complaints filed with the police or justices of the peace are also submitted to the prosecutor.<sup>65</sup> Initially, the prosecutor will determine if there is sufficient evidence to submit the complaint for further investigation.<sup>66</sup> After the prosecutor submits a complaint to the appropriate court, an investigating judge has three months to consider the validity of the complaint.<sup>67</sup> Only when the investigating judge finds that the complaint is sufficiently supported will the case be referred back to the prosecutor for further proceedings.<sup>68</sup>

Regrettably, investigating judges often receive cases long after an offense has been committed.<sup>69</sup> As a result, the opportunity to collect time-sensitive evidence and conduct critical interviews is minimal or entirely absent.<sup>70</sup> Cases also suffer from enormous delays because the three-month period in which an investigating judge may conduct an inquiry is routinely extended.<sup>71</sup> René Magloire, Haiti's former Minister of Justice, lamented that "judges tend to lead investigations, and they often work in secrecy."<sup>72</sup> Furthermore, when performed, investigations are often deficient due to severe resource constraints.<sup>73</sup> According to one source, there are only four investigating judges for all of Port-au-Prince, which has an estimated population of three million.<sup>74</sup> Thus, judicial procedure and resource constraints effectively render a woman's medical certificate indispensable as likely the only evidence in a case beyond a woman's presumably disbelieved testimony.

### C. INADEQUATE WITNESS PROTECTION NECESSITATES *PARTIE CIVILE*

In addition to the absence of a clear statutory definition of rape, Haiti lacks evidentiary rules—such as rape shield statutes—that protect

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63. *Id.* at 4.

64. Jagannath, *supra* note 29, at 41 (citing CODE D'INSTRUCTION CRIMINELLE D'HAÏTI (CODE OF CRIMINAL PROCEDURE) art. 14–16 (Haiti)).

65. *Id.* (citing CODE OF CRIMINAL PROCEDURE art. 19).

66. *Id.*

67. *Duvalier Prosecution: Jean-Claude Duvalier "Baby Doc" Prosecution*, INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI, <http://www.ijdh.org/projects/jean-claude-duvalier-prosecution> (last visited July 30, 2013).

68. *Id.*

69. INT'L CRISIS GRP., *supra* note 55, at 11.

70. *Id.*

71. Haitian law permits an investigating judge to extend the three month period of time, which is allotted for investigating the validity of a case, if needed to conduct a further inquiry. *Duvalier Prosecution*, *supra* note 67.

72. Moloney, *supra* note 19 (quoting René Magloire, former Minister of Justice, who now leads the drafting of new laws on sexual violence as part of a presidential commission on judicial reform).

73. CHRGI, *supra* note 3, at 143.

74. INT'L CRISIS GRP., *supra* note 55, at 4 n.17.

rape victims from in-court testimonial inquiries that can be humiliating and re-traumatizing. The lack of interrogative protection, coupled with severe gender discrimination in Haiti, ensures that victims will endure harassment and distrust at trial. Mario Joseph, a prominent Haitian lawyer who represents rape victims in a *partie civile* capacity, stated that the “line of questioning and the culture of blaming women often means women are reluctant to open up in court.”<sup>75</sup> Thus, victims are often hesitant to testify in court about their attack. However, by invoking *partie civile* protections, victims may no longer be called upon to testify, thereby avoiding the brunt of degrading inquisitors.

Under Haiti’s Code of Criminal Procedure, individual civil complainants can join a case originally brought on criminal grounds by the Haitian government prosecutor.<sup>76</sup> The *partie civile* procedure allows a victim to piggyback claims for money damages against her alleged attacker on the criminal prosecution.<sup>77</sup> Under the *partie civile* system, the trial court may award compensation to a victim of rape to be paid by the defendant.<sup>78</sup> Significantly, when a victim joins in a criminal trial as *partie civile*, she becomes party to the action.<sup>79</sup> “[S]he may stay in the courtroom throughout the trial but cannot testify as a witness.”<sup>80</sup> “Instead, her pre-trial statement to the investigating judge, which is contained in the *dossier* (book of evidence), is relied upon by the prosecution at trial.”<sup>81</sup> Thus, the *partie civile* procedure offers an attractive alternative to testifying at trial.

While there are advantages of *partie civile*—a victim’s civil attorney can be involved in the criminal case, a victim can be compensated for harm attributed to the defendant, and finally she may obtain protection from the throes of judicial examination—the procedure also has some clear disadvantages for victims in the context of rape prosecutions. Namely, it prevents a woman from testifying in court before the jury about the details and circumstances of her attack. On one hand, the *partie civile* system shields a victim from abuse during cross-examination.<sup>82</sup> On the other hand, it prevents a victim from offering live testimony at trial,

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75. Anastasia Moloney, *What Justice for Haiti’s Rape Survivors?* TRUSTLAW (Feb. 16, 2012, 11:42 GMT) <http://www.trust.org/trustlaw/news/feature-what-justice-for-haitis-rape-survivors> [hereinafter *Rape Survivors*] (“I’ve seen male judges blame the victim and imply it’s their fault because, for example, they wore a short skirt,” [Mario] Joseph said.”).

76. *Duvalier Prosecution*, *supra* note 67.

77. Brian Concannon Jr., *Justice for Haiti: The Raboteau Trial*, INST. FOR JUSTICE & DEMOCRACY IN HAITI (2001), available at <http://www.ijdh.org/institute-for-justice-democracy-in-haiti-home-349> (last visited July 30, 2013).

78. IVANA BACIK, ET AL., THE LEGAL PROCESS AND VICTIMS OF RAPE: A COMPARATIVE ANALYSIS OF THE LAWS AND LEGAL PROCEDURES RELATING TO RAPE, AND THEIR IMPACT UPON VICTIMS OF RAPE, IN THE FIFTEEN MEMBER STATES OF THE EUROPEAN UNION 183 (1998).

79. *Id.* at 180.

80. *Id.* at 215.

81. *Id.* at 13.

82. *Id.* at 180.

thereby depriving the jury of an essential opportunity to evaluate her credibility in the first instance, which increases the jury's reliance on a medical certificate as corroboration of her prior account.

