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Meena Jagannath

Bureau des Avocats Internationaux

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BARRIERS TO WOMEN'S ACCESS TO JUSTICE IN HAITI

Meena Jagannath†

I. ABSTRACT

While gender-based violence is not a new phenomenon in Haiti, the aftermath of the January 12, 2010 earthquake further exposed the vulnerability of Haitian women and girls to gender-based violence and the limited possibilities for women to evince a judicial response to gender-specific violations of the law. Drawing from the experiences of Haitian lawyers and women's rights advocates, this paper will examine women's barriers to accessing justice in Haiti by drawing on actual examples of gender-based violence at each step of the investigatory process under the Haitian justice system. It will provide, by way of background, an overview of the Haitian justice system, including gender rights under Haitian law, the framework of Haiti's obligations with respect to the administration of justice, and the structure and processes of each institution implicated in the pursuit of justice for cases involving gender-based violence. Additionally, the case studies will reveal the requirements and barriers women confront at each stage of the process. The article will then explore community-based responses to addressing these barriers and provide recommendations on legislative, judicial, and law enforcement reforms aimed at improving women's access to justice.

† Meena Jagannath is a 2011–2012 Lawyers' Earthquake Response Network Legal Fellow at the *Bureau des Avocats Internationaux* (BAI), based in Port-au-Prince, Haiti, and its U.S.-based partner, the Institute for Justice & Democracy in Haiti (IJDH). At the BAI, Meena coordinates the Rape Accountability and Prevention Project, which combines direct legal representation in Haitian courts and the international fora with international and national advocacy on gender-based violence and grassroots organizing. She earned her J.D. from the University of Washington School of Law, where she was a William H. Gates Public Service Law Scholar, and her M.A. in International Affairs with a concentration in human rights from the School of International and Public Affairs at Columbia University. For the past ten years, over the course of her professional and academic careers, she has been a human rights activist and advocate in diverse contexts around the world. The author would like to thank Mario Joseph, director of the BAI, Brian Concannon, director of IJDH, and Lisa Davis, clinical professor for the International Women's Human Rights Clinic at CUNY School of Law, for their support, mentorship and guidance throughout her work in Haiti.

II. INTRODUCTION

*“Pawòl fò, machwa gonfle.”*¹

The mouths of Haitian women have long been swollen by untold accounts of violence. Silenced by the structural impediments caused by the deep-rooted gender discrimination that has marked their society, women in Haiti have only recently begun speaking out against gender-based violence in a systematic fashion. However, while the past decade has seen advances in developing the women’s movement and integrating governmental institutions aimed at combating the structural inequalities that give rise to and perpetuate gender-based violence and discrimination, progress remains slow in the face of class divisions and setbacks such as the scale of Haiti’s January 12, 2010 earthquake that killed hundreds of thousands and uprooted over a million people, by official estimates.²

Even before the earthquake, Haiti’s statistics on gender indicated women’s low economic and political status in Haitian society. According to the 2008–2010 Poverty Reduction Strategy Paper on Haiti, 60% of female-headed households had been living in extreme poverty pre-earthquake.³ Another telling statistic on women’s economic disfranchisement before the earthquake indicates that 83% of women’s economic activity occurs within the informal sector.⁴ Women’s political involvement corresponds accordingly: there is only one female senator⁵ in the 30-member 2011 Senate (or 3.33%)⁶ and four female deputies out of 95 total actual mem-

¹ Haitian proverb that means, “Strong words make the mouth swell.” In other words, extraordinary news prevents one from speaking.

² See *Earthquakes with 1,000 or More Deaths Since 1900*, U.S. GEOLOGICAL SURVEY (last modified Apr. 14, 2011), http://earthquake.usgs.gov/earthquakes/world/world_deaths.php.

³ INT’L MONETARY FUND [IMF], HAITI: GROWTH AND POVERTY REDUCTION STRATEGY PAPER, 2008–2010, IMF COUNTRY REPORT NO. 08/115, 22 (2008), available at <http://www.imf.org/external/pubs/ft/scr/2008/cr08115.pdf>.

⁴ Comm. on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of all Forms of Discrimination against Women – Combined Initial, Second, Third, Fourth, Fifth, Sixth, and Seventh Periodic Reports of States parties: Haiti, ¶ 13.2, U.N. Doc. CEDAW/C/HTI/7 (July 9, 2008) [hereinafter CEDAW combined reports].

⁵ INTERPARLIAMENTARY UNION, HAITI SENATE: LAST ELECTIONS, http://www.ipu.org/parline/reports/2138_E.htm (last updated July 15, 2011). No women were elected in the 2010–2011 elections for 11 seats on the Senate. *Id.* The sole female senator’s term expired in January 2012. *Id.*

⁶ *Id.*

bers of the 49th Chamber of Deputies (or 4.21%).⁷ This longstanding economic and political exclusion of Haitian women is both a result of and a factor perpetuating gender discrimination that impinges on women's expression of their basic human rights.⁸

Given this sobering backdrop, Haiti's deadly 2010 earthquake could only exacerbate the existing vulnerability and disfranchisement faced by women and girls. Owing to the precarious conditions imposed by displacement as well as social and economic dislocation, poor women and girls are disproportionately exposed to the risk of sexual or gender-based violence (GBV) characteristic of post-disaster scenarios.⁹ The aftermath of Haiti's disaster has proven no different: since the earthquake, human rights advocates and women's groups have noted an epidemic of GBV in camps for internally displaced persons (IDPs), where preventative measures such as adequate security and access to services have been severely lacking.¹⁰

International-level advocacy on the part of these groups has drawn the attention of the international community to the issue of GBV in post-earthquake Haiti, while national advocacy and grassroots organizing has helped increase women's awareness of their rights and encourage greater reporting of instances of sexual violence in the camps.¹¹ Accordingly, cases of gender-based violence, and rape specifically, are increasingly making their way onto the courts' dockets, and the demand for legal recourse has risen among women survivors of sexual violence. Unfortunately, the Haitian justice system has yet to grow in accordance with the number of rape cases presented to it, owing to a number of structural (corruption, long procedure, lack of resources)¹² and social barriers

⁷ *Id.*

⁸ See Inter-Am. Comm'n on H.R., *The Right of Women in Haiti to be Free from Violence and Discrimination*, ¶ 11, OEA/Ser.L/V/II, Doc. 64 (2009) [hereinafter IACHR Report].

⁹ See WORLD HEALTH ORGANIZATION [WHO], WHO ETHICAL AND SAFETY RECOMMENDATIONS FOR RESEARCHING, DOCUMENTING, AND MONITORING SEXUAL VIOLENCE IN EMERGENCIES 6 (2007), available at http://whqlibdoc.who.int/publications/2007/9789241595681_eng.pdf.

¹⁰ MADRE ET. AL., *Gender-Based Violence Against Haitian Women & Girls in Internal Displacement Camps*, in UNIVERSAL PERIODICAL REVIEW, REPUBLIC OF HAITI, SUBMISSION TO THE HUMAN RIGHTS COUNCIL 12TH SESSION 87, 88 (2011), available at <http://ijdh.org/wordpress/wp-content/uploads/2011/04/LERN-Compiled-UPR-Submissions-1.pdf> [hereinafter UPR SUBMISSION ON GBV].

¹¹ 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 (2011).

