

# Report



## Gender Justice Best Practices

Haiti 10–11 September 2007

Report commissioned by the International Legal Assistance Consortium upon request by the Haitian Ministry of Women's Affairs and Women's Rights, presented at a seminar in Haiti.

#### **RAOUL WALLENBERG INSTITUTE**

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law aims to be a leading institution for research, education and training regarding all aspects of international human rights law.

The goal is to advance knowledge and understanding of international human rights law and to promote respect for and fulfilment of human rights through research, education and overall capacity building.

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International Legal Assistance Consortium is a world wide consortium of NGOs, providing technical legal assistance to post- conflict countries.

#### **RAOUL WALLENBERG INSTITUTE**

Stora Gråbrödersgatan 17 B,  
P.O. Box 1155, SE-221 05 Lund  
Sweden

Phone +46 46 222 12 00

Fax +46 46 222 12 22

[www.rwi.lu.se](http://www.rwi.lu.se)

#### **ILAC Head Office**

Box 22082, SE-104 22 Stockholm  
Sweden

Phone +46 8-545 714 20

Fax +46 8-517 110 77

#### **Visiting address:**

Hantverkargatan 21, 4th floor  
Stockholm, Sweden

[www.ilac.se](http://www.ilac.se)

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## Foreword

Building and strengthening the rule of law is of fundamental importance for a sustainable peace and for the development of a society emerging from armed conflict. Gender justice, being part of the rule of law, must be mainstreamed into all aspects of the judicial system.

In a country's transition from conflict, there is a unique opportunity to adopt strategies and policies for the establishment of the rule of law and the promotion of gender equality and gender justice. At a Partners for Gender Justice meeting in 2005, the then Minister of Women's Affairs and Women's Rights in Haiti, H.E. Adeline Magloire Chancy, asked for assistance in promoting gender justice in Haiti within four key areas relating to the legislative process.

ILAC responded by commissioning ILAC member, the Raoul Wallenberg Institute for Human Rights and Humanitarian Law (RWI), to research and compile best practices in the requested areas: customary unions, determination of paternity, termination of pregnancy and domestic violence and rape.

With generous financial support from the Swedish International Development Cooperation Agency (Sida), the RWI conducted this study based on country experiences from various countries across the world where international human rights standards have been kept at the forefront. The methodology used in the study for evaluating legislation also gives an indication of how effective the law really is, in practice.

The report was first presented at a seminar in Haiti 10-11 September, 2007 where much support and appreciation was expressed by the Ministry of Women's Affairs, the Minister H.E. Marie Laurence Jocelyn-Lassègue and other participants, from the Ministry of Justice, the Senate and the NGO community.

I would like to compliment and express my gratitude to the drafters of the report at the Raoul Wallenberg Institute: Dr. Iur. Christina Johnsson, Director, Academic Department; Ms. Andrea Algård, researcher; Ms. Hélène Ragheboom, researcher and Dr. Iur. Jonas Grimheden, Senior Researcher, for their thorough research, which has proven to be both useful and practical. The research team at RWI has also been supported by Judy Dacruz, Elize Delpont, Diana Trimiño and many others who have contributed in various ways with information and advice at various stages. I would also like to extend my thanks to RWI Deputy Director Rolf Ring and Publications Officer Timothy Maldoon, for contributing their expertise, and for coordinating the project. In addition, I want to thank the Folke Bernadotte Academy for generously funding the printing of the report, which is also available in French.

Finally I want to express my heartfelt thanks to ILAC's representatives in Haiti, Programme Manager Francisco Díaz Rodríguez and Cherese Nirva Louis, whose efforts and assistance have contributed greatly to the success of the project.

It is with great pride that ILAC now presents this report to a broader audience, in the conviction that it will be useful also for other countries and contexts.

Stockholm, 15 October 2007



**Christian Åhlund**  
ILAC Executive Director

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## EXECUTIVE SUMMARY

At the request of the then Haitian Minister of Women's Affairs and Women's Rights, H.E. Adeline Magloire Chancy, the Raoul Wallenberg Institute (RWI), commissioned by the International Legal Assistance Consortium (ILAC), conducted research in the area of gender justice. More specifically and in accordance with the terms of reference provided by the Haitian Ministry, the project focused on the five separate but interrelated areas of: (1) termination of pregnancy, (2) Non-marital cohabitation (customary unions) (3) paternity determination, (4) domestic violence, and (5) rape. This report presents a compilation of examples of 'best practices' from various countries in the world, relating to legislation, policy and implementation, giving concrete models within those five areas. Here, 'best practices' are referred to as practical, good examples, from which governments and non-governmental organisations (NGOs) in a legislative drafting process would benefit. The report aims at providing tools for the realisation and implementation of international human rights standards. For this reason, the best practices are defined on the basis of those standards.

## RÉSUMÉ

A la demande de S.E. Adeline Magloire Chancy, alors Ministre à la Condition féminine et aux Droits des Femmes en Haïti, l'Institut Raoul Wallenberg (IRW), commissionné par ILAC, a réalisé une étude sur le thème de l'égalité des sexes en matière de justice. Plus précisément, et conformément aux termes de référence du projet tels que soumis par le ministère haïtien, les recherches ont porté sur cinq domaines distincts bien qu'interdépendants : (1) l'interruption de grossesse, (2) la cohabitation non maritale, (3) la recherche de paternité, (4) la violence domestique, et (5) le viol. Ce Rapport présente une compilation d'exemples de « meilleures pratiques » qui, issus de la législation, des mesures d'application et des politiques de différents pays du monde, fournissent des modèles concrets dans chacun des cinq domaines étudiés. Le terme « meilleures pratiques » fait ici référence à des pratiques exemplaires, de bons exemples dont bénéficieraient gouvernements et ONG dans le cadre d'un processus de rédaction législative. Le Rapport visant à fournir des outils pour la réalisation et la mise en oeuvre des normes internationales de droits de l'homme, c'est sur le fondement desdites normes que sont définies les meilleures pratiques.

## Chapter I: Background to the Project

### **‘Best practice’ and gender justice**

There is evidence of violations of human rights of women in all countries of the world. Very often the escalation of human rights atrocities preceding a conflict involves violations directed especially against women. Abuse of women continues also long after conflicts have been formally resolved. There are reports from post conflict situations of systematic rape and of other kinds of violence toward women as well as of severe discrimination of women in their every day life. It is a major challenge for these societies and for the world community of states to overcome these violations, and to create alternatives to violent and patriarchal structures. However, it is not only severe crimes against women that must be targeted in these situations, but the entire system of protection of the human rights of women, ranging from the right to physical integrity to the right to be a legal person before the law.

In recent time the benefits of ‘best practices’ in various fields including the human rights of women have been discussed on the international arena.<sup>1</sup> Governments and NGOs facing a legislative drafting process would benefit from a list of practical, good examples where the human rights of women are secured and satisfactory fulfilled. Such a list will be inspirational and offer legislative solutions for adoption and implementation. The then Haitian Minister of Women’s Affairs and Women’s Rights, H.E. Adeline Magloire Chancy, called for such best practices during the 2005 High Level Meeting on Building Partnership for Promoting Gender Justice in Post-Conflict Societies. More specifically the Minister asked for a compilation of best practices on gender justice within four areas: (1) termination of pregnancy, (2) Non-marital cohabitation (customary unions) (3) determination of paternity, and (4) domestic violence and rape. This report is the result of that request.

The report comprises an investigation on best practices with regards to legislation, policy and implementation progress within these fields. When conducting research of this kind it is important to clarify a few concepts and to explain the choices of the practices that are considered as ‘best.’<sup>2</sup> For this reason, the present chapter as well as the following (II) describe the preconditions and the methodology of this study. Only after that are the best practices accounted for. In order to make the report as accessible as possible, each area is dealt with in a separate section. Given the complexity of domestic violence and rape, it is divided into two sections. The report ends with a concluding chapter listing the main findings. The appendices include an overview of gender equality legislation<sup>3</sup> as well as general data for the countries surveyed.

### **‘Best practices’ as understood in this report**

There are no general principles or rules for identifying what constitute best practices. The concept is on its own relative, meaning that it has to be related to a goal, standard or qualitative level. In this report, best practices are therefore defined with the help of international human rights standards within the field of gender justice. This means that we establish international human rights law concerning the four areas, that of termination of pregnancy, customary unions (cohabitation), paternity determination, domestic violence and rape, as far as possible. We have included both binding and non-binding law since, as shall be shown, binding international law may leave an area relatively unregulated. However, even if unregulated, the area is often not without recommendations or clear tendencies towards a development direction. We thereby aim at capturing current developments in the field of international human rights law and recognising the evolving nature of human rights.

Chapter II contains a comprehensive overview of the binding and non-binding human rights standards in international law, so that the reader also can establish independently wherefrom the best practices derive, be they binding or not.

Even though the term ‘best practices’ is a relative one and, in this context, connected to international human rights law, it is nevertheless possible to define it in a more precise way. For the purpose of the report, we have defined a ‘best practice’ as *a practice that represents significant steps toward the realisation of the rights in question and that demonstrates the state’s willingness and commitment to the full implementation of international human rights standards*. Thus, the use of the term ‘best practice’ does not imply that a specific practice is the best solution in all contexts, nor that the practice in question is perfect, but that it is part of a process towards realising the relevant human rights fully. Alternative terms would be ‘good practice’, ‘good example’ or ‘exemplary practice’. Such terms may better express that a specific practice may or may not be suitable in a particular setting. However, we have chosen to rely on the commonly accepted term ‘best practice’ for the purpose of recognition as well as to avoid misunderstandings through the usage of less familiar concepts.

Something should be said on how the best practices, as understood in this report, are supposed to be used in practice. The idea is that best practices offer a broad spectrum of possible ‘legal’ solutions, all corresponding to the international human rights standards within the specific area. Besides legal technical solutions, the practice, as evident from the word itself, shall also entail policies for implementation and the outcome of implementation in the society. A government or a non-governmental organisation or any other interested party may use the report as a source of inspiration in adopting a new law or advocating the adoption of a legal statute or an amendment to an existing one. Therefore, in addition to giving information about legal technical solutions, the report also gives examples of policies accompanying the laws and making their implementation more effective.

Thus, it should be pointed out that best practice encompasses three components: law, policy and reality. We are of the view that the law cannot stand on its own as a best practice, but must be accompanied by a policy of implementation and its effect on the reality. A legal statute can be ever so good, but if it is not implemented properly, it remains too abstract. For that reason the government or state policies are highly important to what constitutes a best practice. We will return to this issue later when elaborating on the method that has been used to define the best practices in this report.

The success of a best practice depends on both the law and the policy. Therefore, the reader of this report has the opportunity to learn from many policies as well as from different legal solutions and how they have played out. Another factor vital to the success of a legal reform is the context in which it operates. Hence, what is working in one country may fail to work in another setting, due to for example cultural differences, the structure of the society and the availability of resources. Likewise, a practice that works well for one particular group of women may not work at all for other groups of women or, for that matter, women and men.

### **‘Best practices’ and human rights indicators – A method**

As mentioned, the best practices as understood in this report involve the three dimensions of law, policy and practice. In order to enclose these dimensions and to formulate a tool by which a best practice can be established, we have chosen to rely on what in international law is referred to as human rights indicators. Human rights indicators are increasingly being used as a method for analysis in the field of human rights.<sup>4</sup> Or rather, it is used as a *tool for measuring the degree of implementation of human rights in a particular country*. Although we are not measuring implementation here, we can still use the indicators for locating good examples of laws and practices concerning gender justice and the areas we were assigned to investigate.

As we see it, the main advantage with human rights indicators is that they can be framed to capture not only the law but also relevant policies and measures of implementation necessary for the full realisation of human rights. Thus, the indicators are particularly suited to identify remaining gaps between human rights obligations and reality.

The use of human rights indicators serves several purposes. First, the elements of best practices are established through the transformation of human rights norms and standards into more practical measurements. Second, the indicators function as a tool for analysis of different human rights areas and of country legislation, and as such as a tool for comparison and selection in the section containing country examples.

Then what is an indicator more concretely? The four principal indicators we have used relate to how *available, accessible, acceptable* and *adaptable* a human right is for individuals in a state. They originate from the former UN Special Rapporteur on the right to education, Katarina Tomasevski.<sup>5</sup> A similar framework has later been used by Paul Hunt, the UN Special Rapporteur on the right of everyone to enjoy the highest attainable standard of physical and mental health, in the identification of good practices and in the context of policy-making.<sup>6</sup> In relation to these four main indicators, the following questions are asked:

<b>Available</b>	Does the domestic legal framework ensure the availability of the rights in question?
<b>Accessible</b>	Is the practical access to the rights, including to relevant services and mechanisms, secured for everyone without discrimination of any kind?
<b>Acceptable</b>	Is the quality of the implementation, including relevant services and mechanisms, ensured?
<b>Adaptable</b>	Is there a broader perspective on the realisation of the rights, i.e. are they coupled with ongoing policy-making, integration, evaluation and education?

We have had these indicators in mind when surveying the international human rights standards in the areas of termination of pregnancy, cohabitation, paternity determination, domestic violence and rape. They guided the questions we asked from an international law perspective and when formulating the sub-indicators specifying the four main indicators (the four A:s). Furthermore, the indicators guided the questions we asked concerning domestic legal orders when trying to find good examples. In the following chapter, the indicators and the sub-indicators are developed further in order to show how we analysed the countries subsequently chosen for their best practices.

On the choice of countries, it must be emphasised that no country is likely to fulfil all the indicators and elements of best practice in the areas researched for this report. Nevertheless, the countries selected will at a minimum fulfil the criteria for legislation and in addition demonstrate a determined and continuous process toward the full realisation of the human rights in question. Having Haiti in mind, we have selected countries that represent both developed as well as developing countries, including post-conflict countries with weak institutional structures, from different regions in the world. Dominant religions in a country have also played some role. Thus, the basic conditions and stages of development of the selected countries differ significantly.<sup>7</sup> All countries used to illustrate best practices have ratified most of the major human rights treaties at both the international and the regional levels. In addition, they have not made reservations impeding the human rights relevant in this context.

### **Sources**

Different sources have been used for different parts of the study. In establishing what a best practice can be, we have used international and regional standards, namely: treaties, general comments, concluding observations, case law and soft law instruments. In addition, academic sources are used. Since the aim is to show good examples of legislation and policies and their impact on reality, and while the purpose has not been to establish in a strict sense what the state is regarding each area involved, we do not claim to be absolutely accurate in every detail of the description of international law. Rather, the purpose has been to determine the content of international law, conclusions from global and regional monitoring mechanisms and discussions among international law scholars. This has been done so as to define a tool for establishing what the best practices are in terms of domestic legislation. We have used international law sources, such as country reports and compilations made by monitoring bodies, to find countries that were of best practice.

On domestic legal sources the following should be noted. We used primary and secondary domestic sources from the countries chosen as examples. The main emphasis, however, lies on secondary sources due to language barriers, the access to primary sources and the lack of possibilities to make accurate independent interpretations of legal statutes. To ensure that the information concerning policies and practices is solid, we have contrasted government materials with NGO material and international organisation material, reports of treaty bodies and academic research. To some extent we have travelled to the countries studied and consulted domestic experts. Again, the aim has not been to establish the precise situation in the countries, but to find enough information to provide a good example from which the reader can find inspiration and sufficient guidance. The level of detail also varies to some extent from country to country, partly due to the available information and partly due to accessible information in major languages. Throughout the report references are made to global, regional and national sources, so as to enable research of more extensive material.

**Other delimitations**

A few delimitations have been made. As regards the level of detail and accuracy of international law and domestic law, this has already been discussed above.