In sum, the absence of a clear definition of rape, deficient investigations, and inadequate witness protection render medical certificates the most important piece of any rape prosecution.

#### IV. PRACTICAL IMPEDIMENTS TO OBTAINING AN ADEQUATE MEDICAL CERTIFICATE

The fear of social stigmatization and reprisals, and difficulty accessing adequately resourced and affordable medical facilities with appropriately trained medical professionals causes many victims of sexual violence to remain silent. Additionally, even when victims of sexual violence want to come forward, they often lack access to basic information regarding the legal necessity of obtaining a medical certificate, the requisite process for filing a complaint and seeking a legal remedy, and the importance of seeking medical care within seventy-two hours of the attack.<sup>85</sup> Because of these obstacles, which have only become more pronounced in the aftermath of the earthquake, medical certificates have become the single greatest impediment to achieving justice for rape in Haiti.<sup>84</sup>

##### A. GENDER DISCRIMINATION, SOCIAL STIGMATIZATION, AND FEAR OF REPRISALS

Haitian women face gender discrimination, distrust, and marginalization at nearly every access point of the justice system.<sup>85</sup> The medical facilities at which a woman must obtain a medical certificate are no exception to this rule. Victims often experience similar attitudes from the medical professionals charged with providing emergency care.<sup>86</sup>

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83. *Rape Survivors*, *supra* note 75 (“It’s very important for women to know about getting a free medical certificate and the 72-hour rule, for women to see a doctor within 72 hours to get contraception, be tested for sexually transmitted diseases and preserve evidence,” said Mayla Appolon, co-founder and co-director of Kofaviv.”).

84. Advocates and attorneys have begun to uncover these impediments to justice as a result of concerted efforts to bring legal cases. In conjunction with grassroots groups in Haiti and international partners, the *Bureau des Avocats Internationaux* launched the Rape Accountability and Prevention Project to respond to the epidemic of rapes in the wake of the 2010 earthquake. The project “provides individual victims of sexual assault the legal services they need to obtain justice and compensation, while working with allies in Haiti and abroad to transform the social context that underlies the vulnerability of all poor Haitian women to assault. The Project also aims to deter future rape by punishing the perpetrators and forcing a more effective response by law enforcement and the justice system.” *Rape Accountability and Prevention Project (RAPP)*, INST. FOR JUSTICE & DEMOCRACY IN HAITI, <http://www.ijdh.org/projects/rapp> (last visited July 30, 2013); *see also* Blaine Bookey, *Enforcing the Right to Be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 CUNY L. REV. 255, 273 (2011).

85. 56th Sess. Statement, *supra* note 2.

86. Interview with Legal Team, *supra* note 44.

Victims commonly feel a sense of shame and embarrassment over what they have endured. Indeed, the social stigma attached to sexual violence deters many victims from reporting incidents to authorities or seeking appropriate medical attention.<sup>87</sup> Amnesty International reported that one twenty-six year-old woman living in an IDP camp did not go to the hospital until two to three weeks after her attack because she was ashamed.<sup>88</sup> Another rape victim stated that she “was afraid to go to the hospital. [She] was ashamed of having to explain at the hospital what had happened to [her].”<sup>89</sup> Parents are also reluctant to seek medical attention for their children and report their cases of rape for many of the same reasons.<sup>90</sup>

Similarly, victims often refuse to report incidences of sexual violence or seek medical attention for fear that their aggressor will threaten, harass, or retaliate against them or their families.<sup>91</sup> The police do little in the way of “ensuring that victims are protected against retaliation or future abuse, further discouraging victims from coming forward.”<sup>92</sup> Furthermore, frequent breaches of confidentiality lead to “dangerous consequences for the survivor and [serve to] deter other survivors from seeking medical attention.”<sup>93</sup> Women endure threats of further violence against themselves or their families when they are seen at hospitals or clinics seeking treatment.<sup>94</sup> Representatives from the Commission of Women Victims for Victims (*Komisyon Fanm Viktim pou Viktim* or “KOFAVIV”)<sup>95</sup> described an alarming, albeit very common, situation in which victims are threatened with reprisals by members of their attackers’ families.<sup>96</sup> These fears significantly reduce the chances that a victim will seek timely medical attention for what could be life-threatening injuries or to obtain a medical certificate.

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87. CHRGI, *supra* note 3, at 72.

88. *Aftershocks*, *supra* note 1, at 12.

89. *Id.* at 16.

90. Interview with Legal Team, *supra* note 44.

91. CHRGI, *supra* note 3, at 74.

92. *Id.*

93. Letter to Dr. Canton, *supra* note 28, at Annex F.

94. Interview with Legal Team, *supra* note 44.

95. Founded in 2004, The Commission of Women Victims for Victims is a nonprofit Haitian women’s organization that provides informal psychosocial support for victims of rape. *KOFAVIV—Commission of Women Victims for Victims*, INST. FOR JUSTICE & DEMOCRACY IN HAITI (March 8, 2008), <http://ijdh.org/kofaviv-commission-of-women-victims-for-victims>.

96. Medical Agents from KOFAVIV who accompany victims to the General Hospital in Port-au-Prince experience considerable harassment while victims are waiting to be seen or while waiting for public transportation after their exam. The agents indicated their need for a private vehicle for transportation to and from the hospital because the harassment and threats are so serious. Interview with Legal Team, *supra* note 44.

## B. THE 72-HOUR RULE AND ACCESS TO MEDICAL CARE

A unique intersection of health and the law arises in the aftermath of an attack. As a practical matter, a woman must seek medical care within seventy-two hours of a sexual assault in order to receive adequate medical treatment, including HIV prophylaxis and emergency contraception.<sup>97</sup> Similarly, because the evidentiary value of a medical certificate depends on physical proof of a sexual aggression—such as the presence of semen or injuries indicating violence—a timely visit to a medical professional ensures that critical evidence will be preserved for use during a subsequent prosecution.<sup>98</sup> “Although the preservation, analysis, and use of forensic evidence in cases of rape [in Haiti] are still severely underdeveloped, the reliability and precision of the medical certificate still depends on quick action.”<sup>99</sup> Quick action requires knowledge of the available medical services and the ability to access that medical care.