¹² See INT'L CRISIS GRP., LATIN AMERICA/CARIBBEAN BRIEFING NO. 27, KEEPING HAITI SAFE: JUSTICE REFORM (2011) [hereinafter ICG REPORT].

that discriminate against female complainants at each level of the process and discourage women and girls from formally seeking justice.

Women occupying the economically disfavored class and those still living in the IDP camps suffer the consequences of these barriers. Unrepresented women's cases often fall by the wayside in the face of disorganization and corruption, including prioritization of cases in which money is likely to influence the judges or clerks taking the case.¹³ Many of these women cannot afford private counsel, and free legal services are almost non-existent in Haiti.¹⁴ Following the 2010 earthquake, the *Bureau des Avocats Internationaux* created the Rape Accountability and Prevention Project (RAPP) in partnership with the Institute for Justice & Democracy in Haiti and several grassroots women's organizations such as KOFIVIV,¹⁵ FAVILEK,¹⁶ KONAMAVID,¹⁷ and GCFV¹⁸ in order to provide a mechanism by which women and girl victims of sexual violence can obtain free legal counsel and other services that support and encourage prosecution of rape and other forms of gender-based violence. It is on the basis of the findings of this program, the first of its kind in Haiti, that this article reveals critical gaps in the Haitian justice system.

The article will begin by giving a general overview of the right to remedy under Haitian law and international instruments to which Haiti is a signatory, and next outline Haiti's legal obligations with respect to gender rights. It will then give a brief overview of the functions of each institution involved in the prosecution of sexual violence and describe the attitudes and capacity issues facing each, drawing on examples from the cases and experiences of Haitian lawyers and women's rights advocates¹⁹ to highlight the inade-

¹³ Benedetta Faedi, *The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti*, 44 STAN. J. INT'L L. 147, 190 (2008); Interview with Marie Esther Felix, in Haiti (Aug. 13, 2011) (on file with author).

¹⁴ ICG REPORT, *supra* note 12, at 7.

¹⁵ Komisyon Fanm Viktim pou Viktim [Commission of Women Victims for Victims].

¹⁶ Fanm Viktim Leve Kanpe [Women Victims, Get Up Stand Up].

¹⁷ Kòdinasyon Nasyonal Viktim Direk [National Coordination of Direct Victims].

¹⁸ Groupe Concertation des Femmes Victimes [Dialogue Group for Women Victims].

¹⁹ Methodological note: Since, at the time of writing this article, no program outside of the Rape Accountability and Prevention Project (RAPP) at the Bureau des Avocats Internationaux (BAI) provided systematic and comprehensive free legal assistance to victims of sexual violence (from start to finish—other organizations do set up selected victims with pro bono legal assistance, but this is not systematic and sometimes does not accompany the victim through the legal process to the end), much of

quacies of the Haitian justice system in its treatment of predominantly poor or disadvantaged victims of rape. The article will then conclude with recommendations to enhance community-based responses that strengthen the rule of law and support legislative measures to broaden the protections for women and girls against violence as necessary to improve women's access to justice through the Haitian justice system.

III. BARRIERS TO ACCESSING JUSTICE

A. *Overview of Rights Under the Haitian Justice System*

While the 1987 Constitution of Haiti includes an “absolute obligation to guarantee the right to life, health and respect of the human person for all citizens without distinction” in accordance with the Universal Declaration of Human Rights,²⁰ it also stipulates that any duly ratified international treaties or agreements directly become a part of Haitian law and abrogate any conflicting laws.²¹ Thus, where its national law falls short, Haiti has a relatively well-defined legal framework for rights through the regional and international rights treaties it has signed to reinforce and protect human rights.

i. Framework of Haiti's International, Regional, and Constitutional Human Rights Obligations Relating to the Administration of Justice

Under Haiti's legal framework, citizens have the right to seek adequate remedy in a competent tribunal. Although the 1987 Constitution of Haiti does not explicitly grant a right to remedy to vic-

the observations from this article come from direct experience working on legal cases in the Port-au-Prince-based RAPP program for over one year with several Haitian lawyers. Marie Esther Felix had been the dedicated RAPP attorney at the BAI for almost one year prior to my integration into RAPP. I subsequently have gained considerable exposure to the Haitian justice system and rape prosecution in particular, through interviews, court accompaniments and case management for over 150 adult and minor victims of sexual violence primarily from Port-au-Prince. Thus, many propositions raised by Marie Esther Felix have been corroborated by my personal experience in the system, as well as discussions with subsequent Haitian lawyer colleagues working on rape cases. In addition, my close work with women's rights groups has provided me with substantial knowledge of the socio-political context of the women's movement as well as issues that plague the legal system. As this article is intended to be very specific to rape prosecution, I have limited discussion of related topics that impact the Haitian justice system's response to rape.

²⁰ CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, Mar. 10, 1987, art. 19. *See also* Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

²¹ CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, art. 276-2.

tims of human rights abuses, Article 27 does provide the right for an arrested individual to bring suit in court for any violation of the provisions on individual liberty.²² However, both by Article 19 of the Constitution and under customary international law, Haiti is bound by the provisions of the UDHR, which provides a right to adequate remedy under Article 8.²³ Additionally, states are required to provide “fair, effective and prompt access to justice” and “adequate, effective, prompt and appropriate remedies, including reparation.”²⁴

Haiti has also ratified the International Covenant on Civil and Political Rights (ICCPR), which requires states to make available and enforce an effective remedy for victims as determined by a competent authority.²⁵ The U.N. Human Rights Committee, tasked with monitoring implementation of the ICCPR, notes states’ obligations to provide victims access to “effective remedies to vindicate those rights,” and requires states to make reparations.²⁶

Other international human rights treaties that Haiti has signed and ratified also provide for victims’ right to an effective remedy. Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for effective protection and remedy, as well as adequate compensation or satisfaction for a violation of rights.²⁷ Similarly, the Convention on the Rights of the Child (CRC) requires that a state rehabilitate the victim-child.²⁸

²² *Id.* art. 27. *See also* Article 50, which provides for a jury trial for “crimes of blood” and political crimes, but this speaks to procedural due process protections more than the basic human right to remedy.

²³ UDHR, *supra* note 20, art. 8 (“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.”).

²⁴ *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/Res/60/147, I.2(b) & (c) (Dec. 16, 2005) (implementing legal obligations under international human rights and humanitarian law) [hereinafter Basic Principles].

²⁵ International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. Exec. Rep. No. 23, 102d Cong., 2d Sess., 999 U.N.T.S. 171 (ratified by Haiti on Feb. 6, 1991).

²⁶ U.N. Human Rights Comm., Gen. Cmt. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶¶ 15–16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

²⁷ Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1955, 660 U.N.T.S. 195 (ratified by Haiti on Dec. 19, 1972) [hereinafter CERD].

²⁸ Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3 (ratified by Haiti on June 9, 1995) [hereinafter CRC].