We have also made a few conceptual restrictions. As a general delimitation, we have focused on the four areas conceptually as we have understood that they are used in Haiti. If the study had been commissioned for another country, the approach may have been slightly different. For example, the notion customary union is, as we understand it, used in Haiti to represent two persons living in a relationship without being married: a non-marital cohabitation. In another context, where customary law is recognised as a legal source, the term customary union has another connotation referring to a special legal entity equal to marriage. This and similar legal qualification matters may occur in any comparative study, and we have tried as far as possible to point out where such misunderstandings can take place.

The term gender-based violence encompasses a broad spectrum of violence against women, including domestic violence, trafficking, sexual violence, sexual harassment, female genital mutilation, forced marriages, forced abortions, etc. However, the focus of this study is limited to domestic violence and rape, two of the most frequently occurring violations of women's human rights. Nonetheless, bearing in mind the interrelatedness of all types of gender-based violence, what is written on domestic violence and rape will be equally relevant for other types of gender-based violence.

When it comes to paternity determination, we have chosen to focus on the actual determination, rather than for example its legal and economic consequences. Further clarifications are made in relation to the text on best practices below in chapters II and III.

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## Chapter II: Establishing ‘Best Practices’

### **International human rights standards and indicators**

The term ‘best practices’ is, as mentioned above, a relative one. There are probably many ways of establishing what such a practice is, but we have chosen to take international human rights standards as the point of departure. Since this report is not monitoring or aiming at presenting how individual countries comply with international law, it does not venture into discussing the issue of state obligations under international law, although the countries chosen to illustrate good examples have all ratified the major human rights treaties.<sup>8</sup> Rather, the ambition is to make a survey of the international human rights standards in the areas of termination of pregnancy, cohabitation, paternity determination, domestic violence and rape. Based on this survey, we formulate a method for investigating country legislation with the purpose of identifying best practices. As defined in chapter I, a best practice is a law and/or a policy and practice that to a large extent correspond to the international human rights standards in the survey.

The method used for identifying the international human rights standards in question and for searching for best practices among states is based on the so-called ‘human rights indicators’. Well-formulated indicators are able to take into account the three dimensions of law, policy and reality and thus give a broad perspective of how different legislative solutions can work in society. The indicators used in this study are divided into main indicators and sub-indicators. The four main indicators relate to the availability, accessibility, acceptability and adaptability of human rights.<sup>9</sup> The sub-indicators specify the questions asked through the main indicators and work as an elaborate tool for finding as broad a spectrum of the best practices as possible. The sub-indicators are further elaborated in the table below.

**Indicators**

<b>Termination of pregnancy</b>	<b>Main indicator</b> Available	<b>Sub-indicator</b> Ratification of international and regional human rights instruments	
		Legal framework in line with international standards	
		Possibility to lodge complaints and have them examined	
	Accessible	Non-discriminatory access to services <sup>10</sup>	
		Physical, economical, social and other barriers are removed	
		Access to information and education	
	Acceptable	Quality of services	
		Cultural acceptability of services	
	Adaptable	A comprehensive national strategy on reproductive health exists and is subject to regular evaluation	
		Reproductive health, including abortion, is integrated into other health programmes	
		Continuous education of affected actors on current rights and standards	
	<b>Domestic violence and rape</b>	<b>Main indicator</b> Available	<b>Sub-indicator</b> Ratification of international and regional human rights instruments
Legal framework in line with international standards			
Possibility to lodge complaints and have them examined			
Accessible		Non-discriminatory access to judicial mechanisms and services	
		Physical, economical, social and other barriers are removed	
		Access to information and education	
Acceptable		Quality of judicial mechanisms and services	
		Cultural acceptability of judicial mechanisms and services	
Adaptable		A comprehensive national strategy on violence against women and rape that is subject to regular evaluation	
		No contradiction between rights and other legislation	
		Continuous education of affected actors on current rights and standards	
<b>Non-Marital Cohabitation</b>		<b>Main indicator</b> Available	<b>Sub-indicator</b> Ratification of international and regional human rights instruments
	Legal framework in line with international standards		
	Possibility to instigate judicial proceedings		
	Accessible	Non-discriminatory access to services	
		Physical, economical, social and other barriers are removed	
		Access to information and education	
	Acceptable	Quality of judicial mechanisms and services	
	Adaptable	Systematic and integrated approach reflected in legislation and policies	
	<b>Determination of paternity</b>	<b>Main indicator</b> Available	<b>Sub-indicator</b> Ratification of international and regional human rights instruments
			Legal framework in line with international standards
Possibility to instigate proceedings			
Accessible		Non-discriminatory access to services	
		Physical, economical, social and other barriers are removed	
		Access to information and education	
Acceptable		Quality of services	
Adaptable		Systematic and integrated approach reflected in legislation and policies	

As can be seen in the table above, sub-indicators differ slightly from one area to the other, reflecting the specificities of each. It is important to point out that in the description of best practices, in chapter III, individual indicators are not highlighted. Indicators were used as research tools but do not structure our findings.

### **International human rights standards on the termination of pregnancy**

No universal human rights instrument, binding or non-binding, includes a clear and general right to termination of pregnancy.<sup>11</sup> Although the detrimental effects of unsafe abortions on the health of women are generally recognised, no consensus exists among states regarding a right to abortion in all cases. Legal provisions and political statements on reproductive health are often ambiguous. It is open to debate whether terms such as family planning and reproductive health services should be interpreted to encompass abortion.<sup>12</sup>

Consequently, states enjoy a rather wide margin of appreciation in regard to abortion legislation. Nonetheless, it must be kept in mind that various human rights are closely connected to abortion. These include non-discrimination and equality, equality before the law, the right to life, the right to the highest attainable standard of physical and mental health, the right to decide the number and spacing of one's children, the right to protection of privacy and family, the right to equality in the family, the right to be free from torture and inhumane treatment and the right to liberty and security of person.

Notably, no international human rights body has interpreted the right to life as protecting the life of unborn children. An overview of the United Nations treaty bodies' general comments, jurisprudence and concluding observations show that, under certain circumstances, a denial of abortion may however constitute a human rights violation. Thus, according to the treaty bodies, abortion should be legal in the following cases:

- Pregnancy because of rape<sup>13</sup>
- Pregnancy because of incest<sup>14</sup>
- Congenital abnormality of the foetus<sup>15</sup>
- When the life of the mother is at stake<sup>16</sup>
- When the physical or mental health of the mother is at stake<sup>17</sup>

Denial of abortion in the cases enumerated above is seen as a form of violence against women because it incites women who want to perform an abortion to seek unsafe and illegal abortion services.<sup>18</sup> States parties to international human rights treaties have been urged to amend their legislation criminalising abortion in that sense and to withdraw provisions penalising women who undergo abortions.<sup>19</sup>

It is important to notice that in cases where abortion is legal, the decision to carry out an abortion must rest entirely with the woman; access to abortion should never depend on spousal consent.<sup>20</sup>

It is equally important to stress that abortions must never be carried out without the fully informed consent of the woman concerned. Forced and non-consensual abortions constitute a gender-specific form of torture as well as a violation of the right of individuals to decide the number and spacing of their children.<sup>21</sup>

Moreover, access to abortion should not be discriminatory. In this context, the Committee on Cultural, Economic and Social Rights (CESCR) has underlined that the right to health entails an obligation for states to refrain from denying or limiting equal access to health services for all persons, including undocumented migrants and asylum seekers.<sup>22</sup>

Where the law allows for abortion, safe abortion has to be accessible in practice for all women.<sup>23</sup> Consequently, not only must the state provide safe abortion services, but it also must inform women about them.<sup>24</sup> The state should ensure that third parties do not limit access to health-related information and services.<sup>25</sup> If healthcare providers refuse to perform legal abortions (due to, for example, conscientious objection), women should be referred to alternative healthcare providers.<sup>26</sup> Women who are denied legal abortion are entitled to an effective remedy – see e.g. art. 2(3) of the International Covenant on Civil and Political Rights (ICCPR) – including access to prompt appeals procedures and compensation.<sup>27</sup> Denial of abortion in circumstances permitted by law may also constitute inhuman and degrading treatment,<sup>28</sup> a grave human rights violation. The Committee Against Torture has also expressed its concern, and recommended states to eliminate practices that require women seeking post-abortion care when suffering from complications after illegal abortions to denounce the abortion provider for prosecution purposes.<sup>29</sup> Moreover, legislation outlawing abortion, even when the pregnancy is a result of rape, at the cost of serious harm and unnecessary deaths caused by illegal abortions, indicates an omission by the state party to prevent acts that prejudice gravely women's physical and mental health, and to prevent cruel and inhuman acts in general.<sup>30</sup>

The treaty bodies have never explicitly dealt with gestational limits for abortion, leaving the definition of these limits to a large extent to the discretion of states. Nonetheless, a gestational limit so short that it in practice bars access to safe abortion would not be compatible with the aforementioned human rights standards.

The issue of abortion is inherently connected to the enjoyment of reproductive health, and the United Nations treaty bodies underline the linkage between illegality of abortions, high rates of unsafe abortions and high levels of maternal mortality, and lack of reproductive healthcare programmes.<sup>31</sup> Thus, abortion, whether legal under all circumstances or only in certain cases, cannot be separated from other reproductive health measures such as the provision of reproductive and sexual healthcare, contraceptives and family planning education. The Committee on the Rights of the Child has stressed the importance of respecting adolescents' right to privacy and confidentiality with respect to treatment and counselling on health matters, including reproductive health matters.<sup>32</sup>

At a regional level, the only instrument explicitly providing for a right to abortion under certain circumstances is the Optional Protocol on the Rights of Women in Africa.<sup>33</sup> The Ministers of Health within the African Union recently adopted a Plan of Action for sexual and reproductive health and rights, calling for a strengthening of the health sector and improved access to sexual and reproductive health services.<sup>34</sup> The need to reduce the incidence of unsafe abortion is one of the key objectives and one of a number of measures aimed at the improvement of advocacy/policy, capacity building and service delivery.<sup>35</sup>

As for the European system for the protection of human rights, the European Court of Human Rights has never taken a stand on the content of a country's abortion law. Still, the Court has held that art. 2 of the European Convention on Human Rights (ECHR), which lays down the right to life, does not

protect the life of the foetus but the life of the pregnant woman.<sup>36</sup> It has also found that restraints on the dissemination of information about abortion violated the right to freedom of expression laid down in art. 10 of the ECHR,<sup>37</sup> and that the right to privacy stipulated in art. 8 of the Convention does not grant any rights to the father with regard to the foetus when the mother chooses to terminate the pregnancy.<sup>38</sup> In a recent case concerning access to legal abortion, the Court found a violation of art. 8. Healthcare providers refused to perform a legal abortion, eventually resulting in the woman becoming blind after giving birth. The Court held that the state did not comply with its positive obligations to secure the physical integrity of mothers-to-be, and the respect for private life.<sup>39</sup>

At the Inter-American level, the Inter-American Commission of Human Rights (IACHR) has held that art. 4(1) of the American Convention on Human Rights (ACHR), which protects the right to life “in general, from the moment of conception”,<sup>40</sup> does not preclude states from providing safe and legal access to abortion.<sup>41</sup> Where legal access to abortion is denied, the IACHR has called on member states to adopt effective measures to address consequent violations of the rights to life, health, personal integrity and privacy as well as the right of couples to freely determine the number and spacing of children.<sup>42</sup> In 2002, a case involving obstructions by public officials of a raped minor’s legal right to abortion was submitted to the IACHR, citing violations of the victim’s rights to judicial protection, reproductive autonomy and privacy. In the same case, the petitioners urged the IACHR to address violations of women’s reproductive rights in Latin America.<sup>43</sup> In March 2006 the government settled the case by agreeing to pay reparations to the victim, finance the education of the child born as a result of the denial of abortion and to adopt legislative guidelines on access to abortion for rape victims.<sup>44</sup>

### **International human rights standards on non-marital cohabitation**

International human rights law does not per se provide extensive guidance on the regulation of customary unions or *de facto* relationships.<sup>45</sup> The most significant human rights standards affecting the domestic regulation of customary unions are the ones on non-discrimination and equality, equality before the law, the right to equality in the family, the right to protection of the family and children’s rights (including the overarching principle of the best interests of the child). These rights and principles can be applied to all the different aspects of customary unions, such as property, maintenance, inheritance and custody.

The United Nations human rights treaty bodies have expressed an approach slightly different from the one laid down in the treaties themselves. The Committee on the Elimination of Discrimination Against Women (the CEDAW Committee) outlined the most elaborate standard.

According to these monitoring committees, as a starting point and in keeping with binding international law, any legislation concerning relationships should be governed by the principles of non-discrimination and equality. Hence, men and women ought to be treated equally and without discrimination when in the same situation, regardless of them being married or not.<sup>46</sup> Women who cohabit with a man should thus be protected from discrimination. However, this is a separate issue from the question whether such relationships should enjoy protection of law.

Adding to the non-discrimination approach, it is worth-mentioning that the Committee on the Rights of the Child, the CEDAW Committee and the CESCR all seem to focus on the need to protect children equally regardless of their parents’ relationships. In cases concerning custody of children, the legal status of the parents’ relationship shall be irrelevant. The principle of the best interests of the child

should be the primary consideration, and both parents should share equal rights and responsibilities for their children.<sup>47</sup>

The CEDAW Committee has particularly addressed the protection of customary unions with regard to the issues of property, maintenance and, generally, financial support. The Committee emphasises the need to protect the economically weaker party – i.e. most of the time the woman – in *de facto* relationships, and urges states parties to enact legislation in this area.<sup>48</sup> Cohabiting women should in addition be ensured equality with their partner in relation to children and property (the disposal of property during the relationship as well as the division of property at the end of the relationship).<sup>49</sup> The Committee has also expressed its concern over the differential treatment of married and unmarried women regarding maintenance and inheritance rights.<sup>50</sup> Thus, the CEDAW Committee goes as far as to discourage any legal distinctions between married and unmarried couples.

Whether a legally binding right to protection of cohabitation can be ascertained under the Convention on the Elimination of Discrimination Against Women (CEDAW) depends on the weight attached to general recommendations and concluding observations. The Human Rights Committee (HRC) partly supports the CEDAW Committee's arguments in this field. According to the HRC, *de facto* couples are entitled to protection as a family under art. 23(1) of the ICCPR if they are recognised as a family in the national context, be it through legislation or practice. The concept of family is hence not awarded a universal definition: states dispose of a margin of appreciation.<sup>51</sup> While accepting that the term family can also apply to cohabitants, the HRC has stated that differential treatment of married and unmarried partners in social security acts was objective and reasonable under art. 26 of the ICCPR, which lays down the right to equality before the law.<sup>52</sup> The CESCR has expressed concern over the absence of legal recognition of *de facto* marriages.<sup>53</sup>

At the European level, the European Court of Human Rights has stated that the right to respect for family life is not confined to marriage-based relationships, and may hence encompass *de facto* family ties, such as cohabiting partners.<sup>54</sup> However, a right to legal protection for *de facto* partners has not been ascertained.

### **International human rights standards on paternity determination<sup>55</sup>**

Disputes over paternity may arise under various circumstances, for instance when a child is born outside of marriage or when its mother's husband is not its biological father if the child is born within marriage. Different parties may have an interest in instigating a paternity suit: the child, the mother, the presumed father and/or the biological father. In addition, the state will have an interest in securing stable family ties and legal certainty. Consequently, paternity determination cases normally involve the balancing of different interests: of the child, of the parents respectively and of society at large.