The Haitian Ministry of Health and Population, international nongovernmental organization workers, and local health service providers agree that “seeking care, reaching a health facility, and receiving adequate care once a facility is reached” are enormously difficult in Haiti.<sup>100</sup> There are seven institutions in the greater Port-au-Prince area that currently provide medical services for victims.<sup>101</sup> Unfortunately, most victims of sexual assault lack knowledge regarding where to seek medical assistance.<sup>102</sup> Additionally, victims are often “unaware of the importance of the certificates in documenting rape for domestic prosecutions and their right to request them.”<sup>103</sup> This lack of knowledge regarding the location of medical services and the importance of medical certificates serves as an initial barrier to seeking medical care in Haiti.

Furthermore, the ability to access medical care depends in large part on whether a woman has adequate transportation to the medical facility and money to pay for the services rendered. Because medical care is often unavailable or prohibitively expensive in remote areas of Haiti, women must travel substantial distances to reach a hospital.<sup>104</sup> This poses a significant problem for the vast majority of Haitian women, who do not have the money to pay for transportation. Even in urban areas, public

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97. DU MONT & WHITE, *supra* note 22, at 13.

98. See Letter to Dr. Canton, *supra* note 28, at 8; Jagannath, *supra* note 29, at 42.

99. Jagannath, *supra* note 29, at 42.

100. JSI RESEARCH & TRAINING INST., INC., *THE LONG WAIT: REPRODUCTIVE HEALTH CARE IN HAITI* 12 (2009).

101. Press Release, Int'l Org. for Migration, Addressing Sexual Violence Against Women and Girls in Haiti's Displacement Camps (May 17, 2011), available at <http://www.iomhaiti.info/ft/page.php?id=49> [hereinafter IOM Press Release]. The Author understands this figure to represent public institutions only.

102. *Id.*

103. 12th Sess. Working Group, *supra* note 5, at 3–4.

104. *Id.*

transportation is expensive, burdensome, and ill-suited for victims of sexual violence, many of whom are poor, displaced, or both.<sup>105</sup>

Additionally, prosecutors and judges often reject medical certificates from private clinics as inadequate because they do not contain the same information as those from public institutions.<sup>106</sup> Thus, even where a victim may access medical services in close proximity to her home, her medical certificate—if she gets one at all—may not ultimately be acceptable. Consequently, women must go to the public General Hospital in Port-au-Prince if they hope to obtain a legally acceptable medical certificate.

Frequently, victims do not have the ability or the emotional strength to seek medical care by themselves.<sup>107</sup> Indeed, victims may require “psychosocial support and accompaniment to overcome the trauma that might result from sexual assault, and fear of reprisal.”<sup>108</sup> Since the earthquake, a number of grassroots groups like KOFAVIV have developed “networks of community agents to provide this crucial accompaniment and support.”<sup>109</sup> Nonetheless, awareness of and access to these support services remains unavailable in many communities.<sup>110</sup> A shortage of financial and other resources also places severe constraints on the women’s organizations that provide these services.<sup>111</sup>

Moreover, a woman’s ability to access medical care often depends on her ability to pay for services rendered. According to a 2007 circular issued by the Haitian Women’s Ministry, the Ministry of Public Health, and the Ministry of Justice and Public Security, medical certificates must be provided for free.<sup>112</sup> Despite this mandate, hospitals continue to charge victims up to four U.S. dollars per certificate<sup>113</sup>—a significant sum considering that most Haitians live on less than two U.S. dollars per day.<sup>114</sup>

A related issue concerns the inadequacy of exams due to resource constraints. Indeed, “[m]edical services providers are overwhelmed and unable to meet healthcare needs stemming from [sexual] assaults.”<sup>115</sup> The availability of supplies varies depending on the facility, which in turn affects the quality of care a woman receives.<sup>116</sup> Some facilities are unable

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105. Interview with Legal Team, *supra* note 44.

106. This Note addresses the irregularity of medical certificates across medical institutions in as an additional barrier to obtaining justice. *See infra* Part VII.C.

107. IOM Press Release, *supra* note 101.

108. Jagannath, *supra* note 29, at 42.

109. *Id.*

110. *Id.*

111. Interview with Legal Team, *supra* note 44.

112. Letter to Dr. Canton, *supra* note 28, at Annex D.

113. *Rape Survivors*, *supra* note 75.

114. Interview by Jose Pierre with Kesner Pharel, President & Gen. Dir., Group Croissance S.A, in Port-au-Prince, Haiti (August 2008), available at [http://childrenheritage.org/Editorial\\_082008.htm](http://childrenheritage.org/Editorial_082008.htm).

115. 12th Sess. Working Group, *supra* note 5, at 3.

116. *Id.*

to provide HIV prophylaxis or emergency contraception.<sup>117</sup> Other facilities are so severely underfunded that patients must pay for everything down to the latex gloves that a physician wears during an examination.<sup>118</sup> Even when a woman is able to reach a hospital and pay for the cost of an examination, she may find that the doors are closed due to a strike or electricity outage.<sup>119</sup> Victims of sexual assault also face “prohibitively long waits,” sometimes “leaving without ever being seen by a doctor.”<sup>120</sup> In other cases, a victim will have to wait weeks to obtain her medical certificate.<sup>121</sup> Sometimes, medical certificates are simply not provided.<sup>122</sup>

Furthermore, medical facilities are often ill-equipped to receive victims of sexual assault. In particular, lack of privacy is a significant concern for victims of sexual assault.<sup>123</sup> Access to female healthcare providers is also severely limited.<sup>124</sup> The shortage of female medical practitioners is a problem shared by many other nations. In Bangladesh, rape prosecutions require production of a medical certificate conducted by a government doctor.<sup>125</sup> There, a severe shortage of female doctors ensures that male doctors conduct the requisite full-body medical exams.<sup>126</sup> Women who have undergone such examinations by male physicians report “how insensitive the process is and how it has often dissuaded them from seeking justice.”<sup>127</sup> These women also report that undergoing a medical examination by a male physician is “tantamount to a second rape.”<sup>128</sup>

Finally, healthcare providers in Haiti often lack training about caring for victims of sexual assault. “Professional schools for doctors and nurses do not include instruction on treating gender-based violence as part of their core curricula or continuing learning programs.”<sup>129</sup> A healthcare professional’s capacity to “recognize, treat, and work to prevent violence against women can have a significant impact on the human rights

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117. *Id.*

118. Interview with Legal Team, *supra* note 44.

119. See 56th Sess. Statement, *supra* note 2, at 3; Letter to Dr. Canton, *supra* note 28, at 8 (“[W]orkers from the public hospital in Port au Prince (HUEU) were on strike for almost two months during July and August 2011.”).