Regional human rights treaties that Haiti has ratified and jurisprudence of regional human rights tribunals have also explicitly mentioned the right. Article 25 of the American Convention on Human Rights (“American Convention”) of the Organization of American States calls for prompt, effective redress before a competent tribunal and enforcement of that tribunal’s decision.²⁹

ii. Obligations Concerning Violence Against Women

1. *Obligations Under International Law*

As to Haiti’s obligations with respect to addressing violence against women, Haiti has ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),³⁰ which incorporates violence against women as a form of discrimination by way of General Recommendation 19 to Article 1 of the CEDAW Committee.³¹

In addition to CEDAW, Haiti has obligations under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém Do Pará”)³² signed and ratified at the behest of the women’s movement in 1996.³³ The Convention of Belém Do Pará imposes an obligation on state parties to establish mechanisms to investigate, adjudicate and prevent violence against women, with the goal of eliminating it.³⁴

The above provisions, along with those mentioned in the previous section, make up the foundation of the due diligence standard to prevent, investigate, and punish acts of violence against women.³⁵ Under this standard, a state should develop the necessary national legislation and mechanisms by which victims of gender-

²⁹ American Convention art. 25, July 18, 1978, 1144 U.N.T.S. 123 (ratified by Haiti on Sept. 14, 1977). *See also* Velasquez-Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 62 (July 29, 1988) (“State Parties have an obligation to provide effective judicial remedies to victims of human rights violations.”).

³⁰ Convention on the Elimination of all Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (ratified by Haiti on July 20, 1981) [hereinafter CEDAW].

³¹ Lisa Davis, *Still Trembling: State Obligation Under International Law to End Post-Earthquake Rape in Haiti*, 65 U. MIAMI L. REV. 867, 881 (2011) (“Recommendation No. 19 defines GBV as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately.’”).

³² Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 (entered into force March 5, 1995) [hereinafter Convention of Belém Do Pará].

³³ Faedi, *supra* note 13, at 179.

³⁴ Convention of Belém do Pará, *supra* note 32, art. 7.

³⁵ Davis, *supra* note 31, at 882–85.

based violence can have recourse to the justice system free of discrimination as to gender, or any other social status.³⁶ Accordingly, Haiti has a specific obligation under international law to put into place effective mechanisms of providing redress for gender-based violence that are accessible to all women and girls.

2. *Obligations Under National Law*

In addition to the obligations undertaken under national law through Article 276-2 of the Haitian Constitution, which directly incorporates international treaty obligations into national law, Haiti has a national legal framework that addresses discrimination and gender-based violence. Although Haiti's Constitution had to go through multiple revisions in the mid-1900s to address the concerns from the women's movement, it was not until the 1987 Constitution of Haiti, currently in force, that Haiti eliminated the gender distinctions previously included in such provisions as those on women's participation as candidates in national elections.³⁷ Under the current Constitution, Articles 17–19 reaffirm the principle of non-discrimination with respect to the exercise of civil and political rights, equality before the law, and protection of individual human rights.³⁸

Similarly, Haiti's Penal Code, based upon the French Penal Code of 1810, did not change its classification of rape as an offense against morals (*attentat aux moeurs*)³⁹ as opposed to an offense against the person until 2005. Articles 1–4 of the Decree of July 6, 2005⁴⁰ reformed Articles 278–281 of the 1835 Penal Code of Haiti to make rape a criminal offense to an individual's physical integrity, as opposed to an offense to an individual's moral integrity or honor.⁴¹ While this represented a significant step for the women's movement, however, it did not provide a comprehensive framework for addressing and punishing a wider range of gender-based violence offenses, such as sexual harassment in the workplace. Furthermore, in practice, the provisions have not been applied in a

³⁶ *Id.* at 883.

³⁷ See CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI; CEDAW combined reports, *supra* note 4, at 26–28 (summary of the history of the Haitian Constitution's treatment of discrimination against women as per Article 1 of CEDAW).

³⁸ CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, arts. 17–19.

³⁹ CODE PÉNAL [C. PÉN.] [HAÏTIAN CRIMINAL CODE], arts. 279–80 (Haiti).

⁴⁰ See Décret du 6 juillet 2005 *modifiant le Régime des Agressions Sexuelles et Elimination en la Matière les Discriminations Contre la Femme* [Decree Modifying the Regulation of Sexual Assaults and Eliminating Forms of Discrimination Against Women], LE MONITEUR [THE MONITOR], Aug. 11, 2011 (Haiti).

⁴¹ See Faedi, *supra* note 13, at 181.

systematic, effective fashion that targets the underlying discrimination inherent in the legal system.⁴²

In 2011, the Ministry on the Status of Women and Women's Rights (*Ministère à la Condition Feminine et aux Droits des Femmes*) along with the Organization of American States (OAS) and the National Dialogue on the Prevention of Violence Against Women (*Table de Concertation Nationale contre les violences faites aux femmes*)⁴³ began an initiative to draft, in consultation with civil society and jurists, a comprehensive bill on violence against women and girls. Though the bill is still in the stage of drafting and in need of significant revisions, it constitutes an important step towards Haiti's protection of the rights of women and girls to be free of discrimination and violence.

B. Overview of Criminal Procedure for a Case of Rape, Including Introduction of the Structures Below

i. Haitian Criminal Procedure

The Haitian justice system is modeled after the French civil system, and its criminal procedure is directed by the Criminal Procedure Code (CIC, *Code d'Instruction Criminelle*). Because post-earthquake cases of rape received by the *Bureau des Avocats Internationaux* (BAI) have only recently begun to be referred to the criminal court stage for trial,⁴⁴ this article will focus on the functions of the various actors within the judicial police (*police judiciaire*) in the stages leading up to trial.⁴⁵

Under Article 9 of the CIC, the powers of the judicial police are exercised by the police, justices of the peace, the Office of the Prosecutor (*parquet/Ministère Public*), the investigating judges (*juges*

⁴² *Id.* at 182.

⁴³ This entity consisting of state actors, members of civil society, as well as agencies for international cooperation formed in 2003 to coordinate the responses of different actors in society with the aim of addressing and preventing violence against women in an efficient manner. *See* CONCERTATION NATIONALE CONTRE LES VIOLENCES FAITES AUX FEMMES, PLAN NATIONAL DE LUTTE CONTRE LES VIOLENCES FAITES AUX FEMMES, PREVENTION, PRISE EN CHARGE ET ACCOMPAGNEMENT DES VICTIMES DE VIOLENCES SPECIFIQUES FAITES AUX FEMMES 2006–2011 (2005).

⁴⁴ As of the writing of this article, there are nine BAI cases that have received orders referring the cases to the criminal court for judgment. Three of these cases were heard in criminal court during the last week of July 2012.

⁴⁵ "The judicial police researches crimes, offenses and misdemeanors, assembles to proof of these, and brings the adult or minors offenders to the courts or special jurisdictions charged with determining and fixing the duration of their punishment in penitentiary institutions or re-education centers as prescribed by the law." CODE D'INSTRUCTION CRIMINELLE D'HAITI [CIC] [CODE OF CRIMINAL PROCEDURE], art. 8 (Haiti).

d'instruction) and the Institute for Social Welfare and Research (IBESR, the equivalent of child protection services).⁴⁶ This section will analyze the functions of each body and the barriers presented at each stage of the legal process of prosecuting rape.⁴⁷

ii. The Police and Justices of the Peace

1. *Structure and Functions*

The Haitian National Police (HNP)⁴⁸ is supervised by the Minister of Justice, appointed by the Prime Minister. The HNP is the institution for law enforcement in Haiti, headed by the Director General, whom the President appoints. HNP is made up of different units, in particular the Central Direction of Judicial Police (DCPJ), which is the body tasked with carrying out the preliminary criminal investigations.⁴⁹

Chapter II, Article 10 of the CIC describes the duties of the police: to investigate crimes, misdemeanors and offenses; provide a preliminary report to the justices of the peace on the facts of the crime as well as any evidence they can gather; collect and confiscate items that could have been taken; and arrest and bring before the justices of the peace any individual caught in the act, or “flagrant offense” (*flagrant délit*).⁵⁰

According to Chapter V of the CIC, police officers and justices of the peace are members of the Judicial Police (*police judiciaire*)⁵¹ and act as auxiliaries of justice for the Chief Prosecutor (*Commissaire du Gouvernement*).⁵² They have a role to receive complaints, and, in the case of a flagrant offense (*flagrant délit*), make arrests and execute *mandats d'amener*⁵³ issued by the Office of the Prosecutor (*parquet*). The Justices of the Peace (*juges de paix*), who take

⁴⁶ CIC, art. 9.