Generally, international human rights law allows for a rather large margin of appreciation in cases where the balancing of different interests is central to the outcome. The relationship between human rights and paternity determination is still relatively unexplored. At present, international human rights law does not contain any clear provisions on paternity determination as such. Paternity could nevertheless be connected to the following rights and principles: non-discrimination and equality, equality before the law, protection of the family, right to privacy, the best interests of the child and the right to know one's identity. It should also be noted that international human rights law does not provide any guidance with regard to the right to claim paternity or to instigate a paternity suit.

The CEDAW Committee provides comments on paternity in a general recommendation. It stresses equal rights and responsibilities of men and women with regard to their children.<sup>56</sup> The best interests of the child should always be the paramount consideration.<sup>57</sup> The Human Rights Committee has a more ambiguous position as it on the one hand states that children born out of wedlock should not be discriminated against, and on the other hand grants the right to maintain personal relations with both parents only to children born within marriage.<sup>58</sup> A father to a child born out of wedlock only has a right to recognition of paternity if his relationship to the child fulfils the minimum requirements for the existence of a 'family'. Examples of such minimum requirements are an active life together, economic ties and a regular and intense relationship. Consequently, biological ties have not been considered as important as *de facto* bonds.<sup>59</sup>

The Committee on the Rights of the Child provides the most elaborate comments on paternity. It emphasises both the importance of not separating the child from its parents<sup>60</sup> and the right of the child to know its identity<sup>61</sup>. In addition, the Committee goes one step further by urging states to create accessible and expeditious procedures, including legal assistance to the mother, in order to facilitate the establishment of paternity for children born out of wedlock.<sup>62</sup>

As for the European human rights system, the European Court of Human Rights has concluded, similarly to the Human Rights Committee, that once a family life between a father and his child is recognised, the state is under a positive obligation to safeguard the said relationship, including through giving the possibility to recognise paternity.<sup>63</sup> In cases where no family ties exist between the biological parent and child, the legal *pater est* presumption, according to which a married man is regarded as the father of his wife's children, is upheld. Thus, a state may award primary importance to legal certainty and security of family relationships over biological paternity.<sup>64</sup> According to the Court, states have the positive obligation to ensure that their national courts effectively take into consideration the child's interest to know its parents. The Court has found the failure to do so to be a violation of the right to respect for private and family life.<sup>65</sup>

### **International human rights standards on domestic violence and rape**

It is currently undisputed that violence against women can constitute a human right violation regardless of whether it occurs within the public or the private sphere of life. Among other things, gender-based violence is acknowledged to constitute a form of discrimination with detrimental effects on women's ability to enjoy human rights on a basis of equality with men. Numerous binding and non-binding international human rights instruments also address violence against women.<sup>66</sup> Relevant rights are, *inter alia*, non-discrimination and equality, equality before the law, right to the highest attainable standard of physical and mental health, right to life, right to be free from torture and inhuman or degrading treatment, right to security and liberty of persons, right to equality in the family, right to housing and judicial rights.

The CEDAW Committee provides the most elaborate guidelines on violence against women, but all United Nations human rights treaty bodies address violence against women in their general comments and concluding observations.<sup>67</sup> Generally, they seem to agree that legislation has to be non-discriminatory and equal for women and men alike. In particular, legal rights and protection against violence should not be determined by the sexual life or 'honour' of the victim.<sup>68</sup>

General comments and other sources from the monitoring bodies emphasise the interdependence and linkage between violence against women and the enjoyment of other rights and freedoms such as equality, the prohibition of torture and the right to health. For example, the Human Rights Committee notes that in order to monitor compliance with the prohibition of torture and cruel, inhuman or degrading treatment laid down in art. 7 of the ICCPR, all state parties need to include information on legislation and practices relating to violence against women, domestic violence and rape as well.<sup>69</sup> This connection shows the gravity attached to the matter, in particular as the prohibition against torture is an absolute right with no limitations.<sup>70</sup> The Committee Against Torture has also expressed its concern regarding widespread acts of sexual violence against women, including while in detention as well as discriminatory practices during investigation and judicial process.<sup>71</sup> The CEDAW Committee and the Human Rights Committee both highlight the important connection between domestic violence and economic independence as lack of economic independence often forces women to stay in violent relationships.<sup>72</sup> Yet another connection is made between violence against women and equality in marriage and family relations: equality in this context includes the right to freely choose one's spouse.<sup>73</sup> In addition, both the CEDAW Committee and the CESCR underline the crucial link between health and gender-based violence. The obligations of states in relation to the right to health comprise obligations to prevent violence, to protect women against violence and to prosecute perpetrators. Moreover, the healthcare sector must, according to these bodies, be trained to detect and deal with this kind of violence in a gender-sensitive way.<sup>74</sup> It is widely recognised that domestic and sexual violence cause not only enormous suffering at the individual level but also huge socio-economic costs at all levels of the society.<sup>75</sup>

The Committees' general comments and concluding observations further clarify the requirement for legislation in the field of violence against women. Consequently, in order not to be in violation of international human rights standards, legislation should at a minimum meet the following criteria:

- The definition of rape is based on the lack of consent and not on the use of violence/force/coercion<sup>76</sup>
- Rape within marriage is criminalised<sup>77</sup>
- Domestic violence is given a broad definition, i.e. includes physical and psychological violence, and is subject to specific legislation<sup>78</sup>
- Relationships targeted by the legislation on domestic violence include: wives, *de facto* partners, former partners, girlfriends (even if not living in the same house), female relatives and female household workers
- Sexual harassment is criminalised and defined as a crime<sup>79</sup>
- Incest is defined as a specific crime<sup>80</sup>
- Sexual exploitation and trafficking is criminalised<sup>81</sup>
- The law treats sexually exploited persons as victims and not as offenders,<sup>82</sup>
- Sentences are not too lenient<sup>83</sup>

- No discriminatory mitigating circumstances, such as defence of honour or reduced sentences if the rapist marries the raped woman<sup>84</sup>
- Sexual crimes and offences are defined as crimes of violence against persons and not as crimes against morality<sup>85</sup>
- The investigation of gender-based crimes should be mandatory, i.e. these crimes should constitute public offences<sup>86</sup>

Besides these minimum criteria, it is said that the integrity and dignity of the woman who has been subjected to violence or rape should always be fully respected.<sup>87</sup>

Generally, legislative measures alone are not sufficient to discharge the state's obligations under international human rights law. Instead, states have to take all appropriate measures to actually implement and enforce the laws effectively in practice. Measures should include public awareness raising, protective and support services for victims (including psychological and medical assistance), effective mechanisms to receive, investigate and prosecute complaints, civil remedies and gender-sensitive training of all affected public officials.<sup>88</sup> In particular, prejudices, practices, stereotypes and attitudes hindering women's equality need to be addressed and overcome at all levels.<sup>89</sup> Judicial procedures and mechanisms, from investigation to enforcement, should be both gender and child sensitive.<sup>90</sup> For instance, the general public and the press should be excluded from a trial when the private life of the victim so requires.<sup>91</sup> The CEDAW Committee holds that the state party has far reaching obligations to protect and prevent violence against women. In particular, the state should provide for a possibility to apply for a protection or restraint order, and ensure non-discriminatory access in practice to support services.<sup>92</sup>

The United Nations treaty bodies have not specifically dealt with evidence and the evaluation of evidence in cases of domestic violence and rape. However, the requirement to respect the dignity and privacy of the victim might influence the admissibility of evidence, for example evidence on the victim's previous sexual life.<sup>93</sup> Provisions on the administration of justice also provide certain minimum standards that states need to comply with.

In sum, states parties to the United Nations human rights treaties are required to recognise violence against women as a human right violation, and to strive towards its eradication through all possible means in both the public and private spheres. The required actions include legal reforms and their effective implementation, provision of support services as well as preventive measures such as awareness-raising campaigns.

Within the European system, the case law of the European Court of Human Rights has emphasised the positive obligations of states parties in regard to sexual crimes.<sup>94</sup> Sexual crimes and abuses have been determined to fall within the scope of torture and inhuman and degrading treatment.<sup>95</sup> The court has also confirmed that rape could occur within any relationship, including marriage.<sup>96</sup> In addition, the right to privacy under the ECHR is interpreted as imposing positive obligations upon states parties to protect a person's physical and moral integrity, including his or her sexual life.<sup>97</sup> It is the lack of consent and not the use of violence or force, which should be the constituent element of the crime of rape.<sup>98</sup> A requirement of proof of physical resistance on behalf of the victim would not be compatible with the ECHR.<sup>99</sup> Furthermore, states are under a positive obligation to establish an effective legal framework and to conduct official investigation and prosecution, even if private parties committed the crime.<sup>100</sup> Investigations of sexual crimes need to be thorough and context-sensitive, and, for instance, take into

account the particular vulnerability of young persons.<sup>101</sup> Judicial proceedings on domestic violence and rape have to comply with the guarantees for fair trial under the ECHR.

The Inter-American human rights system, which comprises the only international treaty that exclusively addresses violence against women, has approached the issue as “first and foremost, a human rights problem” that “has its roots in concepts of the inferiority and subordination of women”.<sup>102</sup> The IACHR has in several cases ruled that rape and other sexual abuse violate the right to humane treatment, personal liberty, privacy, fair trial, judicial protection and the rights of the child,<sup>103</sup> as well as the right to physical and psychological integrity.<sup>104</sup> It has also held that in certain circumstances rape amounts to cruel, inhuman and degrading treatment<sup>105</sup> or torture.<sup>106</sup> A case involving the forced sterilisation and subsequent death of a peasant mother was held by the IACHR to constitute a violation of the right to life, humane treatment and equality before the law as well as a failure to prevent, punish and eradicate violence against women.<sup>107</sup> Gender-based violence, in particular sexual violence and domestic or intra-familial violence, has also been linked to the pattern of killings of women in Mexico.<sup>108</sup> In particular, impunity and discriminatory practices have been singled out as factors that encourage violence against women:

“The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence... The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”<sup>109</sup>

By failing to act with due diligence in the prevention, investigation, prosecution and punishment of violence against women, the state is in violation of its treaty obligations towards women’s human rights.<sup>110</sup> To combat these practices, the IACHR has recommended “urgent and effective measures of a juridical, educational and cultural nature as required to put an end to (...) violence against women”.<sup>111</sup> In the *Fernandes v. Brazil* case, which concerned domestic violence, it listed extensive measures that the state should take to provide redress to the victim and to promote the importance of respecting women and their rights as recognised in the Convention of Belém do Pará.<sup>112</sup>

At the African regional level, the Protocol on Rights of Women in Africa provides a broad definition of violence against women.<sup>113</sup> State parties are obliged to undertake wide-ranging measures to ensure the prevention, punishment and eradication of all forms of violence against women, whether in private or public,<sup>114</sup> and to eliminate discrimination.<sup>115</sup>

## Chapter III: Best Practices

### Termination of pregnancy

#### *Introduction*

Abortion policy and legislation is presented and analysed with regard to Albania, Guyana, France, Sweden and South Africa. These countries vary when it comes to size, religion, social and economic situation and legal culture. What they have in common however is that they all illustrate good examples in certain aspects of abortion and reproductive freedom. Furthermore, they have all adopted abortion legislation with the purpose of decreasing mortality rates among women undergoing illegal abortion, thereby securing the right to health for a larger part of the population. These countries do, to a large extent, fulfil the international standards on reproductive health, but at the same time illuminate different approaches to this matter. That is also the reason why they have been selected in this context.

#### *Termination of pregnancy laws: Crucial elements*

There are several common denominators in the legal acts of the countries chosen as good examples with regard to termination of pregnancy. They can be summarised as follows.

- Consent and authorisation
- Criteria and methods for termination of pregnancy
- Accessibility
- Counselling and information
- Competent service providers
- Sanctions for violation of abortion laws
- Civil and administrative responsibility
- Individual cost of abortion

#### *Consent and authorisation*

The selected legislation is based on the idea that the woman is the primary decision-maker regarding abortion.<sup>116</sup> However, in all five countries, there are a few exceptions where the authorisation of a third party is additionally required. This concerns the format of the woman's consent and the age of the woman. As will be shown later, the self-determination of the woman can also be conditioned by the number of weeks of pregnancy.

Regarding the consent and its format, some regulations leave it open for the medical service provider to decide on the format,<sup>117</sup> while others demand the consent to be submitted in written form,<sup>118</sup> possibly subsequent to a first visit to a physician.<sup>119</sup>

With regard to minors, the legislations vary. Under Albanian law, women below the age of 16 cannot make the decision by themselves.<sup>120</sup> The consent of their parents is required. In the other countries, there is no age limit, but women who are minors can be recommended to consult their parents before the intervention. It is, however, not a requirement.<sup>121</sup> Swedish legislation goes the furthest in securing women's self-determination and forbids the medical staff to contact the minor's parents or legal guardians if it is believed that she would suffer serious harm were the latter to be informed of her decision.<sup>122</sup> A middle way is found in French law: where the minor woman is unwilling or unable to

contact her parents or guardians, she must designate an adult person who will accompany her through the process.<sup>123</sup>

*Criteria and methods for termination of pregnancy*

As shown below, the time limit for abortion, until which the woman is not required to provide any reasons for her request for an abortion, varies from one country to another:

<b>Time limits for abortion upon request (number of weeks)</b>				
Albania <sup>124</sup>	France <sup>125</sup>	Guyana <sup>126</sup>	South Africa <sup>127</sup>	Sweden <sup>128</sup>
12	12	8	12	18

Once a pregnancy has advanced past the legal time limit for an abortion upon request, a different set of rules and procedures applies. In most cases, the woman will then have to provide reasons for requesting an abortion and await a decision from a third party. Such reasons can be that she cannot afford to raise a child or that her social situation does not allow her to do so. Other reasons that might allow a legal abortion are that pregnancy is the result of a rape, that the woman’s life or mental health are threatened by a pregnancy or that the foetus might be ill. The following table shows the variations in weeks, reasons and competent decision-makers among the selected countries:

## Reasons / Competent authority / Number of weeks of pregnancy

Reason	Albania <sup>129</sup>		Sweden <sup>130</sup>		South Africa <sup>131</sup>		Guyana <sup>132</sup>		France <sup>133</sup>	
	Authoriser	Weeks of pregnancy	Authoriser	Weeks of pregnancy	Authoriser	Weeks of pregnancy	Authoriser	Weeks of pregnancy	Authoriser	Weeks of pregnancy
Social / Economic	Team <sup>134</sup>	22	Team <sup>135</sup>	Until viability <sup>136</sup>	1 Dr.	22	1 Dr. 2 Dr.	8-12 12-16		
	Team <sup>137</sup>	22	Team <sup>138</sup>	Until viability <sup>139</sup>	1 Dr.	20	1 Dr. 2 Dr.	8-12 12-16		
Rape / Incest	Team <sup>137</sup>	22	Team <sup>138</sup>	Until viability <sup>139</sup>	1 Dr.	20	1 Dr. 2 Dr.	8-12 12-16		
Life or health <sup>140</sup> of mother	3 Dr.	∞	Team <sup>141</sup>	∞	2 Dr.	∞	3 Dr.	∞	Team <sup>142</sup>	∞
	3 Dr.	∞	Team <sup>143</sup>	∞	2 Dr.	∞	1 Dr. 2 Dr.	8-12 12-16	Team <sup>144</sup>	∞

Dr: doctor(s)  
∞: unlimited

As shown by the table above, there are significant variations among the countries. Whereas some countries only involve physicians as decision-makers, others add social workers, psychologists or even laymen to assess the woman's reasons. As regards economic and social reasons, in countries where they can constitute a valid ground for abortion, the woman's entire social and economic environment is taken into account.<sup>145</sup> Applications to the responsible authority can be supplemented with both a medical and a psychosocial examination.<sup>146</sup>

Importantly, when a woman applies for an abortion on the ground of rape or incest, neither a court judgement nor a police report is required under the abortion laws: the woman's own statement, sometimes coupled with a psychosocial investigation, is sufficient evidence.<sup>147</sup> As will be shown in the section on administrative complaints mechanisms, few countries allow appeals against negative decisions of the deciding authority.