120. 12th Sess. Working Group, *supra* note 5, at 3.

121. *Rape Survivors*, *supra* note 75.

122. *Id.*

123. 12th Sess. Working Group, *supra* note 5, at 3.

124. *Id.*

125. Jharna Moni, *Dhaka: Medical Examinations Traumatic for Rape Survivors*, ONEWORLD S. ASIA (Feb. 16, 2010), <http://southasia.oneworld.net/todayshheadlines/dhaka-medical-examinations-traumatic-for-rape-survivors>.

126. Although medical examinations are conducted by male physicians, they are almost always done in the presence of a female employee. *Id.*

127. *Id.*

128. *Id.*

129. Amanda Klasing, *Ending Violence Against Women: A Public Health Imperative*, HUM. RTS. WATCH, WOMEN’S RTS. DIVISION (Dec. 16, 2011), <http://www.hhropenforum.org/2011/12/ending-violence-against-women-a-public-health-imperative>.

of women everywhere, and is especially critical in disaster or displacement situations with high risk of sexual violence, like Haiti.”<sup>130</sup>

C. LACK OF UNIFORMITY AND CLARITY REGARDING THE USES OF MEDICAL CERTIFICATES

The absence of a uniform medical certificate across healthcare institutions poses an additional obstacle to achieving justice for victims of sexual violence. Medical institutions throughout Port-au-Prince have adopted medical certificates that “vary greatly in terms of detail and form.”<sup>131</sup> For instance, the public General Hospital (*Hôpital de l’Université de l’Etat d’Haïti*) issues a seven-page certificate that details a patient’s mental, physical, and reproductive health.<sup>132</sup> In contrast, *Centres Gheskio* and *Médecins Sans Frontières* issue a simple one-page certificate that leaves the level of detail provided largely to the examining physician’s discretion.<sup>133</sup>

In Port-au-Prince, the prosecutor’s office or the investigating judge often refuses to pursue a case because the proffered medical certificate was not issued by a State-run medical facility or it did not provide sufficient detail.<sup>134</sup> Specifically, prosecutors in Port-au-Prince frequently require that a victim produce a certificate from the General Hospital.<sup>135</sup> This is true, “notwithstanding the fact that the government’s protocol regarding medical certificates, issued in 2007 by the [Women’s Ministry, the Ministry of Justice and Public Security, and the Ministry of Public Health and Population], confirms that the certificates can be issued by any health center in Haiti at the request of a victim or the judiciary.”<sup>136</sup> This requirement poses innumerable problems for victims of sexual assault, as accessing medical care at the General Hospital in Port-au-Prince can be enormously difficult due to the multiplicity of factors previously mentioned.

Moreover, healthcare providers are frequently unaware of the kind of evidence that ought to be collected or the manner in which the evidence ought to be stored. While judicial actors continue to refuse medical certificates due to lack of sufficient detail,<sup>137</sup> the government has yet to promulgate a sufficiently detailed step-by-step process that all healthcare providers may follow to ensure that any relevant aspect of the victim’s

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130. *Id.*

131. Jagannath, *supra* note 29, at 42.

132. *Id.*

133. *Id.*

134. 56th Sess. Statement, *supra* note 2, at 3.

135. See Letter to Dr. Canton, *supra* note 28, at 8; see also Jagannath, *supra* note 29, at 42.

136. Letter to Dr. Canton, *supra* note 28, at 8 (citing *Protocole d’Accord sur l’Octroi et la Gratuité du Certificat Médical Relativement aux Agressions Sexuelles et/ou Conjugales*, le 17 janvier 2007).

137. Jagannath, *supra* note 29, at 42.

injuries and presentation are recorded with the utmost accuracy. Additionally, healthcare providers have received inadequate guidance as to the legal significance of proper and thorough examinations and documentation. Indeed, healthcare providers play a critical role in ensuring that victims of sexual violence have effective access to justice. Thus, medical professionals responsible for preparing the medical certificates must be apprised of their legal significance and what must be recorded to ensure that a case may proceed.<sup>138</sup> Healthcare providers, however, must not be charged with drawing legal conclusions.<sup>139</sup> Because the term “rape” has legal significance, it is purely the province of the judge or the jury to determine whether a rape has occurred. Rather, healthcare providers must only report on a victim’s physical and emotional presentation.

Another common problem with the current assortment of medical certificates is linguistic. Haitian Creole remains the only language spoken by the vast majority of Haitians; however, legal proceedings, if initiated, are almost always conducted entirely in French.<sup>140</sup> Because medical certificates are used primarily as evidence in legal proceedings, they are also written in French.<sup>141</sup> As a practical matter, this means that the information a victim relays to her physician in Creole will be translated into French by the physician herself. This translation creates an enormous risk that some of the victim’s account will be misrepresented or lost entirely. Furthermore, by recording a woman’s account of her attack in a language she does not understand, she will be unable to read it herself and verify its content for accuracy.

The confluence of the obstacles detailed above make obtaining a medical certificate and pursuing justice an unlikely prospect for the vast majority of women in Haiti. The following discussion explores how these systemic failings seriously undermine a woman’s right to an effective remedy under domestic and international law.

#### V. REQUIRING MEDICAL CERTIFICATES AS A PREREQUISITE TO PROSECUTION VIOLATES A WOMAN’S RIGHT TO AN EFFECTIVE REMEDY UNDER DOMESTIC AND INTERNATIONAL LAW

Violations of the right to nondiscrimination occur both when sexual violence is perpetrated and when victims are denied a legal remedy after

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138. Letter to Dr. Canton, *supra* note 28, at Annex F.