⁴⁷ Under Art. 3 of the CIC, the civil process can march hand in hand with the criminal process. Accordingly, the BAI and other complainant-side lawyers represent victims in seeking damages from the accused as “partie civile.” CIC, art. 3.

⁴⁸ See IACHR Report, *supra* note 8, at 29.

⁴⁹ *Id.*

⁵⁰ *Flagrant délit* literally means “flagrant offense,” but denotes either when a person is caught in the act of committing a crime or immediately after (“*un temps voisin*”, usually within a 24 to 48-hour window, though it can be extended in certain circumstances at the discretion of the prosecutor). It also applies when the accused is denounced by public outcry (*clameur publique*) or “when the accused is found with the effects, weapons, instruments or papers that give the presumption that he is the author or accomplice, provided that it is within a time immediately after the offense.” CIC, arts. 10, 30–31.

⁵¹ *Id.* art. 9.

⁵² *Id.* art. 38–43.

⁵³ *Id.* art. 30.

down the preliminary information of the crime and victim's complaint (*procès-verbaux*),⁵⁴ can also issue a *mandat d'amener* to be executed by the police.⁵⁵ A *mandat d'amener* is an order to render the accused to the prosecutor's office for prompt interrogation (within 48 hours), which will then decide whether to transfer the accused from jail (*garde à vue*) to prison.⁵⁶ A *mandat de dépôt*⁵⁷ must be issued in order to continue detention of the accused.⁵⁸

2. Reporting Requirements and Barriers

As auxiliaries of justice, the police and justices of the peace are meant to receive complaints from the public and answer for them with diligence.⁵⁹ However, the police often answer by saying that they do not have the resources to respond to a complaint, such as a vehicle to get to the scene, or gas to power the vehicle they do have.⁶⁰ Furthermore, though the police are theoretically reachable by telephone, in most cases the number does not work or the police officers do not answer.⁶¹ Victims and their lawyers have said that it is particularly difficult to reach the police at nighttime. There have even been instances where the person answering the call has said that the police are sleeping and cannot respond.⁶²

Thus, the best way to file a complaint with the police is to visit the police station directly. However, this also poses significant barriers. First, the time spent traveling to the police station risks losing evidence or important facts about the crime that would otherwise be recuperated if the police could arrive at the scene of the crime. Second, not all women have the capacity or the will to go to the station immediately because they are distrustful of the police, fearful or they cannot pay for transport. Third, women often face discriminatory reactions (discussed in the next section) or receive misinformation from police officers. For example, in several cases, the police have referred the victim to the justice of peace instead of taking her complaint directly, as they are required to do.⁶³ In other

⁵⁴ *Id.* art. 39.

⁵⁵ *Id.* art. 30.

⁵⁶ See ICG REPORT, *supra* note 12, at 3.

⁵⁷ Literally, "order to deposit."

⁵⁸ *Id.*

⁵⁹ CIC, art. 38.

⁶⁰ Interview with Marie Esther Felix, in Haiti (Aug. 13, 2011).

⁶¹ *Id.*; MADRE/CUNY Training with Grassroots Women's Focus Group in Port-au-Prince, Haiti (July 26–28, 2011) [hereinafter Focus Group Data] (on file with author).

⁶² Interview with Marie Esther Felix, *supra* note 60.

⁶³ *Id.*

cases, the police have told the victim to get her medical certificate (discussed below) before filing a complaint,⁶⁴ though they are not competent to evaluate this evidence, and are not required to have it in order to take a complaint.⁶⁵

3. *Attitudes and Capacity*

The attitudes of the police towards a victim when she presents her complaint have seriously discouraged reporting instances of gender-based violence.⁶⁶ The first response many women or girl victims receive when they go to the police station to report an incident is that the police do not have the resources to investigate the scene of the crime.⁶⁷ In the case of a flagrant offense, and even outside of that window, the failure of the police to visit the site of the alleged crime results in the loss of critical evidence and contravenes the CIC's requirement that the Chief Prosecutors (or its auxiliaries) arrive at the scene without delay to furnish the *procès-verbaux*.⁶⁸

Furthermore, the discriminatory or sexist form and attitude of some police officers when they receive complainants at the station have re-traumatizing and dissuasive effects on victims' reporting. Victims and lawyers have noted that these officers minimize or offend the women who come before them, commenting that the complaint is a ruse to get money out of the system.⁶⁹ The problem is more acute for adult women, particularly poor women, whom police have refused to believe because they think she is lying.⁷⁰ In some instances, police officers have asked female complainants what they had done or what they were wearing to have provoked the sexual assault, or whether they had already had previous sexual relations with the accused.⁷¹

The police are also more reluctant to act in cases in which a

⁶⁴ Interview with mother of rape victim, in Haiti (Feb. 17, 2012).

⁶⁵ CIC, art. 42–43. The police are required to pass any complaints, preliminary information (*procès-verbaux*), or other papers on to the investigating judge for evaluation.

⁶⁶ *Id.*; Focus Group Data, *supra* note 61. See also Faedi, *supra* note 13, at 187.

⁶⁷ Interview with Marie Esther Felix, *supra* note 60. See also INT'L CRISIS GRP., UPDATE BRIEFING NO. 26: KEEPING HAITI SAFE: POLICE REFORM 5 (2011); Faedi, *supra* note 13, at 189–90.

⁶⁸ CIC, art. 22.

⁶⁹ Interview with Marie Esther Felix, *supra* note 60; Focus Group Data, *supra* note 61.

⁷⁰ Interview with Marie Esther Felix, *supra* note 60.

⁷¹ Focus Group Data, *supra* note 61.

minor⁷² has raped a minor.⁷³ That is to say, there is a noticeable difference in treatment of a given case depending on the age of the aggressor. If the aggressor is a minor, the police are often unwilling to respond because they know of the limited avenues of legal recourse in dealing with juvenile offenders.⁷⁴ Not only does this block off an avenue to justice for an increasing number of minor victims of sexual violence, but it also increases the possibility of delinquency among minors where there is virtually no mechanism for rehabilitation of these children.⁷⁵

These attitudes reflect a lack of training and sensitivity to gender stereotypes. Lawyers have noted that since the earthquake, as consciousness among victims has risen and more GBV cases have been reported, there has been some improvement among those police officers that have undergone training on how to deal with victims of GBV.⁷⁶ The failure to adequately respond is a function of some police officers' lack of such training, as well as confusion as to their roles and when or how to arrest individuals.⁷⁷ There is a noticeable difference in the reactivity between officers who have been well-trained and those who have not been sensitized in cases of GBV in particular. For example, the personnel at the Departmental Service of Judicial Police (*Service Départemental de Police Judiciaire*, hereinafter SDPJ) has shown itself to be recognizably better trained than other sections of the police.⁷⁸ In one case brought to the SDPJ, the officers worked with the complainant and used techniques to locate the accused aggressor and approach him in civilian clothes to make the arrest.⁷⁹ Similar training across all of the police stations would thus greatly enhance the capacity of the police to respond to victims' complaints.