Methods of abortion also vary depending on the stage of pregnancy. In general, the time limits for different methods are left for medical authorities to decide, but the legislation may still prescribe diverse procedures to be followed for each method.<sup>148</sup> Most countries use the medical and surgical methods, but a combination of both is also possible. Surgical methods used for termination of pregnancy include vacuum aspiration (until the 12th week), and dilatation and evacuation (abortions at a later stage of pregnancy).<sup>149</sup> The medical method – drugs terminating the pregnancy by causing uterine contractions – has proved to be safe and effective until the 12th week of pregnancy.<sup>150</sup>

#### *Accessibility*

Termination of pregnancy might in practice not be easily accessible to women, even though a country has adopted a well-formulated abortion law. There are indeed many factors that may impair a woman's access to abortion services. Two examples follow, from South Africa and Albania respectively, illustrating the obstacles that need to be addressed in order to ensure accessibility for all women.

Both Albania and South Africa, two countries where legal abortion is a relatively new phenomenon, experience problems in securing equal physical access to abortion services.<sup>151</sup> Physical access to health services remains a problem notably in rural communities in both countries. It is often time-consuming to travel from rural parts to cities, and the cost of transportation is a heavy burden for many.<sup>152</sup> In Albania, an additional problem is the low ratio of human resources within the healthcare sector,<sup>153</sup> especially in rural areas since most of the qualified healthcare personnel have moved to larger cities despite incentives such as higher salaries in rural areas.<sup>154</sup> In 2002, it was estimated that only about 60% of the Albanian population had access to family planning services.<sup>155</sup> A South African evaluation revealed another challenge: out of the 292 facilities designated to provide termination of pregnancy services, only 32% were actually functioning.<sup>156</sup> It is believed that the judgmental attitude of some healthcare staff is one factor hampering proper implementation.<sup>157</sup>

In Albania, many women prefer to not visit the closest health service as they fear that confidentiality will not be upheld. This is another factor that hinders access to reproductive health services. This problem raises the issue of confidentiality in small communities and reflects the prevailing conception of reproductive health as a very private matter.<sup>158</sup> In South Africa, lack of knowledge about the law, possible stigmatisation and preferences for traditional medicines contribute to women resorting to illegal abortion in several regions.<sup>159</sup>

The above-mentioned challenges can be overcome through continued efforts to increase awareness among the general population and through training of clinic staff.

Third parties can sometimes bar access to legal abortion services, for instance by physically preventing women from entering a clinic where abortions are carried out. In France and South Africa, it is an offence under criminal law to prevent the lawful termination of pregnancy, or to obstruct access to a facility for the termination of pregnancy.<sup>160</sup>

#### *Counselling and information*

In order to facilitate the difficult decision whether or not to undergo an abortion, the legislation often entails provisions regarding information for women on the medical intervention and its consequences, as well as counselling, and follow-up consultations. The aim is to enable the woman to make an informed decision. *Regulations governing the specific information, which should be given to all women seeking an abortion, are common.*<sup>161</sup>

The relevant healthcare staffs normally have a duty to inform women seeking abortion about their rights, the different methods of abortion and the immediate and long-term medical risks involved.<sup>162</sup> To ensure that the woman fully understands the information, it can be given in both oral and written form, and must be given in a language that the woman understands.<sup>163</sup> Standardised information sheets, including for instance the relevant provisions of the law, practical information on what to bring to the procedure, explanations of possible medical complications and a list of relevant contact information, can ensure that the same information is given at all healthcare facilities.<sup>164</sup> Another common part of the mandatory information concerns family planning. In most countries, every woman must be provided with information on birth control and contraceptives, whether before the abortion – in the abovementioned written document for instance<sup>165</sup> – or in connection with the abortion.<sup>166</sup>

Personal counselling, often in the form of psychosocial guidance by a professional before and after the abortion, can be either mandatory or voluntary.<sup>167</sup> For example, in Guyana pre- and post-abortion counselling is mandatory for the woman.<sup>168</sup> Her partner is also encouraged to participate. A waiting period of 48 hours is required between the first request for abortion and the performance of the abortion.<sup>169</sup> Another solution is found in Sweden where all women are offered voluntary pre-abortion counselling, and voluntary post-abortion counselling in cases where the abortion is carried out after the 18th week of gestation.<sup>170</sup>

Follow-up consultations after the abortion aim at ensuring that the abortion has been completed, examining the woman's health and sometimes also providing additional counselling.

Public information campaigns regarding access to abortion and the consequences of abortion, but also regarding contraceptives and sexual health in general, have proven essential in all these countries. Education in schools is crucial as well. The identified good practices regarding information and education target both boys/men and girls/women, and stress the equal and shared responsibility of both sexes in the context of reproductive health.

Below, examples of public information campaigns and strategies are provided. They illustrate different approaches chosen to address prejudices and lack of information on abortion.

<b>Example</b>
<p>In 2002 only 75.1% of Albanian women between 15–49 years living in marriage or in unions used contraception. However, 67.1% used the traditional method of withdrawal, whereas modern contraception methods (including birth control pills, condoms and sterilisation) were used by 7.9%.<sup>171</sup> The main obstacle to contraceptive use is patriarchal structures, which put the responsibility for protecting women from unwanted pregnancies solely on the women. The Albanian Ministry of Health has tried to tackle these negative attitudes through, for instance, awareness-raising campaigns in the media and home visits by midwives.<sup>172</sup> In 2005, a TV-advertisement campaign was launched on both public and private channels, aimed at demonstrating the responsibility of men and women alike.<sup>173</sup> Television was chosen as the medium for information dissemination as the Reproductive Health Survey had showed that TV was one of the main sources for sexual information.<sup>174</sup></p>

<b>Example</b>
<p>Within the Swedish public healthcare system, maternity centres, gynaecology clinics, abortion clinics and youth centres provide information on contraception and abortion. The telephone directory, which is distributed for free to all households and available on the Internet, includes contact information to all healthcare institutions in each county. In order for information to reach persons speaking a language other than Swedish, a state-funded webpage on reproductive health matters in 13 different languages has been created.<sup>175</sup> Access to information on web pages necessitates access to the Internet. In the Swedish setting, however, most people do have access to Internet either at home, at work, at school or at public libraries.<sup>176</sup> Free healthcare advice is also provided via a specific toll free number in most counties.<sup>177</sup></p>

<b>Example</b>
<p>Sexual education in schools is a crucial component of awareness raising. To secure that all children and young persons receive sexual education, many countries include it as a mandatory part of the curricula for both private and public schools.<sup>178</sup> In order to stress the importance of equal and shared responsibilities of the sexes in regard to sexuality and reproductive health, the subject focuses not only on biological facts but also includes discussions on relationships, values, gender and prejudices.<sup>179</sup> Nonetheless, experience shows that the key to successful sexual education lies with the teachers. It is vital that they feel at ease with the subject and that they possess sufficient knowledge to teach the subject appropriately.<sup>180</sup> Therefore, a first step is to educate the teachers, for instance through the inclusion of sexuality and reproductive health as an obligatory component of teacher training at the universities.<sup>181</sup></p>

Example
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<p>In both Albania and Sweden, specialised youth centres have proved to be an efficient way of reaching out to young people, girls and boys alike, with information and assistance.<sup>182</sup> Some common features influencing the success of youth centres can be identified:</p>
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| <ul style="list-style-type: none"> <li>• The premises are easily accessible, centrally located and separated from other activities</li> <li>• Opening hours are adapted to school hours</li> <li>• Visits are free of charge</li> <li>• Parents are not informed of a visit unless the client agrees</li> <li>• Outreach work is conducted in cooperation with schools</li> <li>• The centres offer both healthcare services and social services, targeting sexual and reproductive health as well as psychological and social health</li> </ul> |
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#### *Competent service providers*

It is imperative to regulate the procedure for the termination of pregnancy since it involves basic human rights and affects the physical integrity of the person on whom the abortion is made. *It is essential that the competent authorities be designated to carry out abortions, that the conditions in which an abortion can be performed are determined, and that the quality of services together with the education of healthcare staff is supervised.* The collection of data among service providers is another important element of the legal framework that serves as a tool for analysis of the country situation in the context of abortion. All selected countries require that service providers collect specific data regarding abortion, and that the data is transmitted to a central authority at regular intervals.<sup>183</sup> As a matter of fact, all countries have provisions whereby only registered physicians and sometimes also nurses and midwives are allowed to perform abortions. Similarly, abortions may only take place at registered healthcare facilities.<sup>184</sup> Though national rules in this area differ, reflecting each country's legal culture, it is important to observe that such regulations exist and their modalities.

Another essential matter in the context of service providers is the importance of providing healthcare also to women who suffer complications from illegal abortions.<sup>185</sup>

In order to illustrate the regulation and supervision of competent service providers in the different countries chosen, the examples of Sweden, South Africa and Albania are given below:

<b>Example</b>
<p>In Sweden, all abortions must be performed at a general hospital or in another approved medical institution by a person who is registered in the professional register as a physician.<sup>186</sup> To be eligible for employment within the healthcare sector, physicians, nurses and midwives must be registered in the national professional register. University education leading to a profession within healthcare must include abortion and reproductive health in their curricula. Hence, all registered healthcare professionals have acquired some knowledge in this specific area. A national health authority is responsible for supervision of quality and safety of healthcare institutions and their personnel.<sup>187</sup> As abortion constitutes a health service under Swedish legislation, all general laws and regulations governing healthcare apply to abortion services. As a consequence, abortions shall be performed with respect for the rights to non-discrimination and dignity.<sup>188</sup> Other requirements for healthcare in general, which are relevant in the context of abortion, include good sanitation, safety, accessibility, respect for each individual's integrity and self-determination<sup>189</sup> as well as guarantees of medical confidentiality and privacy.<sup>190</sup></p>
<p>As regards data collection, the Swedish national health authority provides a good example. It compiles data given on a monthly basis by healthcare providers, indicating the total number of legal abortions in the country together with the woman's age, her country, municipality and parish of residence, previous deliveries and abortions if any, the clinic where the abortion was performed, the form of care, the stage of pregnancy at the time of the abortion and the method used.<sup>191</sup> Secrecy rules apply: information enabling the identification of a woman who has undergone an abortion may thus not be disclosed.<sup>192</sup></p>

### Example

During the first twelve weeks of pregnancy, South African registered midwives and nurses who have completed a specific training course are authorised to carry out abortions. After the 12th week, only registered physicians may perform abortions.<sup>193</sup> The widening of the scope of service providers aims at increased accessibility of services. Research shows that trained midwives and nurses are well suited to provide high-quality abortion services in the absence of physicians.<sup>194</sup> The objective to provide abortion services at the lowest level of the health system is also reflected in the provision of education. Governmental training initiatives for healthcare providers have so far included value clarification workshops, training for both doctors and nurses in manual vacuum aspiration and training regarding contraception and emergency contraception. Non-governmental organisations assist with training for counselling and provision of abortion services.<sup>195</sup>

The law also includes a number of criteria that have to be met by every healthcare facility wanting to be accredited to carry out abortions. Accredited healthcare facilities must have access to the following:

- Medical and nursing staff
- An operating theatre
- Appropriate surgical equipment
- Drug supplies for intravenous and intramuscular injection
- Emergency resuscitation equipment and access to an emergency
- Appropriate transport should the need arise
- Facilities and equipment for clinical observation
- Appropriate infection control measures
- Safe waste disposal infrastructure
- Telephones as a means of communication.<sup>196</sup>

The responsibility for supervision and accreditation lies with the Ministry of Health, but is exercised in close cooperation with provincial bodies.<sup>197</sup>

### Example

Drawing from its own experience, the Albanian Ministry of Health strongly recommends any country that introduces legal abortion to carefully regulate the supervision of private clinics in the abortion law and accompanying regulations.<sup>198</sup> The abortion law, adopted at a time when private clinics were not authorised to perform abortions,<sup>199</sup> only provided for supervision of public clinics. This problem of lack of surveillance grew with the increasing number of private clinics, making it essential that a system of supervision be set up also for private healthcare clinics. Today all private clinics are obliged to follow the abortion regulations, but violations are still common.<sup>200</sup> In order to improve the situation, the Ministry of Health is revising the system of surveillance and of statistical reporting in cooperation with the United Nations. Reforms are also underway concerning the licensing of physicians and accreditation of abortion clinics, both within the public and the private sector.<sup>201</sup>

Albanian healthcare personnel are in need of comprehensive and continuous training on reproductive health, including on safe abortion and modern contraceptives. It remains a problem that the older generation of healthcare staff tends not to recommend modern contraceptives and to be judgemental towards unmarried women who want counselling for contraceptives.<sup>202</sup> With the introduction of a programme of free contraceptives, governmental trainings on family planning and counselling targeting family doctors, nurses and midwives have started. So far, the staffs in 400 out of 600 primary healthcare centres have already received training, with trainings to follow also for the remaining centres.<sup>203</sup>

#### *Sanctions for violations of abortion legislation*

Healthcare staff might have ethical objections towards carrying out an abortion. Countries may choose to allow or prohibit conscientious objection to abortion. It is also possible to prohibit conscientious objection to abortion under certain circumstances, or to mandate the referral to other service providers. Whatever solution chosen, it is crucial if one wishes to act in accordance with international standards that the right to conscientious objection does not undermine women's access to legal abortion services in practice.

Sweden represents the strictest approach on this matter as conscientious objection is prohibited. A physician who is employed at a clinic where abortions are performed can only refuse to carry out an abortion if the abortion itself would endanger the life or health of the woman.<sup>204</sup> An intermediary solution is found in Guyana where conscientious objection is generally allowed. However, if the immediate termination of pregnancy is required to save the life or health of the woman, conscientious objection is not permitted.<sup>205</sup> France chooses another approach. A conscientious objection to abortion is permitted, but complemented with an obligation for the practitioner to immediately inform the woman of the refusal and to refer her to another physician able to perform an abortion.<sup>206</sup>

Considering the serious nature of a medical termination of pregnancy, the legislation in all surveyed countries criminalises abortions without consent as well as abortions carried out in contravention of the law. Such legal provisions enable women to have recourse to legal action against doctors or institutions that fail to abide by the law. On the other hand, under a very restrictive abortion law that criminalises women undergoing illegal abortions, reporting a physician's negligence is not conceivable; women then have no possibility of redress.<sup>207</sup>

The most common criminalised acts, or omissions, concern abortions carried out:

- Without the woman's consent
- After the legal time limit
- By an unauthorised person
- At a non-accredited facility
- In disregard of legal regulations<sup>208</sup>

Sentences vary from fines to imprisonment depending on the seriousness of the crime, and on the legal system of each country.<sup>209</sup>

*Civil and administrative responsibility*

It follows from international standards on discrimination and on health that individuals should have a means of complaining of denied access to services. This also includes denial of services on discriminatory grounds, or a physician's negative decision in general, and furthermore the quality of medical treatment. It has been mentioned that criminalisation of lack of action or wrongful action by medical practitioners can be effective as a tool for securing reproductive rights of women. Civil and administrative responsibility of healthcare providers can, nonetheless, also be efficient in cases where medical staff violate legal obligations. If abortion is criminalised, however, any such procedure and access to legal remedies are limited. In such cases, women stand, in practice, outside the possibilities of suing for malpractice or other violations of their dignity. There are other ways for women to seek redress than going to ordinary courts. Just to mention a few examples that we have found in the legal systems that we examined: constitutional courts, ombudsmen, patient committees and disciplinary boards and, of course, fines, conciliation, withdrawal of license, requisition of equipment and penal denunciation.