139. MÉDECINS SANS FRONTIÈRES, SHATTERED LIVES: IMMEDIATE MEDICAL CARE VITAL FOR SEXUAL VIOLENCE VICTIMS 16 (Mar. 2009).

140. MADRE ET. AL, *supra* note 17, at 20; see G. Mathurin, *Haiti’s President Vows to Step Up Anti-Rape Efforts*, HAITIAN DIASPORA (June 7, 2011), <http://haitiandiaspora.com/2011/06/07/haiti’s-president-vows-to-step-up-anti-rape-efforts>.

141. See Inter-Am. Comm’n on Human Rights., Request for Precautionary Measures under Article 25 of the Commission’s Rules of Procedure, submitted by MADRE et al.(Oct. 19, 2010), at Appendix B (documenting medical certificates in French).

suffering violence.<sup>142</sup> When a victim's testimony is distrusted due to discriminatory attitudes about women, her right to a remedy and equality before the law is violated.<sup>143</sup> Victims of rape and other forms of sexual violence have the right to a remedy under both domestic and international law.<sup>144</sup> The Haitian Constitution explicitly details the right to a remedy under Haitian law. Specifically, Article 19 states that all citizens, without distinction, shall have the right to life, health, and respect of the human person.<sup>145</sup> Article 42 states that no citizen shall be "denied access to the courts open to him under the Constitution and the laws" of Haiti.<sup>146</sup> Additionally, Article 276.2 of the Haitian Constitution explicitly incorporates international treaties and covenants that have been ratified by the government into domestic law without requiring additional legislation.<sup>147</sup>

A number of international treaties to which Haiti is a party further afford the right to an effective remedy. In particular, Haiti has ratified each of the constituent parts of the International Bill of Human Rights.<sup>148</sup> Article 8 of the Universal Declaration of Human Rights specifies that everyone "has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>149</sup> The International Covenant on Civil and Political Rights requires that states "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . determined by competent judicial, administrative or legislative authorities."<sup>150</sup> The Human Rights Committee, charged with monitoring compliance under the International Covenant on Civil and Political Rights, has emphasized the importance of "prompt, thorough and effective investigations into allegations of abuse."<sup>151</sup> Moreover, authoritative international bodies interpret Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, which

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142. CHRGI, *supra* note 3, at 84.

143. *Id.*

144. *Id.* at 72.

145. Davis, *supra* note 41, at 880.

146. CONST. DE LA RÉPUBLIQUE D'HAÏTI (1987) art. 42 [Haiti].

147. Davis, *supra* note 41, at 873.

148. See Press Release, Inst. For Justice & Democracy in Haiti, Haiti Ratification of ICESCR, (Feb. 7, 2012), available at [http://www.ijdh.org/press-release-haiti-ratification-of-icescr/#.UY\\_RG7Vax8E](http://www.ijdh.org/press-release-haiti-ratification-of-icescr/#.UY_RG7Vax8E).

149. Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), (Dec. 10, 1948).

150. International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. Doc. A/RES/2200A, (Mar. 23 1976).

151. CHRGI, *supra* note 3, at 77 n.8 (quoting Special Representative of the U.N. Secretary-General, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 41, U.N. Doc. A/HRC/11/13/Add.1 (May 15, 2009) (by John Ruggie) (discussing the Convention Against Torture)).

Haiti recently ratified,<sup>152</sup> as implying an obligation to provide access to a remedy for abuses of Covenant rights.<sup>153</sup> Similarly, these bodies interpret Article 2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women, to which Haiti became a party in 1981, as requiring impartial and effective remedies for victims of gender-based violence.<sup>154</sup> Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women aims at achieving nondiscrimination and equality before the law.<sup>155</sup>

In addition to the aforementioned treaties, Haiti has ratified a number of regional instruments that recognize a victim's right to a remedy before the law. Article 24 of the Inter-American Commission on Human Rights, to which Haiti has been a party since 1977, recognizes the right to equal protection under the law.<sup>156</sup> Additionally, Article 25 regards the right to judicial protection as requiring that the State not only to "provide access to judicial recourse, but also a reasoned decision on the merits of the case."<sup>157</sup> Haiti has also been party to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women since 1997.<sup>158</sup> Most significantly, Article 7(b) provides that states have a duty to protect individuals from human rights violations committed by third parties, including private actors.<sup>159</sup> This duty entails taking action to ensure that perpetrators of sexual violence are punished.<sup>160</sup> The Commission stresses the importance of "effective access to justice, not just formal access."<sup>161</sup> The Commission explains:

[F]or access to justice to be adequate, the formal existence of judicial remedies will not suffice; instead, those remedies must be effective for prosecuting and punishing the violations denounced and in providing redress. . . . [A]n effective judicial response to acts of violence against women includes the obligation to make simple, rapid, adequate and impartial judicial recourses available, without discrimination, for the

152. Press Release, Inst. for Justice & Democracy in Haiti, *supra* note 148.

153. Special Representative of the U.N. Secretary-General, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 23, U.N. Doc. A/HRC/11/13/Add. 1 (May 15, 2009).

154. CHRGI, *supra* note 3, at 77 n.11. Note that CEDAW does not contain an explicit provision granting the right to a remedy like that which appears in the ICCPR.

155. CHRGI, *supra* note 3, at 83.

156. INTER-AM. COMM'N ON HUMAN RTS., THE RIGHT OF WOMEN IN HAITI TO BE FREE FROM VIOLENCE AND DISCRIMINATION, OEA/Ser.L/V/II, doc. 64 (Mar. 10 2009) available at <http://www.cidh.oas.org/countryrep/Haitimujer2009eng/HaitiWomen09.Chap.IIIandIV.htm>.

157. CHRGI, *supra* note 3, at 73 (citing Carranza v. Argentina, Case 10.087, Inter-Am. Comm'n H.R., Report No. 30/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 71 (1997) (discussing the content of Article 25)).

158. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará"), June 9, 1994, 33 I.L.M. 1534.

159. CHRGI, *supra* note 3, at 72.

160. *Id.*

161. *Id.* at 76 n.1 (citing Organization of American States [OAS], Inter-Am. Comm'n H.R., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, doc. 68, ¶ 1 (2007)).

purpose of investigating and punishing these acts and providing redress, so that in the end these acts do not go unpunished.<sup>162</sup>

Accordingly, it does not suffice that the government of Haiti has formally provided a judicial remedy for rape; it must also ensure that victims of rape are able to avail themselves of that remedy.