The lack of resources has required that ancillary institutions step in to provide the dissuasive security presence needed in the post-earthquake scenario where much of the population is still living in IDP tent camps. The United Nations Stabilization Mission in Haiti (MINUSTAH) and the UN Police Division (UNPOL) have

⁷² Under the Haitian Constitution, the age of majority is 18-years-old. CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, art. 16-2.

⁷³ Interview with Marie Esther Felix, *supra* note 60.

⁷⁴ *Id.*

⁷⁵ Though there are corrective education centers in Port-au-Prince, including the "Duval Duvalier" *Centre d'Accueil* (see C. Pén. art. 50), these are woefully inadequate and overburdened for the number of juvenile offenders in Port-au-Prince.

⁷⁶ Interview with Marie Esther Felix, *supra* note 60.

⁷⁷ *Id.*; Focus Group Data, *supra* note 61.

⁷⁸ Interview with Marie Esther Felix, *supra* note 60.

⁷⁹ *Id.*

taken on patrolling in some of the camps when the Haitian National Police cannot be present. However, while it is desirable to have a force to deter violence and an institution to receive complaints from victims at any hour of the day, MINUSTAH and UNPOL are of limited effectiveness because they do not have an executive mandate that allows them to make arrests, take complaints and perform policing duties.⁸⁰ Thus, while the units installed in several large camps throughout Port-au-Prince may be trained in receiving victims of gender-based violence, they have a limited capacity to actually respond to complaints beyond leading a victim to the police station, the prosecutor's office, or the Brigade for the Protection of Minors (BPM) to file a complaint.

iii. Office of the Prosecutor (Parquet/Ministère Public)

1. *Structure and Functions*

As mentioned above, the chief prosecutor (*Commissaire du Gouvernement*)⁸¹ is represented by police agents and justices of the peace as auxiliaries. The chief prosecutor heads the Office of the Prosecutor and is the third major component of the judicial police.⁸² The chief prosecutor is represented through *substituts*, or deputy public prosecutors.⁸³ The chief prosecutor and its deputies take on the role of *Ministère Public* as the principal party acting in the public interest in a criminal matter and the neutral party in civil matters.⁸⁴ There are 14 judicial jurisdictions in Haiti, each of which has a prosecutor's office directed by a chief prosecutor.⁸⁵ Additionally, there is a prosecutor's office for the courts at each instance—the Supreme Court, appeals courts, and trial courts.⁸⁶

The prosecutor's office has the power to receive complaints and conduct investigations into all complaints, including those submitted by the police and the justices of the peace.⁸⁷ It can also issue *mandats d'amener* and *mandats de comparution*⁸⁸ in flagrant offense

⁸⁰ UN Police Div. [UNPOL] GBV Coordinator, Presentation at GBV Sub-cluster Meeting (July 28, 2011).

⁸¹ When cited in CIC, the *Commissaire du Gouvernement* refers to the ensemble of the police, the justices of peace, and the standing magistrates (*magistrat debout*) who act as *substituts* for the Chief Prosecutor.

⁸² CIC, art. 9.

⁸³ *Organisation Judiciaire*, JURISTE HAITIEN, http://juristehaitien.chez.com/pages_textes/syst_judic/p_organ_judic.htm (last visited Mar. 7, 2012).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ IACHR Report, *supra* note 8, at 31.

⁸⁷ Interview with Marie Esther Felix, *supra* note 60; CIC, art. 32.

⁸⁸ An order for the accused to present himself/herself in court. CIC, art. 77.

cases, refer cases to an investigating judge by preliminary indictment (*requisitoire d'informer*), and issue the definitive indictment (*requisitoire définitif*) once the investigating judge has finished instructing on the case and has ordered the case to be tried before a criminal or correctional court.⁸⁹

Haitian lawyers and women's rights advocates place particular emphasis on the obstacles that exist at the level of the prosecutor's office.⁹⁰ Aside from misunderstood reporting requirements, limited resources and deeply engrained gender discrimination that deters women from filing complaints, there is a high degree of corruption and racketeering that occurs at this stage, making it particularly challenging for poor women and girls to access justice for gender-based violence claims.

2. Reporting Requirements and Barriers

The Office of the Prosecutor takes over a case (*saisi*) in the criminal process in several different ways. It automatically takes jurisdiction when a complaint is filed there directly. In such a case, it must immediately begin a public action if the crime has taken place within its territorial jurisdiction.⁹¹ Preliminary reports and complaints (*procès-verbaux*) from the police or justices of the peace are also submitted to the prosecutor's office for further investigation.⁹² In the case of a flagrant offense (*flagrant délit*), individuals may make a denunciation if they are witnesses to the crime, or if the perpetrator is pursued by public outcry (*clameur publique*).⁹³

In the context of the gender-based violence claims of poor women, the prosecutor's office poses considerable obstacles for reporting and ensuring that a case advances through the legal process. Of these, medical certificates to show evidence of a sexual assault and the resource constraints of the prosecutor's office are most significant.

a. Medical Certificates

Though not technically required by law, actors in the Haitian justice system place an inordinate amount of importance on the

⁸⁹ CIC, art. 115. The investigating judge can also send the case to the police's court (*Tribunal de Simple Police*) and release the accused if the judge finds that the accused is guilty of a minor infraction (*simple contravention*). *Id.* at 116.

⁹⁰ Interview with Marie Esther Felix, *supra* note 60; Focus Group Data, *supra* note 61.

⁹¹ CIC, arts. 14–16.

⁹² *Id.* art. 19.

⁹³ *Id.* art. 88.

medical certificate as the foundation for cases of sexual violence.⁹⁴ The medical certificate is thus treated as requisite in practice, and it is the most commonly sought piece of material evidence.⁹⁵ In a case of sexual assault, though, there are significant barriers to obtaining one.

First, a woman should seek medical care within 72 hours of rape in order to preserve evidence⁹⁶ and receive adequate medical treatment.⁹⁷ Although the preservation, analysis, and use of forensic evidence in cases of rape are still severely underdeveloped, the reliability and precision of the medical certificate still depends on quick action. However, the ability to act quickly depends on knowledge of the types of services available and the capacity to travel and seek adequate medical care. It also requires psychosocial support and accompaniment to overcome the trauma that might result from sexual assault, and fear of reprisal. While some organizations have established networks of community agents to provide this crucial accompaniment and support,⁹⁸ many Haitian women still do not know of or have access to these services in their communities.

Second, particularly at the level of the prosecutor's office, the medical certificates issued from different institutions vary greatly in terms of detail and form. For example, while the medical certificate from the General Hospital (*Hopital de l'Université de l'Etat d'Haïti*—HUEH) is seven pages in length and provides a number of details regarding the patient's mental, physical, and reproductive health, the medical certificates from other institutions are simple one-page documents that each have faults of their own.⁹⁹ Other institutions simply leave a space for the examining physician to fill in a narrative relating to the examination. As a result, officials at

⁹⁴ INST. FOR JUST. & DEMOCRACY IN HAITI, ET AL., OUR BODIES ARE STILL TREMBLING: HAITIAN WOMEN'S FIGHT AGAINST RAPE 20 (2010), available at <http://ijdh.org/wordpress/wp-content/uploads/2010/07/Haiti-GBV-Report-Final-Compressed.pdf>.