As mentioned above, after the expiry of the time limit for abortion upon request, third party authorisation is required. Unfortunately, only a few countries allow appeals against negative decisions from the authority that assesses the woman's reasons for abortion. Albania is an exception in this regard. According to its legislation every individual has the right to appeal against third party decisions in cases where their reproductive rights are violated.<sup>210</sup> Another variation on this theme is found in South Africa, where all patients have a right to request a referral for a second opinion from another healthcare provider.<sup>211</sup>

Physical barriers, economic barriers and discrimination can also impair access to abortion services. In these cases, it is important that complaints can be lodged, and that the woman in question receives redress. *A first step to ensure equal access for all would be to include an explicit right to reproductive healthcare in the national legislation.* In South Africa, the Constitution includes the right to access reproductive healthcare.<sup>212</sup> As a consequence, an individual who is denied access to abortion may be able to appeal directly to the Constitutional Court.<sup>213</sup> Another possibility is to legally protect the right to reproductive health through the enactment of a specific law on the subject, as is the case in Albania.<sup>214</sup> The Albanian law gives every individual a right to reproductive choice, to reproductive health education and to qualified care for sexual and reproductive health.<sup>215</sup> An important feature of the law is the inclusion of an explicit right for individuals to appeal against actions, decisions and injuries of third parties, when their reproductive rights are violated.<sup>216</sup> In cases where access is barred on discriminatory grounds complaints can often be lodged with complaints mechanisms established to deal specifically with discrimination. These mechanisms can, for example, take the form of ombudsmen or equality courts.

The Swedish example below demonstrates several possible recourses for an individual who wants to lodge a complaint concerning the quality of healthcare services.

Institutions	Tasks	Consequences
National Medical Disciplinary Board <sup>217</sup>	Assesses faults or negligence attributable to members of healthcare staff	- Warning - Reprimand - Removal from professional register
Patient Committees/ Patient Ombudsmen <sup>218</sup>	Assists and supports patients within the public healthcare system	- Reports to relevant healthcare institution
Patient Insurance Scheme <sup>219</sup>	Administers mandatory insurance for public and private healthcare providers	- Financial compensation
Ordinary court system	Adjudicates civil claims for damages	- Awards for damages

#### *Individual cost of abortion*

The cost for abortion born by the individual patient is an important factor in the context of safeguarding equal access to legal and safe abortion services. Another important aspect is the costs of contraceptives. To avoid the use of abortion as a birth control method, affordable contraceptives must be available and accessible to the general public. The following table provides an overview of the costs for abortion and contraceptives in Albania, France and Sweden:

#### Costs related to termination of pregnancy

Country	Cost for abortion	Annual cost for birth control pills	Additional comments
<b>Albania</b>	Public sector: 30 USD Private sector: 50–70 USD <sup>220</sup>	Free of charge <sup>221</sup>	Due to the institutionalised and deeply rooted informal payment system within the healthcare sector, an abortion will in practice cost around 100–300 USD depending on the week of gestation. <sup>222</sup> In cooperation with the UNFPA, birth control pills and condoms are provided free of charge until at least 2010. <sup>223</sup>
<b>France</b>	250–360 USD <sup>1</sup>	0–140 USD (Depending on type) Minors and women who are not insured by the social security: free of charge <sup>2</sup>	The cost for abortion is refunded by social security with 80%. Minors and women with scarce resources can get an abortion free of charge <sup>3</sup> .

<b>Sweden</b>	Swedish citizens: max. 125 USD <sup>224</sup> Registered asylum seekers: max. 55 USD <sup>225</sup> Other nationalities: 690–2070 USD <sup>226</sup>	Swedish citizens: 35–140 USD (depending on type) <sup>227</sup> Registered asylum seekers: max. 55 USD <sup>228</sup>	The Swedish differentiation between Swedish citizens and other nationals is the subject of a national debate, <sup>229</sup> and has been criticised by international human rights bodies. <sup>230</sup>
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### *Reproductive health policies*

When it comes to reproductive health policies, a few issues seem to have been particularly essential for a successful implementation of the abortion laws. *Not only the law but also the policy has to be formulated in a sufficiently clear and understandable manner, enabling it to be applied directly by the relevant authorities. Furthermore it must be supported by a sufficient budgetary allocation. The consolidation of the social acceptance of abortion is equally crucial.* Here, the role of non-governmental organisations entering into a constructive discussion with the governmental authorities prior to the adoption of the law seems to be vital. The presence within the government of a key person or body active in reproductive health matters and willing to support the implementation of the legislation at full length has proven to be influential.

A broad approach towards gender and health needs to be adopted, comprising, for example, measures directed against gender-based violence and discrimination on a broader scale. In some cases, health policies contain measures of a more practical nature, such as the dissemination of contraceptives or the provision of free healthcare, in particular for women and young people. Additionally, it is crucial that policies target not only women but also men as both sexes should share an equal responsibility in regard to reproductive health. In order to evaluate policies, follow-up needs to be established.

### Essential elements of good practices

- Value consolidation
- Active key persons at a high level
- Broad approach towards reproductive health
- Dissemination of contraceptives
- Follow-up

### *Value consolidation and active key persons at a high level*

Guyana provides an example of a country in which the consolidation of the abortion law has been successful and the role of a minister instrumental. The present abortion law was preceded by at least 20 years of active discussion for and against abolishing the criminalisation of termination of pregnancy.<sup>231</sup> Abortion was illegal in Guyana until 1995. In the early 1990s, the Minister of Health expressed support for a more liberal abortion law.<sup>232</sup> Encouraged by this statement, the pro-abortion groups provided the government and the public at large with reliable facts and data on the actual situation in the country via surveys on the incidence of abortion and on attitudes towards abortion among healthcare personnel, university students and teenagers and representatives from the legal profession. The groups argued that they, too, wanted to see fewer abortions, and that the adoption of a liberal law could help reduce not only the number of unsafe abortions but also the general incidence of abortions.<sup>233</sup> The results of the inquiries showed that illegal abortion existed on a very large scale and that unsafe abortions were the cause of many deaths. The alarming findings convinced the decision-makers and the general public of the need for a law permitting abortion as a means for the improvement of women's health.<sup>234</sup>

*A broad approach to reproductive health*

In Sweden, one of the public health policy's main objectives is to guarantee the enjoyment of safe sexuality and good reproductive health as this is regarded as central to the individual's health and well-being.<sup>235</sup> With this objective in mind, measures are undertaken aiming at preventing unwanted pregnancies and sexually transmitted diseases, at protecting women against gender discrimination and at eliminating sexual violence against women.<sup>236</sup>

Albania, France and South Africa further exemplify how reproductive health can be an integrated component of several different policies and strategies. For instance, policies on family planning, health sector reforms, adolescent health, HIV/AIDS and social affairs may encompass measures for the enhancement of the population's reproductive health.<sup>237</sup> Information campaigns, establishment of family planning centres, supervision of quality and contraceptive security are other envisaged measures.<sup>238</sup> Contraception seems to play a crucial role in reproductive health policies in view of the importance of accessible and affordable contraceptives to minimise the number of abortions.<sup>239</sup> South Africa's contraceptive policy connects access to modern methods of contraception with a number of human rights, including non-discrimination and the right to decide the number and spacing of one's children.<sup>240</sup>

*Follow-up of policies*

In Sweden, where the administrative control is strong, the national health institute coordinates a national follow-up of the public health policy and publishes a report on its findings every fourth year. The follow-up and evaluation include the development of indicators, analysis of the effects of the measures taken, cost-analysis, analysis from a gender perspective and analysis from an ethnic perspective.<sup>241</sup> Another way of measuring implementation is to make, as in Albania, nationwide reproductive health surveys.<sup>242</sup> In such a survey, variables such as the number of abortions, whether the abortion was performed at a public or a private clinic, birth rates, child mortality and maternal mortality can be present. In addition, a reproductive health survey provides useful information about where specific measures are needed in the future. Similarly, a South African evaluation of the implementation of the termination of pregnancy act, two years after its enactment, provided policy makers with valuable input and recommendations for the future.<sup>243</sup> The evaluation demonstrated that unequal access to abortion services continues to be a major problem. Thus, it recommended expanded service provision, and suggested that each province should demonstrate its progress in this respect on an annual basis.<sup>244</sup>

## Non-Marital Cohabitation

### *Introduction*

Customary union policy and legislation are presented and analysed with regard to Croatia, Trinidad and Tobago, France and New Zealand. These countries differ from each other when it comes to size, religion, social and economic situation and legal culture. They have been selected here for what they have in common: they all provide for legal protection of cohabiting non-married couples. The countries all meet international standards on these issues, although diverse approaches have been taken in the different countries.

As concluded above, international human rights law does not require states to enact legal protection for customary unions. Nevertheless, it could be argued – and has been argued by some of the treaty monitoring bodies – that the right to equality and non-discrimination demands that different forms of relationships are equally protected with regard to the above-mentioned rights. There is a tendency among states towards adopting protective legislation regarding customary unions.<sup>245</sup>

This section focuses on a number of key elements in regulating customary unions as well as on the challenges in the implementation in practice of such regulations, which have been identified through the research and the analysis of the selected countries. It also examines the underlying policies and the information disseminated to the population at large regarding rights and obligations arising out of customary unions.

### *Laws regulating customary unions: Crucial elements*

Laws regulating customary unions often aim at providing financial safeguards and protection of the economically weaker party in the union. The scope of the protection varies from country to country, but as a general rule certain areas are systematically subject to legal regulation.

Areas subject to legal regulation include property division at the end of the relationship, whether through separation or upon death, maintenance obligations and children. In many countries, the concept of cohabitation is also integrated into other legal fields such as criminal law and insurance law. A first precondition for the legal protection of cohabiting couples is however the legal definition of cohabitation. Here, the main variation between countries lies in the legislator's choice between the *de facto* approach and the contractual one. In both cases, though, certain criteria for the constitution of a customary union exist. Some countries also allow couples that fulfil the *de facto* definition of a customary union to opt out from the legal provisions, in whole or in part, by way of contract. Good examples of legal regulations concerning customary unions can, thus, contain the following variables:

#### Crucial elements of cohabitation

- Defining cohabitation
- Contracting out
- Maintenance
- Children
- Other legal consequences
- Ending the customary union
- Property division upon separation
- Inheritance
- Legal remedies

#### *Defining cohabitation*

The good examples of laws on cohabitation vary in their definitions of what is recognised as cohabitation. Customary unions, as we also call them for the purpose of this report, may or may not be open to both different- and same-sex partners; they may be defined on the basis of *de facto* criteria or on formal registration; and they may or may not be open to persons who are simultaneously married to or involved in a customary union with someone else.

When it comes to deciding whether or not a couple is cohabiting in a legal sense, the partners' genders can be a determining factor. In some countries, both homosexual and heterosexual unions are recognised,<sup>246</sup> while in others the partners must be one woman and one man.<sup>247</sup> Heterosexual and homosexual relationships can either be regulated in the same legal statutes<sup>248</sup> or in separate acts.<sup>249</sup>

In countries taking a *de facto* approach, customary unions are defined through the existence of a factual situation. The law normally sets out certain criteria that need to be fulfilled for a union to be legally recognised as a customary union. These criteria can be fixed in the sense that they are compulsory for all customary unions, or they can be flexible in the sense that they leave space for individual assessment in each case.<sup>250</sup> By contrast, the contractual approach only recognises customary unions where the partners have concluded and registered a contract. Consequently, the latter approach requires the partners to a customary union to take positive action to obtain legal protection and recognition.

In France, the two approaches to non-marital cohabitation coexist in law. However, we chose to focus here on the contractual approach (*Pacte Civil de Solidarité*) for two reasons: firstly, France is the only country among those comprised in this study that illustrates the contractual approach to customary unions; secondly, under French law, the contractual form grants more rights to partners than *de facto* cohabitation. Non-marital union can thus be formalised by way of a contract between the two partners, organising their common life, and registered at the court office.<sup>251</sup> A joint declaration at the tribunal under the jurisdiction of which they have their common residence has to be made by the persons willing to conclude a contract.<sup>252</sup>

A certain stability and duration of the union are two common *de facto* circumstances that form criteria for legal cohabitation. The minimum time limits set by the law can vary, and in the examples we have studied, they demand from three to five years of cohabitation.<sup>253</sup> As is shown below, time limits may not be an absolute criterion but can be one of several factors playing a role in defining cohabitation. Another common criterion is the existence of children. The fact that there is a child born within the

relationship can in itself confirm the formal existence of a union; the non-fulfilment of the prescribed time limit may then be disregarded. This is the case in Trinidad and Tobago.<sup>254</sup> In other countries, the presence of children within a customary union constitutes a strong, although not decisive, indication of the existence of such union.<sup>255</sup> There are also examples where the law does not take the existence of common children into account at all.<sup>256</sup>

Another essential factor, which may in itself qualify a relationship as legally recognised cohabitation is that one partner has made substantial contributions to the relationship.<sup>257</sup> Such a contribution may include not only substantial financial contributions but also cover other contributions, such as those made in the capacity of a parent or homemaker.<sup>258</sup>

A precondition for a customary union is normally that the two persons live together. This precondition can be without any additional requirement as to the form of their relationship, or, more specifically, with a requirement of a marriage-like relationship. New Zealand has a very flexible definition that allows the authorities, when establishing whether or not a relationship is a customary union, to weigh different factors against each other. Taken together, these criteria have much in common with the features of marriage.

#### Example

A number of requirements are to be fulfilled for a relationship to be recognised as a legal form of cohabitation in New Zealand. In determining whether two persons live together as a couple, all the following circumstances in the particular situation are taken into account:

- The duration of the relationship
- The nature and extent of common residency
- The sexual relationship
- The degree of financial dependence or interdependence
- The ownership, use and acquisition of property
- The care and support of children
- The degree of mutual commitment to shared life
- The performance of household duties
- The reputation and public aspects of their relationship<sup>259</sup>

However, none of these circumstances are necessary for the court to conclude that a *de facto* relationship exists. The court is instead free to attach such weight to the evidence as it deems appropriate.<sup>260</sup>

The general purpose of laws on cohabitation can be to offer protection to people who choose not to get married. It may also be a question of equality between different confessional approaches to cohabitation and relationships or, as already mentioned, a question of protecting the economically weaker party. Depending on the approach taken in this regard, protection offered to customary unions in which one or both partners are already in other relationships vary. In Trinidad and Tobago and in New Zealand, the laws recognise cohabitation between two persons where one of them or both is already married to someone else or in another union.<sup>261</sup> On the other end, the French legislation does not allow for registration of cohabitation if one of the partners is married or already in another registered cohabitation.<sup>262</sup> Similarly, in Croatia, a *de facto* union is not recognised as such if one of the partners is married, or engaged in another customary union.<sup>263</sup>

### *Contracting out*

Even when cohabitation is *de facto* established, most countries allow couples to opt out from the legal framework, in whole or in part, by way of contract. In the case of countries with a contractual approach, the possibility to contract out is inherent to the approach itself and is hence not legally regulated.