The Inter-American Commission on Human Rights underscored these commitments when it outlined Haiti's legal obligation to respect the international human rights of victims of sexual violence in 2010.<sup>163</sup> Specifically, the Commission called on the Haitian government to implement immediately the following precautionary measures in response to the conditions in Port-au-Prince's IDP camps:

1. Ensure medical and psychological care is provided in locations available to victims of sexual abuse of the twenty-two camps for those internally displaced. In particular, ensure that there be:
  - a. privacy during examinations;
  - b. availability of female medical staff members, with a cultural sensitivity and experience with victims of sexual violence;
  - c. issuance of medical certificates;
  - d. HIV prophylaxis; and
  - e. emergency contraception.
2. Implement effective security measures in the twenty-two camps; in particular, provide street lighting, adequate patrolling in and around the camps, and a greater number of female security forces in police patrols in the camps and in police stations in proximity to the camps;
3. Ensure that public officials responsible for responding to incidents of sexual violence receive training enabling them to respond adequately to complaints of sexual violence and to adopt safety measures;
4. Establish special units within the police and the Public Ministry to investigate cases of rape and other forms of violence against women and girls; and
5. Ensure that grassroots women's groups have full participation and leadership in planning and implementing policies and practices to combat and prevent sexual violence and other forms of violence in the camps.<sup>164</sup>

The Commission's decision was groundbreaking: For the first time it granted a request for precautionary measures to protect victims of rape

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162. *Id.* (alterations in original) (quoting OAS, Inter-Am. Comm'n H.R., *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, doc. 68, ¶¶ 4-5, (2007)).

163. The Commission granted a request for precautionary measures filed by displaced women and girls in Haiti. Press Release, MADRE, IACHR Sets Recommendations for Haitian Government to Address Sexual Violence in IDP Camps (Jan. 6, 2011), available at <http://www.madre.org/index/press-room-4/press-releases-34/news/iachr-sets-recommendations-for-haitian-government-to-address-sexual-violence-in-idp-camps-544.html>.

164. Davis, *supra* note 41, at 889.

perpetrated by private actors.<sup>165</sup> The Commission implicitly recognized that the Haitian government has a duty to prevent violence against women by non-state actors.<sup>166</sup> The Commission also emphasized that the international community, including nongovernmental organizations, plays an integral role in ensuring that relief and assistance efforts are properly geared toward achieving these objectives.<sup>167</sup> To that end, both houses of the United States Congress introduced a resolution calling “on the Government of Haiti to take steps to implement the recommendations of the Inter-American Commission on Human Rights” and asserting the United States’ “commitment to support the Haitian Ministry of Women’s Affairs in its efforts” to address gender-based violence in Haiti.<sup>168</sup>

Flowing from its many obligations under both domestic and international law, Haiti must undertake to provide effective access to justice for victims of sexual violence, first and foremost by addressing the issue of medical certificates. The following Part details some suggested reforms—both legal and non-legal—to achieve that end.

## VI. ADDRESSING THE ISSUE OF MEDICAL CERTIFICATES IN HAITI AND PROPOSALS FOR REFORM

Despite Haiti’s progress addressing sexual violence, much remains to be accomplished in terms of effective access to justice. In order to meet its international and domestic obligations to diligently investigate, prosecute, and punish cases of rape, thereby providing a remedy for victims of sexual violence, the government of Haiti must ensure better access to victim-oriented medical, legal, and other support services. More importantly, because the legal consequences of not obtaining a medical certificate after enduring sexual violence are irreparable in most cases, it is imperative that the government of Haiti take steps to address the barriers women face when seeking medical attention.

### A. HAITI’S EFFORTS TO CONFRONT SEXUAL VIOLENCE AND THE ISSUE OF MEDICAL CERTIFICATES

In 2005, the government of Haiti adopted the 2006–2011 National Plan to Combat Violence Against Women, which defines violence against women as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”<sup>169</sup> The National Plan provided an

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165. MADRE ET AL., *supra* note 17, at 12.

166. *Id.*

167. Davis, *supra* note 41, at 890.

168. S. Res. 352, 112th Cong. (2012); H.R. Res. 521, 112th Cong. (2012).

169. U.N. WOMEN, GOOD PRACTICES IN NATIONAL ACTION PLANS ON VIOLENCE AGAINST WOMEN 8 (2010) (quoting Convention of Belém Do Pará [Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women], June 9, 1994, 33 I.L.M. 1534, at art. 1).

opportunity to “develop an effective, comprehensive and nationally-relevant response to treaty obligations and international standards related to violence against women, but also to demonstrate that response, and so aid the reporting process to international bodies.”<sup>170</sup> Specifically, it detailed measures for building more robust victim support services: rape prevention programs, including advocacy and education, training and capacity-building efforts, prosecution, punishment and rehabilitation of perpetrators, data collection and analysis, and cooperation with international and regional organizations.<sup>171</sup> To date, little has been achieved in the way of implementing the commitments set forth in the National Plan.<sup>172</sup>

As previously mentioned, the Women’s Ministry, the Ministry of Justice and Public Security, and the Ministry of Public Health and Population issued a binding protocol in 2007, according to which medical certificates must be made available by any healthcare facility free of charge at the request of the victim or the judiciary.<sup>173</sup> Despite the clarity of these directives, medical professionals and judicial actors continue to circumvent their orders by refusing to issue or charging victims for medical certificates.<sup>174</sup>

The Women’s Ministry released a manual in May 2011 that briefly addresses the issue of medical certificates.<sup>175</sup> The degree to which the manual has been disseminated is unclear but the dialogue on the subject is certainly a step in the right direction. Specifically, the manual discusses the difference between a medical report and a medical certificate—the former is used for diagnoses and treatment purposes and the latter is used for legal purposes.<sup>176</sup> Furthermore, the manual discusses the general objectives of the medical certificate, namely that certain evidence may be used to infer lack of consent in a rape prosecution.<sup>177</sup> Notably, the manual also states that the absence of traumatic wounds or other signs of physical violence is not dispositive of whether a rape occurred.<sup>178</sup> Unfortunately, despite positive pronouncements, the manual stresses that, in the absence of a guilty plea, a medical certificate may be the only means of confirming the truth.<sup>179</sup> This rhetoric reinforces the discriminatory belief that a woman’s testimony is not reliable.