⁹⁵ CODE PÉNAL [C. PÉN.] art. 1 (Haiti), reprinted in MENAN PIERRE-LOUIS & PATRICK PIERRE-LOUIS, CODE PÉNAL app. at 15 (2007). Three elements must be proven for a conviction of rape. The material (*matériel*) element is an act or omission that the penal law punishes; the legal element is the assigned penalty that makes the act or omission an infraction; and the moral element is the criminal intent. *Id.*

⁹⁶ JANICE DU MONT & DEBORAH WHITE, SEXUAL VIOLENCE RESEARCH INITIATIVE, THE USES AND IMPACTS OF MEDICO-LEGAL EVIDENCE IN SEXUAL ASSAULT CASES: A GLOBAL REVIEW 13 (2007), available at www.svti.org/mlResearchBrief.pdf.

⁹⁷ *Sexual Violence*, MEDICINS SANS FRONTIÈRES, <http://www.doctorswithoutborders.org/news/issue.cfm?id=3466> (last visited Mar. 7, 2012). This includes emergency contraception and the HIV prophylaxis, which are most effective in the 72 hours following sexual intercourse or rape.

⁹⁸ See, e.g., *supra* notes 15–19 and accompanying text.

⁹⁹ Medical Certificates on file with the author and the CUNY Law Review.

the *parquet* have turned away complainants because of a perceived inadequacy of their medical certificates and have insisted on the form issued by the General Hospital.¹⁰⁰ In addition to the concerns of accessibility and the efficacy of the General Hospital, this practice poses a serious problem for victims when the General Hospital is closed because the hospital workers are on strike—a common-place occurrence.¹⁰¹ In such cases, the victims are forced to seek services at other institutions, risking their ability to depend on the medical certificate as a key piece of evidence in their legal cases.

But the prosecutor's office's insistence, by reflex, that victims present the medical certificate at the time of filing a complaint also highlights a lack of understanding within the prosecutor's office as to the reporting requirements and the purpose of the medical certificates. It is often the case that if the complainant does not present a medical certificate, the prosecutor's office declines to take the case or does not advance with the investigation.¹⁰² Lawyers and advocates have heard the officials in the prosecutor's office make derisive statements about complainants without a medical certificate—essentially equating her lack of a medical certificate to proof that she is lying about the rape.¹⁰³ Similarly, clerks at the prosecutor's office have previously said, "This is an easy case, there's no medical certificate."¹⁰⁴

However, the prosecutor's office inappropriately makes this determination. As a preliminary matter, the prosecutor's office can and should act on a complaint if it is filed while there is still a *flagrant délit*. Since it takes three days at a minimum, and more commonly one week, for a victim to obtain a medical certificate after examination, it is not reasonable for the prosecutor's office to ask for a medical certificate during the window of time for a *flagrant délit*. It is up to the investigative judge to weigh the evidence and instruct on the case,¹⁰⁵ and thus the prosecutor's office (or the police, for that matter) need not have the medical certificate in hand while the flagrant offense window still exists. Additionally, sometimes even the best medical examination may not produce any relevant evidence, or other material evidence may be available to support the claim, such as witness testimony. Finally, it rein-

¹⁰⁰ Focus Group Data, *supra* note 61; Interview with Marie Esther Felix, *supra* note 60.

¹⁰¹ Focus Group Data, *supra* note 61.

¹⁰² Interview with Marie Esther Felix, *supra* note 60.

¹⁰³ *Id.*; Focus Group Data, *supra* note 61.

¹⁰⁴ Interview with Marie Esther Felix, *supra* note 60.

¹⁰⁵ CIC, art. 43–44.

forces the discriminatory view that a woman's testimony alone is unreliable.

b. Resource Limitations

Resource constraints disproportionately impact poor women who cannot afford to hire an attorney or pay the necessary court fees. For example, while the prosecutor's office will receive a complaint or issue a *mandat d'amener*, the complainant must bear the costs of the process-server (*huissier*).¹⁰⁶ Additionally, unrepresented complainants are much less likely to succeed in prosecuting their claims due to inefficiency, disorganization, and inadequate resources.¹⁰⁷ This inefficiency and the competing demands on resources result in greater opportunities for intermediaries to take advantage of unrepresented and vulnerable complainants, triage that favors those with means or representation, and increased corruption, as a later section will discuss.

Victims, advocates, and lawyers have noted that the prosecutor's office officials are rarely present in the office on time, much less during the office hours they are required to keep.¹⁰⁸ Hence, it is common for complainants to come to the prosecutor's office early in morning to file a complaint and wait until noon for the officials to arrive.¹⁰⁹ Once the officials do arrive, it is often the individuals with representation who pass ahead, or those with money may pay an intermediary or the clerk him/herself to ensure that they go ahead.¹¹⁰ Furthermore, there is an inadequate system of communication with the victims that often results in the release of the accused from jail because she was not present for the accused's interrogation within 48 hours of his/her arrest, and the prosecutor's office fails to inform the victim's lawyer of the hearing directly.¹¹¹ The issue of communication also arises when a victim is called for a hearing, but the prosecutor's office does not attend to her in a timely manner. There have been cases in which the victim had a 9:00 a.m. hearing and the prosecutor's office left after waiting a full day without any information, only to find the next day that the accused was released because she was not present when the prosecutor's office called the accused forward around 6:00

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See also ICG Report, *supra* note 12, at 4.

¹⁰⁸ Interview with Marie Esther Felix, *supra* note 60.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Focus Group Data, *supra* note 61.

¹¹¹ Interview with Marie Esther Felix, *supra* note 60.

p.m.¹¹²

3. *Attitudes and Capacity*

a. Discriminatory Attitudes as a Barrier

Discriminatory attitudes of both the clerks and the judges at the prosecutor's office pose a barrier to victims' desire to pursue justice. It is common for prosecutor's office officials receiving the complaint to discredit the victim's story as a ruse and blame the victim or the victim's parents for the act.¹¹³ This discriminatory treatment is particularly acute towards poor women and girls, whose claims are considered especially suspect because prosecutor's office officials believe that the women or parents of the minor-victim are simply telling a story to extract money from the accused.¹¹⁴ For example, in one case, the deputy public prosecutor (*substitut*) told the victim's lawyer directly, without considering the available evidence, that he just did not believe the victim was raped, and that he believed she was bringing the case because she needed money from the accused.¹¹⁵

Furthermore, discrimination towards poor women and girls has transferred to these victims' lawyers and supporting advocates in the form of disrespect and hostility. Lawyers and advocates have noticed immediate changes in the attitudes of some clerks in the prosecutor's office who withhold information or resist sharing the case file on various pretexts.¹¹⁶ One extreme example of this is when the victim went to the clerk's office of the prosecutor's office to obtain the case number in order to identify the deputy prosecutor (*substitut*) leading the accused's interrogation. In order to delay turning over the file, the clerk replied that his finger was hurt and he could not open the file.¹¹⁷ The victim and her advocates were obliged to leave; when the lawyer returned later to recover the file, the clerk replied that he had already put away the file and could no longer give her the information.¹¹⁸

One possible impact on the case is that the accused could be released because the lawyer and victim cannot access the informa-

¹¹² *Id.*

¹¹³ Interview with Marie Esther Felix, in Haiti (June 20, 2011); Interview with Marie Esther Felix, *supra* note 60; Focus Group Data, *supra* note 61.