Acts regulating the possibility for partners to contract out differ regarding the possible scope of the partners' contract and the formalities surrounding it. Whereas all countries allow couples to contract out from all relevant provisions regarding property division and maintenance,<sup>264</sup> some still enable the courts to set aside or alter parts of the contract would its enforcement cause grave injustice.<sup>265</sup> On the other hand, the weaker party may still be protected by formalities required to enter into a valid contract. For instance, it can be required that both parties have independent legal advice, including information on the consequences of the contract, before signing the contract.<sup>266</sup> It further seems to be common to require that a lawyer witnesses the written signatures of the parties at the conclusion of the contract.<sup>267</sup> In some countries agreements between the partners only produce legal effects towards third parties if they are entered into public records.<sup>268</sup>

### *Maintenance*

Upon cohabitation may follow, similar to marriage, mutual responsibilities, such as maintenance. As is shown subsequently, these obligations may arise already during the relationship or, more commonly, after its dissolution. In the case of France, which has adopted the contractual approach, the partner's obligation to maintain his or her partner is present already within the cohabitation. Partners bound by a French contract commit themselves to a common life, and to provide mutual assistance as well as material aid to each other during the duration of their relationship. Unless the partners decide otherwise in their contract, the material aid should be proportionate to their respective means.<sup>269</sup> Another alternative to the legal regulation of maintenance during a relationship is to leave it to the partners to set up a voluntary contract that is binding before a court of law.<sup>270</sup>

In all the studied countries, which have chosen a *de facto* approach towards cohabitation, there are examples of maintenance after dissolution of a customary union.<sup>271</sup> Various circumstances precondition a partner's responsibility to step in financially. The most important factors concern differences between the partners' standard of living and earning capacities because of the division of functions during the relationship,<sup>272</sup> the need for the applicant to undergo training or education to become self-supporting<sup>273</sup> and his or her need to support a child born within the cohabitation relationship.<sup>274</sup> The maintenance is paid during a certain period of time, varying from a short time to three years, or to long-term maintenance in cases where children are involved. Decisive factors are the length of the union, the financial resources of both partners and their age. If the person receiving maintenance remarries or enters into another customary union, the obligation for the ex-partner to pay maintenance usually ends.<sup>275</sup>

### *Children*

As demonstrated by both the legal criteria governing cohabitation and those applicable to maintenance, the presence of children in a relationship often affects the level of legal protection granted to the customary union. With the view of protecting the child, it is important that the consequences of being born by cohabiting parents are similar to those of being born in wedlock. In other words, the way in which the parents have chosen to live must neither affect their parental responsibilities nor the rights of their children. This is the main rule in the countries we have examined. Parents thus have equal responsibilities to share custody rights and responsibilities for the welfare of their children.<sup>276</sup> All matters concerning children are to be decided according to the principle of the best interest of the child.<sup>277</sup> The government of New Zealand has recently stated its intention to work towards a change of the presumption rules for paternity due to the significant number of children born in *de facto* relationships. The proposed new presumption rules would extend to *de facto* couples (of opposite sex), but the exact formulation of the presumption rule has not yet been established.<sup>278</sup>

In Trinidad and Tobago it is possible for partners to make a cohabitation or separation agreement on their duties towards the children. However, it can never affect the court's power to make an order with respect of the custody of children.<sup>279</sup> Provisions in such agreements relating to the education and moral training of children, financial support for children and access to children are disregarded by the court if it is in the best interest of the child to do so.<sup>280</sup>

### *Other legal consequences*

For a customary union to be equivalent to a marriage, it is important that cohabitant couples receive a protection in many areas of the society, such as in criminal law issues, in social security matters and in tax law regulations. An example of equality in criminal law concerns the possibility of acting as a witness against the partner in a criminal case. In many countries, a person is allowed to refuse to testify against his or her spouse, and the same provision applies to cohabiting partners in, for example, Croatia.<sup>281</sup> Similarly, cohabiting partners should be protected against domestic violence on equal terms with married couples.<sup>282</sup> There are examples of equality between marriage and cohabitation with regard to social insurance issues. These comprise health insurance, as well as social aid in various forms.<sup>283</sup> The French law also treats marriage and customary unions alike in the context of taxation.<sup>284</sup>

### *Ending the customary union*

In countries adhering to a *de facto* approach, cohabitation naturally ends when the factual criteria constituting the union are no longer at hand. Thus, the partners can simply move apart without having to go through any formal procedure. On the other hand, where a contractual approach governs cohabitation, the contract forming the union must be formally dissolved and the dissolution registered. Even in the dissolution of *de facto* unions, however, a contract outlining the division of property may be required. For such a contract to be legally valid it is possible to demand that it has been entered into a public register, or that it is foregone by legal counselling and witnessed by third parties.<sup>285</sup> When the partners fail to agree on the division of property, or on other matters arising in the context of dissolution, the case can be referred to a court for settlement of the dispute.

*Property division upon separation*

There are different ways to approach the division of property after the dissolution of cohabitation. From a gender justice point of view it is essential, having in mind the fact that women often own less property than men and perform more unpaid work than their male partners, that the dissolution does not result in an unfair situation for the woman. As mentioned above, the legal regulations will normally step in only if the case is referred to court settlement.

It is important to define what property is included in the statutory division. In most cases, a distinction is made between personal property and shared property, hence between property not subject to division and property that shall be divided between the partners. Property subject to division shall, as a general rule, be divided equally between the partners.<sup>286</sup> One interesting example is found in New Zealand. There the law regulates in detail the property subject to division. Relationship property, i.e. property subject to equal sharing, include the family home, family chattels, all property owned jointly by the partners, property owned by either partner immediately before the beginning of the relationship if intended for the common use or benefit of both partners, property acquired after the beginning of the relationship if intended for the common use or benefit of both partners, income and gains from relationship property and the proportion or value of life insurance policies attributable to the relationship.<sup>287</sup> All other property is separate property and shall generally not be divided between the partners.<sup>288</sup>

On the other hand, Trinidad and Tobago provides an example of a broad definition of property. Property subject to division includes real and personal property as well as any estate or interest (present, future or contingent) in such property.<sup>289</sup> The French approach is different, and the main principle is that each partner personally owns all property he or she acquired before or during the cohabitation. Where none of the partners can establish his or her ownership of a property, the said property, whether movable or immovable, is deemed to be owned equally and jointly by both partners. In a contractual clause, partners have the possibility to choose common ownership for property they acquire during the union, together or individually; however, the law defines property that is excluded from joint ownership and remains the exclusive property of each partner.<sup>290</sup>

There are also examples of regulations on the competence of the competent authority or court in cases of conflict concerning property. Some countries have vested the courts with rather extensive powers in order to ensure the redress of economic disparities between the partners. The courts are able to order a lump sum payment from one person's share of the relationship property to the other, or to order one partner to compensate the other for an increase in value of his or her separate property. In doing so, the court considers whether the incomes and living standards of the partners are likely to be significantly different because of the division of functions during the relationship, for instance if one partner stayed at home to care for their children while the other partner built up his or her career.<sup>291</sup>

In keeping with international standards, if cohabitants are legally protected in the national law, that protection should also cover cases where one or both partners are already in another relationship. In situations where one or both of the cohabiting partners also have a legal spouse or another *de facto* partner, legal provisions on the division of property when competing claims exist may thus be established. In New Zealand, detailed regulations determine the priority of claims between all involved parties. If the relationships are successive, property shall be divided in accordance with the chronological order of the relationships. Property shall be divided according to its attribution to the

different relationships in the situation of contemporaneous relationships.<sup>292</sup> Marriages and *de facto* relationships are thus treated equally.

#### *Inheritance*

A crucial issue for partners to a customary union is the inheritance after the death of one partner. The partners to customary unions can either be granted the same rights as spouses or lesser rights, if any.

In New Zealand and Croatia, partners to customary unions possess the same rights as married partners in this respect. In both countries inheritance is connected to certain preconditions, but the main principle is that the customary union partner inherits property.<sup>293</sup> In New Zealand, a surviving partner chooses which rules to apply to his or her case. The available options include the division of property rules, also applicable upon separation, to abide by a will if one exists or to take what is left under the intestacy rules.<sup>294</sup> When more than one partner exists, the rules on priority of claims are equal or similar to those applicable upon separation.<sup>295</sup>

A lesser degree of protection is granted in Trinidad and Tobago, where cohabitants recently were awarded inheritance rights. Such rights are however not equal to those enjoyed by spouses.<sup>296</sup> Under the provisions governing succession, a cohabitant is a person who has been living with the deceased person in a customary relationship for at least five years immediately preceding his or her death.<sup>297</sup> Hence, the definition of cohabitant differs from the act governing property division and maintenance upon separation, under which the time limit may be disregarded if certain circumstances are at hand. Yet another limitation under the succession rules is that only one cohabitation relationship can be taken into account for the purposes of the act, which may cause an unjust situation.<sup>298</sup> In a situation where both a cohabitant and a spouse exist, the cohabitant will only be awarded the part of the estate that was acquired during the time of the cohabitation relationship.<sup>299</sup> Consequently, when a balancing has to be done, marital relationships are still prioritised.

In France, a different solution altogether has been chosen. Customary union partners are not, in contrast to married persons, each other's primary heirs. The surviving partner can inherit a share of his or her deceased partner's property (or all of it if the deceased partner had no child, descendant or surviving spouse) provided the latter had decided so in a will.<sup>300</sup> The surviving partner can stay for one year for free in the common residence; afterwards, he or she can stay only if the deceased partner, owner of the said residence, allotted it to him or her in a will. The inheriting partner will then owe monetary compensation to the deceased's primary heirs, if any. As regards rented common residence, the law provides that the contract is transferred to the other partner if the lessee dies.<sup>301</sup>

#### *Legal remedies*

In all the selected countries, cohabitants can turn to courts for a legal settlement of disputes. Domestic rules governing jurisdiction and appeal vary between the chosen countries. In the context of appeal, it is important to note that all countries allow parties to appeal decisions and judgements by the respective courts.<sup>302</sup> The type of court handling these cases varies between ordinary courts, family judges and specialised family courts.

The court's jurisdiction often limits the right to lodge a case before a court. One example of this from Trinidad and Tobago shows that courts only have jurisdiction if at least one of the parties is domiciled in the country, and both parties lived together in the country during at least one third of their cohabitation relationship.<sup>303</sup> Another important aspect concerns time limits to the instigation of a case. Most countries set time limits, sometimes different depending on the matter, ranging from six months to three years from the date of separation or death of one of the partners.<sup>304</sup>

In Croatia, neither family courts nor special family law departments in civil courts exist. Thus, disputes between cohabitants are referred to ordinary courts following ordinary procedural rules. On the other hand, France has specialised family judges that hear cases relating to, for instance, cohabitation.<sup>305</sup> In New Zealand, family law-related cases are settled before family courts.<sup>306</sup> Trinidad and Tobago has recently opened a pilot family court.<sup>307</sup> Both Trinidad and Tobago and New Zealand further apply special procedural rules to all family disputes, with focus on mediation and conciliation.<sup>308</sup>

With regard to access to courts, several important aspects need to be considered. These include economical, geographical and non-discriminatory accessibility for all. Lack of financial means often constitutes a barrier for justice. Here, legal aid schemes can be one way of ensuring equal access to justice. Most of the selected countries provide legal aid to litigants in family cases, provided that they lack sufficient financial means to pay themselves.<sup>309</sup> In order to ensure access to courts, it is important that they are geographically spread throughout the country.<sup>310</sup> It also seems that the establishment of family courts can contribute to better accessibility by being a one-stop shop. One such example is Trinidad and Tobago, where the family court provides litigation services side by side with services of social workers, legal aid officers, mediators and probation officers.<sup>311</sup> As a consequence, parties may only need one trip to the court to get access to all the services they need. Another feature of the new court is the establishment of a special day-care centre where visitors' children are attended to, hence making it easier for parents to access the court's services.<sup>312</sup>

#### *Information and education*

It is crucial that information on rights and obligations arising from customary unions is disseminated to the general public in order for persons living in customary unions to make use of their rights.

In New Zealand and France, the enactment of new legislation governing non-marital cohabitation received extensive media coverage, which helped to spread information about the new provisions.<sup>313</sup> Currently, information on the legal provisions governing those relationships is available from a variety of sources. General legal information is available at the courts, in the form of informative leaflets, at the web pages of the courts and through personal information from court coordinators.<sup>314</sup> In these two countries, community law centres mainly funded by the state and geographically spread over the country provide free legal advice and assistance to the public on all legal issues, including on family law.<sup>315</sup> In some cases, they may also legally represent individuals in court.<sup>316</sup>

New Zealand provides another good example of civil society activities in this context. The voluntary organisation Citizen's Advice Bureaux provides free, confidential advice and information to the public on any query through its volunteers. Its 87 branches can be reached by personal visits or via a toll-free telephone number.<sup>317</sup> The organisation deals with around half a million clients each year, which indicates that their services are both widely known and accessible.<sup>318</sup>

Another ongoing state initiative is the National Survey of Unmet Legal Needs & Access to Services in New Zealand, which covers all fields of law. Among other things, the survey aims at identifying barriers to legal information and advice, and at measuring access to different legal services.<sup>319</sup>

On the other hand, in Trinidad and Tobago the new legislative provisions on cohabitation have not been coupled with any general awareness-raising campaigns.<sup>320</sup> Even though the family court has launched a series of promotional programmes to raise awareness of its services, people in general are not aware of customary union rights and obligations.<sup>321</sup> This example further points to the importance of coupling new legal provisions with awareness-raising programmes.

### *Policies*

There is a lack of explicit and regularly evaluated policies on the gender aspects of customary unions – nor are those aspects generally included into general gender equality policies.

New Zealand has taken a very progressive approach with regard to financial aspects of customary unions. Since only a few years, the financial effects arising from marriage and *de facto* unions, homosexual as well as heterosexual, are generally the same.<sup>322</sup> This legal change should be regarded in light of an increasing number of *de facto* relationships. Figures from 1996 showed that one in four men and women lived in a *de facto* relationship.<sup>323</sup> Among young persons, *de facto* relationships are today much more common than formal marriages.<sup>324</sup> Family court statistics show that the number of applications involving *de facto* relationships have increased over the years, from 9% in 2002 to 25% in 2004. It is also interesting to note that women accounted for 70% of the total number of applicants under the main act regulating customary unions.<sup>325</sup> This can be regarded as an indicator of the need for protective legislation to redress gender inequalities.

In Trinidad and Tobago, legal protection for heterosexual cohabitants has similarly been enacted within the last decade as a response to the growing number of customary unions in the country.<sup>326</sup> The aim of the new legislation is to redress some of the injustices and hardships caused by the non-recognition of obligations within such unions.<sup>327</sup> Yet the intent is not to equate *de facto* relationships and marriages. The government affirms that it wants to preserve the institution of marriage. Hence, the new laws are to handle the injustice arising at the end of cohabitation, while refraining from undermining the specific status of legal spouses.<sup>328</sup>

As one of the first countries in Europe, Croatia enacted a law for the protection of heterosexual customary unions in 1978. The shift towards legal protection of cohabitants was partly a result of the situation of disadvantaged peasant women who, already in the 1950s, demanded court protection after the breakdown of non-marital unions.<sup>329</sup> As non-marital unions are not subject to registration, there are no precise data on their frequency. However, it is argued that the decrease in numbers of marriages and the increase of non-marital births indicates that the ratio of cohabitation is growing.<sup>330</sup>

In France, the Constitution states that statutes determine the rules concerning the status of persons, matrimonial regimes, inheritance and ownership.<sup>331</sup> It was in 1999 that legal provisions regulating non-marital unions were adopted.<sup>332</sup> One of the main reasons behind the new regulations was the will to acknowledge the claims of the homosexual community to be granted legal status as couples under the French legal system.<sup>333</sup> The fight against homophobia and discrimination against homosexuals were the main justifications invoked by members of Parliament advocating for the law.<sup>334</sup>

In contrast to the other countries, the contractual approach enables an easy overview of the number of customary unions.<sup>335</sup> Although not all cohabiting couples register, the number of concluded contracts keeps increasing every year, demonstrating the need for legal regulation in this field. Between 2000 and 2005, the annual number of customary union contracts rose from 20,000 to 60,000. In parallel, the number of marital unions decreased.<sup>336</sup>

## **Paternity determination**

### *Introduction*

Paternity determination policy and legislation is presented and analysed with regard to Costa Rica, Iceland, Australia and South Africa. These countries vary when it comes to size, religion, social and economic situation and legal culture as shown below, but they all illustrate good examples in that their legal acts recognise the equal responsibilities of men and women in regard to their children as well as the child's right to know her or his identity.