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170. *Id.* at 9.

171. *Id.* at 4–5.

172. Amnesty Int’l submission to the U.N. UPR, *supra* note 15.

173. Letter to Dr. Canton, *supra* note 28, at Annex D.

174. Interview with Legal Team, *supra* note 44.

175. CONCERTATION NATIONALE CONTRE LES VIOLENCE FAITES AUX FEMMES, ÉTAT DES LIEUX DU RÉFÉRENCE DE LA CONCERTATION: RAPPORT NARRATIF § 3.4 [MANUAL] (2011), available at <http://haiti.cridlac.org/XML/fre/doc90941/doc90941-contenido.pdf>.

176. *Id.*

177. *Id.* § 3.4.2.

178. *Id.*

179. *Id.*

B. HAITI'S DRAFT LAW ON THE PREVENTION, PUNISHMENT, AND ERADICATION OF VIOLENCE AGAINST WOMEN

In response to increasing pressure from civil society and the international community, including the landmark 2010 decision by the Inter-American Commission on Human Rights, the government of Haiti has undertaken legislative reform aimed at improving judicial responses to sexual violence. The government is currently in the process of formalizing a Draft Law on the Prevention, Punishment, and Eradication of Violence Against Women (the "Draft Law"). The Draft Law represents a renewed effort to enact comprehensive legislation on violence against women.<sup>180</sup> It seeks to revise sections of Haiti's civil and penal codes in an effort to recognize the full panoply of rights and protections for victims of sexual and other forms of gender-based violence.<sup>181</sup> Indeed, Haiti's penal and criminal procedure codes have remained "virtually unchanged in nearly two centuries, . . . [contributing] significantly to the justice system's dysfunction."<sup>182</sup>

Regrettably, the Draft Law does not explicitly establish that a victim's testimony alone can be sufficient to convict or that a medical certificate is not legally required as corroboration.<sup>183</sup> As such, prosecutors and judges will likely continue to imply a requirement that a woman must substantiate her account of rape through production of a medical certificate documenting her attack. Additionally, the lack of explicit evidentiary standards<sup>184</sup> enables judges and prosecutors to require that a victim produce a medical certificate as a prerequisite to prosecution. Arguably, the Draft Law could serve as an endorsement of the current system in which a medical certificate documenting physical violence is required in nearly every case to corroborate a woman's account of her attack.<sup>185</sup>

In order to remedy the problem of reliance on the medical certificate, other "forms of evidence, as well as other methods of collecting evidence, should also be actively sought (through investigation) and considered" at all stages of an investigation.<sup>186</sup> For example, witness statements, physical evidence of violence such as torn clothing, and psychological reports can be highly probative in rape prosecutions.<sup>187</sup> However, obtaining alternative forms of evidence is entirely dependent on the will and capacity of the

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180. Letter to Dr. Canton, *supra* note 28, at 2.

181. *Id.*

182. INT'L CRISIS GRP., *supra* note 55, at 10.

183. TRUSTLAW, *supra* note 31, at 25.

184. Letter to Dr. Canton, *supra* note 28, at 3.

185. Advocates have requested that the language of the Draft Law be changed to reflect full compliance with international human rights standards for rape law and are hopeful that revisions will be made before the Draft Law is introduced into parliament. See TRUSTLAW, *supra* note 31.

186. Amnesty Int'l, *Burundi: No Protection from Rape in War and Peace*, at 21, AI Index AFR 16/002/2007 (October 2007).

187. *Id.*

police, prosecutors, and judges responsible for investigating rape complaints. To this end, training about how to document and investigate cases of rape and other forms of sexual violence is an essential component of any effective solution.

Nevertheless, in many cases medical certificates strengthen a victim's case against her alleged perpetrator. As such, the healthcare providers charged with performing the medical examinations and documenting any evidence of trauma play a key role in the prosecution process. Uniform healthcare standards, including medical certificates and professional training for healthcare professionals responsible for handling rape cases, are essential to ensure that victims are treated with an appropriate level of sensitivity and respect. Privacy and confidentiality are also necessary to guarantee safe access to medical treatment. Furthermore, victims of sexual violence must have access to free or affordable medical services. Without these assurances, victims will simply be unwilling to take the first step in seeking medical attention.

It is also important that all medical certificates be archived for as long as the victim is permitted to press charges.<sup>188</sup> This requirement would ensure that evidence relating to sexual violence is preserved for use should the victim decide to pursue legal action at a later time. Given the traumatizing psychological effects of sexual violence, this would allow victims to pursue justice when they are more prepared to confront their aggressors.

While the Draft Law does not clarify the problem of medical certificates, it would establish in-court testimonial protections for rape victims. Article 482 of the Draft Law prohibits the judge from discussing the sexual history of the victim.<sup>189</sup> While it is not clear exactly how the provision would be implemented in practice, or how broadly it is meant to apply, it could have an impact on a victim's willingness to testify at trial. Moreover, it would likely serve to reduce a victim's reliance on *partie civile* as the only mechanism by which she can avoid the throes of judicial examination.

Additionally, the Draft Law enhances a number of non-judicial protective measures that seek to improve access to emergency medical services.<sup>190</sup> Specifically, drafters envisioned better training for officials dealing with sexual assault cases.<sup>191</sup> For example, Article 47 "establishes initial and continuing education programs that include information on gender equality and the prevention of violence against women for judges, clerks, the judiciary, the police and forensic doctors."<sup>192</sup> Article 57 "requires hospitals and other private health centers to establish at least

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188. MÉDECINS SANS FRONTIÈRES, *supra* note 139, at 16.

189. TRUSTLAW, *supra* note 31, at 26.

190. See Moloney, *supra* note 19; see also CHRGI, *supra* note 3, at 75.

191. See Moloney, *supra* note 19.

192. Letter to Dr. Canton, *supra* note 28, at 2.

some minimum free services for female victims of violence.”<sup>193</sup> These provisions directly relate to the Commission’s recommendations for precautionary measure.<sup>194</sup> Particularly with regard to the issue of medical certificates, formal legal education and training are essential to ensure that judges are giving appropriate weight to all of the evidence, including victim testimony. In particular, judges must be cognizant of the fact that a medical certificate is not technically required under Haitian law.