¹¹⁴ Focus Group Data, *supra* note 61.

¹¹⁵ *Id.*

¹¹⁶ Interview with Marie Esther Felix, *supra* note 60; Focus Group Data, *supra* note 61.

¹¹⁷ Interview with Marie Esther Felix, *supra* note 60.

¹¹⁸ *Id.*

tion they need to ensure their presence at the accused's hearing during the 48-hour detention period in jail. The differential treatment of victims and their lawyers similarly affects women's confidence in the justice system and their belief that their claims are given due importance.

b. Corruption

Corruption is another major reason why significant barriers exist at the level of the prosecutor's office. Since the BAI attorneys and advocates do not offer bribes or money as a rule, they have not been accorded the respect or attention that private attorneys may enjoy.¹¹⁹ Additionally, the intense backlogs and wait-times facilitate corruption: in some instances, attorneys or complainants with money have paid the clerks and other officials to be heard ahead of others.¹²⁰ It has also given rise to enterprising individuals who pose as intermediaries to unknowing or vulnerable individuals awaiting reception by the prosecutor's office. These racketeers offer to file the complaint on behalf of a victim, or to arrange for the victim to pass ahead, in return for a sum of money. For poor victims without representation or knowledge of the system, this can have the effect of convincing victims to drop their complaints because they are led to believe that they cannot access justice unless they have money.¹²¹

Further, victims without legal representation are particularly vulnerable to the behind-the-scenes maneuvering of various actors that requires sustained pressure and presence at the prosecutor's office in order to detect and devise strategies to circumvent these schemes. For example, when the prosecutor's office clerk refused to disclose the case number to the victim's lawyer in one instance, the lawyer and the victim's advocates insisted on staying at the prosecutor's office until they saw the accused being released from jail.¹²² At that point, they were able to intervene and obtain the information needed to have the victim present at the interrogation of the accused.¹²³

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Interview with father of client, in Haiti (Aug. 22, 2011). *See also* Faedi, *supra* note 13, at 188.

¹²² Interview with Marie Esther Felix, *supra* note 60.

¹²³ *Id.*

iv. Investigatory Stage (Cabinet d'Instruction)

1. *Structure and Processes*

The *Cabinet d'Instruction* is the primary investigatory stage of the criminal process. The *Cabinet* is made up of investigating judges (*juges d'instruction*), who may: take complaints for flagrant offenses;¹²⁴ issue arrest warrants (*mandats d'amener, de dépôt, d'arrêter*) and summonses (*mandats de comparution/invitation*)¹²⁵ without consulting the prosecutor's office;¹²⁶ and receive cases from the prosecutor's office with a preliminary indictment (*requisitoire d'informer*).¹²⁷ They can also issue search warrants (*mandat de perquisition*) and seize any evidence according to the same rules that apply to the prosecutor's office,¹²⁸ as well as grant provisional liberty to the accused during the course of the investigation.¹²⁹ The investigating judges "instruct" on the case and visit the scene of the crime, accompanied by the prosecutor's office and the court's clerk.¹³⁰

The investigating judge additionally summons all of the people mentioned in the denunciation or the complaint, and those individuals identified by the prosecutor's office as familiar with the offense or the surrounding circumstances for an individual hearing.¹³¹ They each give their declaration under oath, recorded by the clerk and signed by the judge and the testifying individual.¹³²

Once the instruction is complete—that is to say, once the investigating judge finishes gathering testimony and other evidence and evaluates it for indices of guilt or innocence—the jurisdiction of the *Cabinet* terminates and the case is sent back to the prosecutor's office with an order to drop the case (*ordonnance de non lieu*)¹³³ or to refer the case to criminal or correctional court (*ordonnance de renvoi*).¹³⁴ If the prosecutor's office deems that the investigation (*instruction*) was incomplete or not sufficiently thorough, it can request that the investigating judge do a supplemental investi-

¹²⁴ CIC, art. 46.

¹²⁵ Though "invitation" is not the word used in the Criminal Procedure Code, lawyers and judges often refer to this order as a *mandat d'invitation*.

¹²⁶ CIC, arts. 48, 77–94.

¹²⁷ *Id.* art. 51.

¹²⁸ *Id.* arts. 73, 75.

¹²⁹ "Main levée du mandat de dépôt ou d'arrêt." *Id.* art. 80 ("Main levée" means "raised hand," to signify temporary release of the accused).

¹³⁰ *Id.* art. 49.

¹³¹ CIC, art. 58.

¹³² *Id.* arts. 62–63.

¹³³ *Id.* art. 115.

¹³⁴ *Id.* art. 116.

gation. If the prosecutor's office is satisfied with the investigation and the investigating judge's accompanying order, then it will issue an indictment (*requisitoire définitive*).

2. *Evidentiary Hearings and Barriers*

At this stage, the victim presents any evidence not previously submitted or seized by the chief prosecutor (*Commissaire du Gouvernement*), and, in addition to separate individual hearings *in camera* of all the witnesses, the investigating judge may summon the victim for a hearing with the accused (*confrontation*).¹³⁵ There are several troubling barriers with respect to the manner in which these hearings take place.

First, there is no well-established and reliable system of communication with the victims when they are called for a hearing or confrontation. Most of the communication with the victim happens over the telephone, and the clerks often communicate directly with the victim, even though the victim has legal representation.¹³⁶ In some instances, the clerk has called the victim for a hearing the next day. This presents a problem if the victim is not in Port-au-Prince and may have difficulties traveling on short notice. It also presents a problem if the victim does not know to, or fails to inform her lawyer of the summons. There have also been instances in which the victim's phone number has been out of service and the clerk cannot locate the person because she does not have a fixed address—a problem particularly affecting the displaced persons living in camps following the earthquake. In other cases, the judges fail to invite the victim altogether, hearing the accused before ever hearing the victim.¹³⁷ In one egregious case, the judge directly communicated with the victim in order to convince her to negotiate a settlement with the aggressor.¹³⁸

Second, the investigating judges do not have adequate training to address the particular sensitivities of the victims of sexual violence. Thus, even a well-meaning judge might re-traumatize the victim at the confrontation hearing, where it is often the case that the victim encounters her attacker for the first time since the assault. In one case, when the accused arrived for the confrontation, the investigating judge asked the 14-year-old victim's mother to get up from her seat beside the victim to allow the middle-aged ac-

¹³⁵ Court accompaniments, in Haiti (June–Aug., 2011) (on file with author).

¹³⁶ *Id.*; Interview with Marie Esther Felix, *supra* note 60.

¹³⁷ Interview with Marie Esther Felix, *supra* note 60.