Paternity determination is central to the enjoyment of a number of other rights. However, it should be emphasised that international human rights law is not very specific in this area. State parties are normally given a large margin of appreciation when adopting paternity determination legislation. It could nonetheless be argued, and has been argued by some of the human rights treaty monitoring bodies, that the right to identity and the right to equality and non-discrimination demand that states facilitate the establishment of paternity. In addition, states have to ensure that children are treated equally whether born within or outside wedlock. Although consequences (legal, moral and financial as well) arising from paternity determination lie outside the scope of this study, some short remarks are made in this respect.<sup>337</sup> From a gender perspective, we believe that it is important to stress that all the selected countries have made provision for equal and shared parental responsibility.<sup>338</sup> Consequently, a man established as the father of a child will be obliged to contribute to the child's upbringing. This point of departure is also a rationale behind the enactment of efficient paternity determination legislation.

This section focuses on a number of elements central to legislation on determination of paternity and its implementation in practice. These elements are the variables identified through the research and analysis of the countries selected; they illustrate different approaches and solutions meeting international standards. It concludes by discussing the importance of the dissemination of information and education of relevant professionals, as well as the policies behind the laws.

### *Laws regulating paternity determination and their crucial elements*

Paternity legislation contains a few variables: they either take their departure in the interest of the child, of the mother, of the father or of the unit of the family. The consequences of paternity establishment also differ widely, but as has been mentioned earlier, it is often the key to many rights of the child and duties of the parents.

The main objective of paternity determination legislation is to establish who the father of a child is. The mother is in more or less all cases known to the authorities. Often there is no question of who is the father in the legal sense either because there is a presumption that the man who is married to the mother at the time of the birth of the child is the father of her child. Presumption rules can have different approaches, but they provide the basis for most legal regulations on paternity determination. In case of doubt, or if the man denies fatherhood, administrative or legal proceedings may be initiated in order to establish the biological father. The initiative to such a procedure rests with the mother/legal guardian, the child or the father, and sometimes the authorities. Lately the methods of establishing paternity have been more advanced, and also more costly. Accordingly, the essential elements in the good examples of paternity determination legislation can be narrowed down to the following:

- Presumption of paternity
- Administrative procedures
- Legal proceedings
- Testing methods
- Individual costs for establishing paternity

*Presumptions of paternity*

A majority of countries apply legal presumption rules for the establishment of paternity. This kind of rule contains a presupposition on who is a father if certain circumstances, such as marriage or cohabitation, are present.

The most common rule is the presumption following from marriage. When the mother is married, her husband is assumed to be the father of the child, and no further proof is needed for establishing his relationship with the child. In one case, presumption arising from marriage is the only existing presumption rule.<sup>339</sup> Extended presumption rules are found in the other countries where presumptions of paternity arise not only from marriage but also from cohabitation.<sup>340</sup>

<b>Example</b>
<p>If an Australian child is born to a mother who is married, or born within 44 weeks after the end of a marriage, the child is presumed to be the child of the woman and her husband, or of her former husband if that is the case.<sup>341</sup> In cases where a child is born to a woman who cohabited with a man, to whom she was not married, at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the child is presumed to be the child of that man.<sup>342</sup> The presumptions of the family law act similarly apply as evidence in child support matters.<sup>343</sup></p>

*Administrative procedures*

In cases where a presumption rule does not apply, it can be possible for the mother, the child or the father to initiate administrative procedures in order to determine whom the father of a child is. These procedures are inherently connected to registration of births, in the course of which the father of the child is relevant. Registration of the father can either be made based on voluntary information from the mother or upon request. Furthermore, the registration may be dependent upon the father’s consent or, may be made without such consent, as one example below shows.

In Australia and South Africa it is voluntary for the woman to give the name of the father at registration.<sup>344</sup> Birth registration forms are provided by the hospitals, and should be completed and signed by both parents if possible. Hence, the name of the father is not necessary for registration.<sup>345</sup> If the father's name is not included in the birth registration form, it is often possible to add it at a later stage by the submission of a statutory declaration.<sup>346</sup>

An example of legislation making it mandatory for the woman to give the name of the father is found in Icelandic law. Each child is to be registered immediately after its birth and the mother is legally obliged to declare the paternity of her child, if no presumption rules apply.<sup>347</sup> The physician or the midwife attending the delivery asks the mother about the child's father and records her statement. However, registration is not finalised until all the requirements under the law have been fulfilled.<sup>348</sup> A statement concerning paternity is always merged with a request for child support from the putative father.<sup>349</sup> If the mother refuses to state the name of the father, and has not made any statement within six months after the child's birth, the court sends her a reminder drawing her attention to her duties, the child's right to know and the father's right to instigate proceedings.<sup>350</sup> When a statement is made, the man who is stated as the father has the option of either acknowledging his paternity in written form, or declining paternity. The latter case may of course lead to further court action by the mother. The man can also choose to submit a form requesting a DNA analysis of him, the mother and the child.<sup>351</sup> If the mother states that more than one man could be the father, or the father suffers from a mental condition making it uncertain whether he understands what he is agreeing to, the case is automatically referred to judicial resolution.<sup>352</sup>

Costa Rican paternity legislation represents a particularly innovative approach concerning the declaration of the mother and the subsequent consent of the father.<sup>353</sup> A mother is able to register the name of her child's father without neither his presence nor consent. The father is then notified in person of the registration and has, from the moment of notification, ten days at his disposal to appeal the registration. A lack of response to the notification is considered as a positive assertion of fatherhood; this assumption has no appeal in the administrative field.<sup>354</sup> If the presumed father chooses to appeal the registration, he as well as the mother and the child have to undergo DNA testing, which is provided free of charge. In cases where the presumed father refuses to take a test or does not show up at the appointment for the tests, he is declared to be the father of the child as long as the mother and the child submitted themselves to testing.<sup>355</sup> The mother can make a paternity declaration either at a healthcare facility or at the office of the civil registry. Important to note is that the choice to make a paternity declaration is entirely up to the woman herself; she is not obliged to do so. If she chooses not to register the father's name at the registration of the birth, she cannot apply the above-mentioned provisions at a later stage. Instead, she or her child will have to initiate a judicial procedure in order to establish paternity.<sup>356</sup>

#### *Legal proceedings*

In some cases it is not possible to establish paternity through presumption or a regular administrative procedure. In other cases an already registered paternity is disputed. Here, it may be possible to initiate proceedings before a court. In the context of legal proceedings, the domestic legislation differs with regard to certain matters. Variations concern the possibility to initiate a paternity procedure before the court (*locus standi*), and the competence and powers of the courts in these cases. Other important factors to take into consideration are time limits for instigating legal proceedings and the possibility to appeal a court decision. However, none of the surveyed countries have introduced time limits to

the establishment of paternity,<sup>357</sup> and all countries allow parties to a paternity case to appeal court decisions to a higher instance.<sup>358</sup>

The initiative in a legal proceeding on paternity can either lie exclusively on the mother, the father and the child (or its representatives), or on other persons who have an interest in the father-child relation. The former is the case in most of the selected countries.<sup>359</sup> Under Australian law, persons who have a proper interest in the result, i.e. in that the relationship between a child and a father is established, can also apply for a paternity declaration.<sup>360</sup> However, there is a difference made in the possibility to initiate a proceeding where the paternity is founded on a presumption because of marriage or cohabitation. In some countries, the presumed father is the only person who has a right to instigate a proceeding in order to rebut a presumption based on marriage.<sup>361</sup> In such cases, another man, the mother or the child cannot challenge the presumption. Another solution is to provide a possibility for the child, the mother and the registered father to instigate a proceeding in order to challenge already registered paternity.<sup>362</sup> With regard to men who are not registered as fathers, a limitation is sometimes made concerning their right to instigate a proceeding when another father has already been registered.<sup>363</sup> Another legal bar for the father's right to instigate proceedings can be that the child was conceived through rape or incest.<sup>364</sup> In some countries, an initiative to challenge a paternity declaration can only be made in relation to another ongoing court proceeding, for example concerning maintenance and custody.<sup>365</sup> An additional limitation to the challenging of paternity is possible in the form of a requirement of evidence that places the fatherhood of a child in doubt; a court then assesses such evidence.<sup>366</sup>

The competence of judges in paternity cases varies. Differences mainly concern the power of judges to order the parties to undergo DNA testing and the power to enforce such an order when the parties do not comply. With regard to power to make orders, the law can either require that the order is requested by a party to the case, or allow the judges to make orders *ex officio*.<sup>367</sup> Only one country grants judges the power to request police assistance in order to transfer the party to the ordered examination.<sup>368</sup> In other countries, judges do not, for reasons of protection of personal liberty, have the power to impose penalties or to force someone to consent to the testing of a child or to comply with a testing order regarding him or herself.<sup>369</sup> A refusal to undergo testing will normally count as important evidence in the absence of a reasonable excuse or explanation.<sup>370</sup>

In order to avoid testing all together, paternity can sometimes be established on the basis of proof demonstrating that a man had sexual intercourse with the mother of the child at any time when the child could have been conceived, provided that there is no evidence to the contrary.<sup>371</sup>

#### *Testing methods and their regulation*

The medical methods used when establishing paternity are seldom regulated in detail in legal statutes, but since it is an invasion of privacy to conduct some of the tests, they often have a regulatory basis. This is particularly true for tests involving blood samples and genetic testing. Since the mid-1980s DNA-testing has become the primary testing method in paternity matters. Accordingly, genetic DNA testing is the most common, if not the only, method used by the selected countries. As DNA testing has implications for, among other rights, the right to privacy and the right to dignity, including consent, it is important that testing is appropriately regulated. In addition, as the test results are used as evidence, both testing and analysis must abide with scientific standards.

All chosen countries have policies and/or regulations governing the procedure of DNA testing and analysis.<sup>372</sup> As demonstrated by the summary below, among other aspects, regulations cover accreditation of laboratories, the handling of bodily samples and the identification of tested persons.

Important elements in the surveyed regulations and policies governing paternity testing

*Scientific quality and safety:*

- Identification of tested persons
- Persons allowed to perform a test, e.g. authorised physicians
- Sterile, disposable and safe equipment
- Labelling of tests
- Storage of tests
- Test analysis
- Accreditation and supervision of test facilities

*Protection of privacy and dignity:*

- Privacy safeguards and strict confidentiality and ethical standards
- Consent from legal guardian(s) when the tested person is a minor
- Separate appointments to protect a child emotionally
- Recourse to complaints mechanisms for the individual

Laboratories are often accredited by government authorities, which enable certain control over the handling of the tests and the results.<sup>373</sup> The presence of non-accredited centres providing DNA testing has been debated as it is difficult to assess their quality, the proficiency of their personnel and the reliability of their test results. Moreover, they do not always respect the ethical standards, as otherwise guaranteed through government accreditation.<sup>374</sup> As a consequence, the results of testing performed by non-accredited centres can be inadmissible as evidence before courts.<sup>375</sup>

To strengthen the protection of privacy, it is also possible to enact further legislation on privacy protection and to establish specialised complaints procedures available for complaints regarding for instance misuse of genetic information.<sup>376</sup> As paternity testing involves healthcare staff, it is likewise important to ensure that individuals can complain when staff do not act in line with regulations and ethical guidelines. Complaints concerning the conduct of medical practitioners can often be lodged with medical boards and may ultimately result in a cancellation of the practitioner's registration.<sup>377</sup>

Timing is another important aspect: the testing must not take too long, leaving people waiting for the results and consequently also without knowledge on who the parent of the child is. It could mean, besides the emotional element, that the child is denied certain rights, and that both the child and the mother suffer financially. For this reason, examples on the length of the procedure are given. In Costa Rica, the laboratory has the results of the DNA test ready in 15 days, which makes the whole process of administrative paternity determination (from the first notification to the father to the notification of the test results) two months long.<sup>378</sup> Once a test has reached a laboratory in Australia, it will normally take between five and ten working days for the final test results to be ready.<sup>379</sup> Thereafter, the complete time span depends on the length of the judicial process, but the completion of a case normally takes

around a year.<sup>380</sup> These two examples demonstrate that an efficient procedure is essential to legal certainty, in addition to saving both time and suffering for the parties involved.

#### *Individual costs for establishing paternity*

The high cost of DNA testing procedures (including indirect costs for having tests done) could prevent paternity cases from coming to a conclusion if the costs were to be entirely born by the individuals. In cases where paternity is established through court proceedings, further costs may arise for legal counselling and representation.

In Costa Rica, DNA testing is provided free of charge within an administrative proceeding.<sup>381</sup> However, as only one government testing facility exists in the country, all individuals must travel to this laboratory. Individuals who cannot afford travelling can receive specific contributions from the social authorities to cover travel expenses. These contributions are not formally regulated, and individuals do not always know about the possibility to receive financial aid.<sup>382</sup> In contrast to the administrative procedure, DNA tests are not provided for free within judicial proceedings. Free legal advice can however be sought at, for instance, legal aid clinics of law faculties.<sup>383</sup> The responsible government authority also gives free information and legal assistance in responsible paternity and domestic violence, sexual harassment and women's human rights.<sup>384</sup> Birth registration, or amendments to it, is always free of charge.<sup>385</sup>

An example of civil society efforts to make paternity testing more affordable and accessible is found in South Africa. A project run in one region of the country focuses on maintenance cases, and offers women the choice of an alternative paternity testing system. The project introduced the pinprick test, which uses blood from pin pricks instead of deep vein drawing of blood. This approach has been validated by the National Prosecuting Authorities as acceptable evidence before courts. From a cost point of view, the pinprick test is considerably cheaper than other methods with a cost of 125 USD compared to 350 USD for a deep vein test. An additional advantage is that the test does not require travel to another city for testing.<sup>386</sup>

In Australia, the cost for a legally valid DNA paternity test (tests taken on mother, father and child) is around 620 USD.<sup>387</sup> Within a court proceeding, the court may order that costs incurred in relation to paternity testing are being compensated. The courts may however make such orders as it considers just with regard to costs incurred in relation to the carrying out of parentage testing procedures.<sup>388</sup> Time-consuming and expensive travels are avoided as any registered medical practitioner can perform the test, and forward it to the closest accredited laboratory.<sup>389</sup> There is also a possibility to obtain legal aid in paternity cases as all family proceedings are prioritised under the legal aid scheme.<sup>390</sup> An interesting condition is made for male legal aid applicants who deny paternity. In these cases, a legal aid grant is only made if the applicant can provide adequate reasons to support his denial and agrees to submit to testing.<sup>391</sup>

#### *Information and education*

The government plays a key role in ensuring that individual women and men receive full and accurate information about paternity and its consequences, as well as providing training of government employees working in positions where paternity issues are relevant on the content of the laws.