The Draft Law also “aims to give more power to the police and prosecutors involved in investigating cases of sexual assault and place the onus on the police to gather evidence that can be used in court.”<sup>195</sup> One reform proposal suggests that suppression of the investigative judge phase would increase the opportunity to collect intact evidence at crime scenes by placing investigations solely in the hands of the police and prosecutor’s office.<sup>196</sup> Consolidating the resources allotted for a pre-trial investigation would greatly improve efficiency and reduce the likelihood that a woman’s medical certificate would be the focal point of a prosecution. If police and prosecutors were called upon to do more at this phase, much of the secrecy and corruption that currently plagues the investigation phase of rape cases would be eliminated.

Hemanex Gonzague, Director General of the Haitian Women’s Ministry, emphasized that the “new law aims to allow the state and other actors to find common ground on how to treat and help victims.”<sup>197</sup> Essential to this effort is a commitment by key government ministries to engage community-based organizations that are at the forefront of the battle against gender-based violence. In large part due to the work of grassroots groups like KOFVIV and Women Victims Get Up Stand Up (*Fanm Viktim Leve Kanpe* or “FAVILEK”),<sup>198</sup> and other organizations like the Office of International Lawyers (*Bureau des Avocats Internationaux*),<sup>199</sup> women have been much less reticent to report rape. These groups have made considerable progress “in sensitizing women and girls to seek support, obtain critical medical care immediately after an aggression, and file complaints with the police.”<sup>200</sup>

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193. *Id.*

194. *Id.*

195. Moloney, *supra* note 19.

196. INT’L CRISIS GRP., *supra* note 55, at 11.

197. Moloney, *supra* note 19.

198. Founded in 1993, FAVILEK, like KOFVIV, is a Haitian women’s organization that provides informal outreach services for victims of rape. *About Favilek*, FAVILEK, <http://favilek.interconnection.org> (last visited July 30, 2013).

199. The Office of International Lawyers is a public interest law firm in Port-au-Prince that provides representation for rape victims. *About Institute for Justice & Democracy in Haiti & Bureau des Avocats Internationaux*, INST. FOR JUSTICE & DEMOCRACY IN HAITI, <http://www.ijdh.org/about> (last visited July 30, 2013).

200. Jagannath, *supra* note 29, at 51.

### C. DEVELOPING A UNIFORM MEDICAL CERTIFICATE

Grassroots women's organizations like KOFVIV and FAVILEK, as well as lawyers, judges, and government representatives, recognize the importance of a uniform medical certificate.<sup>201</sup> A uniform certificate would reduce the likelihood that judges and prosecutors would refuse certificates from certain facilities and would clarify any uncertainty regarding the level of detail necessary to support a prosecution. To that end, reform advocates have lobbied for the creation of a uniform certificate to be used by public institutions, the establishment of guidelines for certificates to be used by private institutions, and the dissemination of training material for medical professionals and judicial actors about the significance and evidentiary value of a medical certificate.<sup>202</sup>

A case study of Liberia could serve as a paradigm for Haitian reformers. In Liberia, coordinated lobbying efforts led to the adoption of a uniform, government-issued national medical certificate.<sup>203</sup> Since 2008, the new medical certificate has been routinely used in cases of sexual violence in public medical facilities across Liberia.<sup>204</sup> The uniform certificate serves as both a legal document and an examination record, thereby simplifying the process for medical professionals and avoiding duplication.<sup>205</sup> The certificate is objective and thorough, which ensures its sufficiency as evidence.<sup>206</sup> In addition, health workers other than doctors are allowed to issue medical certificates, "ensuring that a shortage of doctors in medical facilities would not prevent medical certificates from being issued."<sup>207</sup>

At a recent conference in Port-au-Prince, a number of key actors from civil society, the government sector, and local and international nongovernmental organizations participated in an interactive workshop on the harmonization of medical certificates in cases of sexual violence.<sup>208</sup> The workshop aimed to facilitate an interactive dialogue between Haitian grassroots women's leadership and international and local actors to explore the role of the medical certificate in the prosecution of crimes of sexual violence, difficulties posed by the current administration of medical certificates in Haiti, international best practices in this area, and potential solutions.<sup>209</sup> During an interactive breakout session, civil society experts

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201. Letter to Dr. Canton, *supra* note 28, at 8.

202. *Id.*

203. MÉDECINS SANS FRONTIÈRES, *supra* note 139, at 29.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 30.

208. See KOFVIV ET AL., WOMEN AND GIRLS IN HAITI'S RECONSTRUCTION: A DIALOGUE ADDRESSING STIGMA AND DISCRIMINATION ASSOCIATED WITH SEXUAL VIOLENCE 17-25 (2012).

209. *Id.*

and legal and medical professionals were encouraged to identify flaws in the current assortment of certificates, as well as potential remedies.<sup>210</sup> This type of dialogue and engagement is critical to the formulation of a uniform medical certificate that adequately supports prosecutions and aids medical professionals in the administration of these certificates.

#### CONCLUSION

Access to effective justice remains elusive for the majority of Haitian women who have been victims of rape and other forms of sexual violence. These women face discrimination and gender biases at even the most nascent stages of a prosecution. By requiring that a victim present a medical certificate before pursuing a complaint of sexual violence, police, prosecutors, and judges ensure that only a small minority of rape cases ever makes it past the complaint stage. The often insurmountable barriers to accessing medical attention and obtaining medical certificates virtually preordain that rape allegations will go uninvestigated. Perpetrators of sexual violence ultimately benefit from a system that is plagued by enormous obstacles and few protections for victims.

Undeniably, the medical certificate requirement single-handedly reinforces a climate of impunity and perpetuates gender discrimination in Haiti. Without access to adequate medical services and effective legal recourse, this trend will continue. Furthermore, without explicit legislation stating that a woman's own credible testimony is sufficient to secure a conviction, prosecutors and judges will have little incentive to discontinue the requirement of medical certificates as corroboration in the vast majority of rape cases. The time for reform is now.

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210. *Id.* at 19–21.

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