¹³⁸ Meeting with rape victim, in Haiti (Mar. 26, 2012).

cused aggressor to sit down.¹³⁹ The victim's face transformed, and her body noticeably froze when the man sat down next to her.¹⁴⁰ The judge had not done this on purpose, however; it simply did not occur to him that the act of seating the accused aggressor next to the minor victim would be a traumatizing experience. It was not until the victim's lawyers objected to the seating arrangement that the judge realized that there was a problem.¹⁴¹

Third, language poses a barrier to the interrogation process and the accuracy of the declarations taken at the investigatory stage. Specifically, while the judge asks questions in Haitian Creole, the clerk must write the answers that constitute the declaration in French, since the proceedings of the court take place in French.¹⁴² This can cause a potential problem of misinterpretation or bad translation that could impact the victim's case at the trial stage and disfranchises the victim from being able to correct the record when the judge dictates the victim's declaration to the clerk in French. If the testifying individual does not have an attorney to review and approve the declaration for signature at the conclusion of the hearing, there is a risk that the declaration inaccurately reflects the responses and meanings of the witness. For example, though not in the specific context of gender-based violence, there have been cases in which the witness has been shocked by what is read as their declaration at trial because the clerk misinterpreted, misrecorded, or misrepresented what the witness said during the investigatory hearing.¹⁴³

3. *Attitudes and Capacity*

As at the prosecutor's office stage, discriminatory attitudes of judges and corruption jeopardize the integrity of the legal process at the investigatory stage as well. Some investigatory judges, for lack of training or sensitivity to gender-based violence issues, blame the victim for having done something to attract the aggression, or trivialize the experience.¹⁴⁴ These attitudes surface in the manner of questioning the victim, when the types of questions and the tone of the judge indicate that the judge has prejudged the woman or

¹³⁹ Court accompaniment, in Haiti (July 11, 2011).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Court accompaniments, in Haiti (e.g., July 11, 2011, Feb. 29, 2012).

¹⁴³ Interview with Marie Esther Felix, *supra* note 60.

¹⁴⁴ Focus Group Data, *supra* note 61; Interview with Marie Esther Felix, *supra* note 113; Interview with Marie Esther Felix, in Haiti, *supra* note 60.

girl victim, or believes that she is lying.¹⁴⁵

Added to the discrimination the victim might receive at the prosecutor's office, this kind of treatment by the investigating judges psychologically impacts the victim, who may leave disheartened, undermined, and re-traumatized by the process.¹⁴⁶ Rather than empowering the victim to seek justice for extreme violations of her rights, the actors in the justice system cause a woman to call into question her worth in Haitian society. Experiences of this sort only serve to discourage reporting and convince women, and victims of gender-based violence in particular, that they are not valued by the state or society in general.

Aside from the possibly re-traumatizing effects that the hearings can have on a victim, the *cabinet d'instruction* itself poses a structural problem to the administration of justice. This added step in the procedure prolongs the legal process and allows for added inefficacy of the judges to compound the slow pace of prosecution. Some investigatory judges are slow and do not lead thorough investigations.¹⁴⁷ Victims often have the impression that nothing is happening on their case, and become discouraged in the process.¹⁴⁸ It heightens their fear that the accused has been liberated, and causes them to lose faith in the justice system. Additionally, the long summer recess for criminal trial court judges requires that referral orders from the *cabinet d'instruction* wait until the court session begins again in the fall for the case to be placed on the trial schedule.¹⁴⁹ This creates added inefficacy and backlog at the trial level, while holding victims of rape in limbo for months before they have a chance at accessing justice. Finally, there are an insufficient number of investigatory judges in contrast to the number of cases received by the system,¹⁵⁰ creating an immense backlog at the investigation stage. Here, too, the slowness and caseload facilitate corruption.

Haitian lawyers have noted that the problem of corruption is less pronounced at the level of the *cabinet d'instruction* than at the parquet.¹⁵¹ While some clerks are dedicated and hard-working, there are others who have worked in collusion with the parents of

¹⁴⁵ Focus Group Data, *supra* note 61.

¹⁴⁶ *Id.*

¹⁴⁷ Interview with Marie Esther Felix, *supra* note 60.

¹⁴⁸ *Id.* See also Faedi, *supra* note 13.

¹⁴⁹ *Id.*

¹⁵⁰ Interview with Marie Esther Felix, *supra* note 60; Focus Group Data, *supra* note 61.

¹⁵¹ Interview with Marie Esther Felix, *supra* note 60.

the accused to withhold information from the victim or her attorney, or to manipulate the process so as to have the accused released.¹⁵²

IV. CONCLUSION AND RECOMMENDATIONS

A. *Community Responses and Advocacy*

In the absence of state-funded programs for adequate legal assistance for indigent clients and in light of the numerous barriers to accessing justice for women and girls in Haiti, communities have stepped in to fill the gaps. The Rape Accountability and Prevention Project, which marries legal representation with community-based organizing and advocacy by grassroots groups to provide a comprehensive ensemble of services to victims of sexual violence, has seen qualitative differences in the attitudes of the various actors of the justice system over the course of the initiative's almost two years of existence. For example, prior to these groups' intensive engagement in awareness-raising programs and victim accompaniment through their community-based networks, rape was not as highly reported due to the obstacles described above.¹⁵³ While these obstacles still exist, grassroots groups have progressed considerably in sensitizing women and girls to seek support, obtain critical medical care immediately after an aggression, and file complaints with the police.

The groups' petition to the Inter-American Commission on Human Rights (IACHR) in October 2010,¹⁵⁴ which produced a favorable decision on December 22, 2010,¹⁵⁵ has provided a platform for these groups to call attention to the issue and urge the Government of Haiti to take substantive action to address women's and girls' vulnerability to violence in the IDP camps.¹⁵⁶ The recommendations imposed an added obligation on Haiti to adopt specific measures to reduce gender-based violence and protect against future instances of violence, including capacity building among ac-

¹⁵² *Id.*

¹⁵³ See IACHR Report, *supra* note 8.

¹⁵⁴ Int'l Women's Human Rights Clinic at the City Univ. of N.Y. Sch. of Law et al., Request to Honorable Members of the Inter-Am. Comm'n on Human Rights (Oct. 19, 2010), available at <http://www.law.cuny.edu/clinics/clinicalofferings/IWHRC/research/12705-petition.pdf>.

¹⁵⁵ Letter from Santiago A. Canton, Exec. Sec'y Inter-American Comm'n on Human Rights, to Lisa Davis, Esq., Int'l Women's Human Rights Clinic, City Univ. of N.Y. Sch. of Law et al. (Dec. 22, 2010), available at http://www.law.cuny.edu/clinics/clinicalofferings/IWHRC/research/Haiti_Commission_PM_Decision_2010.pdf.

¹⁵⁶ See Davis, *supra* note 31.

tors in the Haitian justice system.¹⁵⁷ Implementation of these recommendations would also help resolve women's barriers to accessing justice by, *inter alia*, concentrating greater resources on the issue, providing more training to medical professionals and legal actors, and reinforcing the state's commitment to eradicating violence against women.¹⁵⁸

B. Going Forward

The proposed law on violence against women, if proposed to and passed by Parliament, will represent a necessary move by the Government of Haiti towards implementing the recommendations of the IACHR and meeting its human rights obligations to punish, prevent, and redress violence against women.

In terms of institutional reinforcement, more coordinated training and sensitization of the actors in the justice system at all levels on how to deal with the specific context of gender-based violence—the police, prosecutors, and judges—would help address the discouraging effects of gender discrimination and prejudices against poor women complainants in particular.¹⁵⁹ Additionally, gender training would help signal the specific issues that arise in gender-based violence cases, including re-traumatization of the victim. Greater accountability mechanisms within the justice system, as well as a commitment of more resources towards hiring judges, would address the issue of backlogs that give rise to corruption. Simplifying the process of prosecuting rape by, for example, eliminating the added investigatory stage, would reduce the number of steps a victim must take to achieve justice. A better understanding of the structural impediments to accessing justice in Haiti is the first step to improving the status of women before the law.

¹⁵⁷ *Id.* at 889.

¹⁵⁸ *Id.* at 888–91.

¹⁵⁹ *See* Faedi, *supra* note 13, at 190–91.