A good way to ensure that women obtain information is to inform them already at the hospital when they give birth.<sup>392</sup> Information can either be provided by healthcare staff or by a representative of the registration authority working directly at the hospital.<sup>393</sup> It is instrumental that the mother receives

information on the importance of the fact that the child has the names of both his or her father and mother, and on the implications of the declaration of paternity, such as the possibility to receive child support from the father.<sup>394</sup>

The enactment of a new law on paternity determination can also be coupled with more general information campaigns promoting sensitive and responsible fatherhood and equal responsibilities of men and women in the upbringing of children.<sup>395</sup> The distribution of informative brochures on paternity in different languages is one example.<sup>396</sup> Meanwhile, courts, state-funded legal information centres and family relationship centres may all be important actors in the provision of legal information.<sup>397</sup>

In Costa Rica, most of the budget allocation intended for paternity determination has been spent on training and sensitisation of public employees who work directly in this field.<sup>398</sup> As part of that work, an extensive handbook on the paternity legislation, primarily targeting public officials, has been published and distributed.<sup>399</sup>

#### *Policies on paternity issues*

Unlike the other areas covered in this report, paternity determination is not always coupled with policies. Nonetheless, this does not mean that existing policies are less important. As we shall see, they can be a part of a large-scale gender justice programme. Policies related to paternity seem to have a broader underlying aim and involve gender inequalities and the consideration for the 'modern' family life as well as the rights of the child to know one's parents, irrespective of the parents' relationship.<sup>400</sup>

In Australia, revised family law provisions have been introduced as a response to the needs of modern families.<sup>401</sup> The family law also mirrors international human rights standards in recognising the child's right to know both parents, the principle of the best interest of the child and equal and shared parental responsibility.<sup>402</sup> The increasing number of customary unions is now reflected in the new paternity presumption rules. Births outside marriage accounted for 32% of all births in 2003. The number of children not being acknowledged by a father has decreased slightly, while the number of births outside marriage has more than doubled over the past 20 years. During the same period of time, non-acknowledged births decreased from roughly 5% of all births to less than 4%.<sup>403</sup> Political and public debates have so far mainly concerned ethical questions arising in the paternity testing procedure (particularly testing at non-accredited laboratories, including non-consensual and motherless testing).<sup>404</sup>

In Costa Rica, the paternity determination law was first and foremost a response to a high and increasing number of non-recognised children.<sup>405</sup> It is further connected to the general perception of unequal responsibilities of men and women in relation to their children, thus mirroring gender inequalities.<sup>406</sup> Besides the gender equality aspects, the law is founded on the child's right to an identity, and the right to know both one's parents, both recognised as fundamental rights in Costa Rican legislation.<sup>407</sup> Another objective of the law is to reduce the number of lengthy and expensive court cases relating to the establishment of paternity.<sup>408</sup>

An inter-institutional commission, including state authorities and independent professionals, was responsible for the drafting of the paternity law. They consulted with different stakeholders to identify weaknesses in the then current legislation. The national women's institute played an active role in the process together with the minister for women's affairs and the first lady of the country.<sup>409</sup>

Evaluations of the paternity law demonstrate that it has had an impact on the population growth index, and on the cultural practices of denying paternity: the rate of births with a non-declared father dropped from 30% in 2001 to 8% at the end of 2002.<sup>410</sup>

## Rape

### *Introduction*

The countries chosen in the context of rape are Canada, South Africa and Spain. These countries differ in size, religion, social and economic situation and legal culture. Despite those differences, they have in common that they all illustrate good examples in the area of countering sexual violence. Their legislation integrates a number of rights and freedoms, which are of importance in the context of rape. As shown in chapter II, rape involves a number of rights, including the right to life, freedom from torture, freedom from inhuman and degrading treatment, the right to health, right to security and liberty of persons, right to private life, personal integrity and to equality and non-discrimination.

This section contains a survey of good examples of legal statutes and institutions in the selected countries. Due to the specific issues related to domestic violence and rape respectively, they are dealt with in separate chapters. Nonetheless, considering the common features of these areas, the two sections should preferably be read together. For a discussion on the dissemination of information and education, as well as on the policy framework, relevant for both areas, the reader is referred to the section on domestic violence.

### *Rape and their crucial elements*

Though variations occur in the legislation on rape in Canada, South Africa and Spain, bringing to light the states' different approaches, a number of aspects of the prohibition of rape are systematically addressed in the legal regulations and other measures undertaken. Among these are the legal definition of rape and the possibilities to report the crime to the authorities, the assistance and support services the state provides for and the status and rights of rape survivors throughout the proceedings. Thus, the variables accounted for in this chapter are the following:

- Legal definition: Constitutive elements of rape
- Institutions and procedures
- Rights of complainants in court proceedings
- Assistance to persons subjected to rape/sexual offence

### *Legal definition: Elements of rape*

The legal definition of rape is of particular importance in that it directly impacts the level of protection granted to victims. The legal definition varies regarding the terms used, the rules on consent and other elements required for an offence to constitute rape. In the following, these elements are also coupled with evidentiary considerations where appropriate. To start with, it is also important to mention that the wording of the laws studied in this context is gender neutral. Thus, these *laws apply equally to men and women*.<sup>411</sup> In addition, *rape and other sexual offences are public offences* in all selected countries.

Some countries have chosen to replace the offence of rape by offences of 'sexual assault'<sup>412</sup> and 'sexual aggression' or 'sexual abuse',<sup>413</sup> the legal term of 'rape' being deemed not to be broad enough. Another approach is to maintain the term rape while adding other offences, such as 'sexual violation' and 'oral genital sexual violation', to complement the offence of rape.<sup>414</sup>

The definitions of sexual offences are based either directly or indirectly on the absence of consent of the person subjected to the sexual act. The legislation would either make express reference to the notion of consent,<sup>415</sup> or address consent indirectly through other criteria.<sup>416</sup> It is common that criminal law set a presumption of lack of consent when certain circumstances are present. Elements implying a lack of consent can be the presence of coercive<sup>417</sup> or fraudulent<sup>418</sup> circumstances. Nevertheless, none of these elements have to be present in order to prove lack of consent. In addition, the legislation often lists a number of circumstances under which the complainant is deemed to be legally incapable to consent, for instance by reason of his or her age, altered state of consciousness or mental or physical disability.<sup>419</sup>

Another important aspect is that *consent is not implied by lack of resistance*. Thus, resistance is not a required element of crimes against sexual liberty.<sup>420</sup> In terms of evidence and consent, the prosecutor may have the burden of proof to demonstrate that the accused knew, was wilfully blind to or was reckless as to the victim's lack of consent.<sup>421</sup> The defence that an accused had an honest but mistaken belief that the complainant had consented is often restricted. As an example, the accused cannot rely on his self-induced alcohol or drug consumption to escape responsibility.<sup>422</sup>

In all countries, acts of a sexual nature committed against a person under a certain age are presumed to be unlawful regardless of the consent of the young person.<sup>423</sup> Age limits vary from one country to another, often ranging between 12 and 14 years. The limit may also vary depending on the circumstances of the particular case. For instance, the age limit can be set higher for acts committed by a person who is in a relationship of dependency, trust or authority with the young person subjected to the act.<sup>424</sup> Nonetheless, mistake of age can under certain circumstances be invoked as a valid defence, often provided that the accused took all reasonable steps to ascertain the age and that the minor consented to the act.<sup>425</sup>

In the context of consent, it is important to note that none of the selected countries treat rape within marriage, or within other sentimental relationships, differently from other cases of rape.<sup>426</sup> Consequently, the existence of a relationship between the person committing the act and the person to whom it is committed is not a defence to a charge of sexual assault;<sup>427</sup> on the contrary, the existence of an intimate relationship is often an aggravating factor in sentencing.<sup>428</sup>

Beside the lack of consent, other elements must be present in order for a sexual act to constitute a crime. The categories of sexual offences vary from one country to another, each of them having chosen different criteria to classify the offences. The legal criteria seem to focus either on the sexual act or on the degree of violence used. However, a sexual act of some form always has to be present.

The sexual act can be defined in different ways. In some countries, it is broadly defined as, for instance, "circumstances of a sexual nature, such that the sexual integrity of the victim is violated";<sup>429</sup> or as an act violating a person's sexual liberty.<sup>430</sup> These broad definitions thus encompass a wide variety of acts, including touching, oral and anal sex as well as penetration, also including penetration with objects. Hence, rape, or sexual assault, does not necessitate penetration.<sup>431</sup> In the court's analysis of whether an act is sexual or not, it can for instance apply the test of 'the reasonable observer', i.e. would the act appear as an act of sexual nature to a reasonable observer?<sup>432</sup> Even where penetration is not an element of the crime per se, it can constitute an aggravating factor in sentencing.<sup>433</sup> A different legal solution is to more explicitly define the sexual acts in the law itself. As an example, penetration by the genital organs

of the offender into the genital parts or anus of the person subjected to the act can be a requirement for the offence of rape.<sup>434</sup> Other sexual acts, such as penetration with another object and oral sex, then fall outside the scope of rape. However, they are still covered by other criminal figures.<sup>435</sup>

Even though none of the selected countries require the use of violence or force for an act to constitute rape or sexual assault, the degree of violence used in the assault may have an impact on the classification of the offence. In particular, the degree of violence affects sentencing. One example is to divide the crime of sexual offence into separate offences depending on the amount of violence involved. In one country, sexual assault is an assault that does not cause bodily harm, aggravated sexual assault is an assault resulting in serious injuries and sexual assault with the use of a weapon, threats to a third party or that causes bodily harm is an assault in between the two others in gravity.<sup>436</sup> Sentencing reflects the amount of violence used and ranges from 10 years of imprisonment, to 14 years of imprisonment, and to imprisonment for life.<sup>437</sup> Another example of classification is to divide the crime of sexual offence into sexual abuse, where lack of consent is the main criteria, and sexual aggression, which further involves the use of violence or intimidation.<sup>438</sup>

In the evidentiary evaluation of sexual offences, it is important to notice that none of the selected countries require corroborating evidence.<sup>439</sup> Consequently, the absence of a witness to the act does not hinder a convicting judgment.

Together with the criminal case, the complainant normally has the possibility to claim civil compensation for damages. Compensation in these cases appears to be governed by general rules of civil responsibility. Civil responsibility encompasses restitution, reparation for material damages and compensation for mental and physical injuries.<sup>440</sup>

#### *Police, prosecutors, courts / Institutions and procedures*

The competency of the police force, the prosecutors and the courts to handle cases of sexual offences is of utmost importance. Firstly, it determines the outcome of the case. Secondly, it determines whether victim is subjected to 're-victimisation' or not. As a consequence, education and training of these officials is vital. So is the creation of procedures for handling the survivors of sexual offences while safeguarding their dignity.

#### **Police**

The police often are the first contact for an individual subjected to a sexual crime. It is often to the police that persons turn with their stories and complaints. Therefore, the professionalism of the police at this first encounter is crucial. The behaviour of the police affects the subsequent investigation, the willingness to cooperate of the person subjected to the act and the possibility to achieve a conviction in the courts. One way of ensuring a high level of professionalism is to create specialised units for sexual crimes within the police force. This has been done in some countries.<sup>441</sup> A *police sexual aggression unit*, composed of both men and women, can for instance be in charge of taking both the complainant and a forensic investigator to the hospital, and of forwarding the forensic report to the judge in charge of the case.<sup>442</sup> The police can also establish special crisis units for all persons subjected to crimes. For example, such units may provide emotional support, practical assistance and referral.<sup>443</sup>

Additionally, *special guidelines for the police in the handling of sexual offences have a potential to raise the level of professionalism*. In South Africa, national guidelines describe in detail how sexual crime

survivors shall be treated by the receiving police officer.<sup>444</sup> They further include checklists for the collection of evidence, and for how to conduct respectful interrogations without violating the dignity of the complainant.<sup>445</sup>

Survivors of rape might be reluctant to report a rape for various reasons, such as fear for not being taken seriously and shame. It is widely acknowledged that rape is one of the most underreported crimes.<sup>446</sup> Beside the measures mentioned above, many other measures can be adopted at the level of the police to remedy this and create a better climate for reporting. For instance, the possibility to be accompanied by a friend or relative when giving the statement can make the person subjected to a sexual offence feel more at ease.<sup>447</sup> It is also important that a survivor is able to give her or his statement in her or his own language.<sup>448</sup> Another possibility is to allow complainants to report an assault anonymously and not to pursue subsequent charges. In that case, the report is filed by a third person and kept by the police as it might be of use to identify and charge the offender if he or she ever commits a repeat offence.<sup>449</sup>

The creation of a national database of sex offenders, only accessible to the police, can further assist the police in identifying repeat sex offenders, and in preventing sexual offences.<sup>450</sup> The database can include sex offenders' addresses and telephone numbers, committed offences, alias and distinguishing physical marks. Convicted sex offenders may further have the obligation to re-register annually and each time they move.<sup>451</sup>

### **Prosecutors**

The competency of the prosecutor who is in charge of a case involving a sexual crime determines the chances of a subsequent conviction. *The creation of a sexual offences unit within the national prosecuting authority can contribute to a strengthened capacity in the handling of sexual offences.*<sup>452</sup> The mandate of such a unit can include the coordination of policies relating to the prosecution and handling of sexual offences. It may additionally include capacity building, sensitising and training of prosecutors to raise their competence in this area.<sup>453</sup> Guidelines can also assist prosecutors handling sexual offence cases in their work. For example, such guidelines may demand an expeditious handling of these cases and that the prosecutor personally consults with the person subjected to the sexual offence.<sup>454</sup> During the consultation, the prosecutor should discuss any fears that that person may have before the upcoming trial, and explain the court proceedings.<sup>455</sup> The prosecutor is obliged to treat complainants with dignity and respect, and to do his or her utmost to avoid further trauma during the investigation and trial.<sup>456</sup>

### **Courts**

Courts, having the ultimate word in sexual offence cases, are the third relevant institution in this context. In cases involving sexual crimes, the judge's competency is very important to avoid 're-victimisation'. Presiding over the trial, the judge is the person who may bar irrelevant and offending questions. He or she may also allow special measures to ensure that the complainant is not subjected to intimidation. In order to ensure the proper use of existing protective rules, *it is crucial that judges possess sufficient knowledge about the nature of sexual offences, and, in particular, about psychological effects arising from such abuses.* One solution can be the creation of special sexual offences courts with specialised judges. That is the case in South Africa, where specialised courts have been established in order to allow survivors of sexual violence to testify in a secure and friendly environment without the risk of being intimidated.<sup>457</sup> Among the underlying objectives behind the creation of such courts

are the improvement of conviction rates and the elimination of secondary victimisation and trauma. The courts cooperate closely with multi-disciplinary rape care centres (further described below), the police and the prosecutors to ensure that cases, from investigation to judgement, run as smoothly as possible.<sup>458</sup>

*Rights of complainants in court proceedings*

Trials involving crimes against sexual liberty are often particularly difficult for the complainant. As extremely intimate and painful details will be openly dealt with, the risk for intimidation and secondary victimisation increases. For this reason, *it is common that legal rules prescribe various protective measures that can – and in some cases should – be taken to protect the survivor of a sexual crime. However, a careful balancing always has to be done to ensure that the rights of the accused are not infringed.*

Whether specialised or not, courts often possess the power to order that the witness testify outside the courtroom, behind a screen, by means of a closed circuit television.<sup>459</sup> Vulnerable witnesses may also be questioned through a third person, acting as a buffer against hostile and intimidating questions.<sup>460</sup> The court may also ensure that the accused is not allowed to cross-examine the witness.<sup>461</sup> Even though trials are public as a general rule,<sup>462</sup> judges may decide to exclude the public for all or part of the proceedings.<sup>463</sup> Sometimes, the media can be prohibited from publishing or broadcasting the name of the victims or their families, or any other information that might disclose their identities.<sup>464</sup> The law can demand that judges take certain factors into consideration in ensuring appropriate protection of the witness. Such factors may include the witness's psychological impairment, trauma, culture, religion and risk of intimidation. Account can also be taken of the complainant's relationship with the accused.<sup>465</sup> The enactment of specific protective measures is sometimes the general rule when the witness is under 18,<sup>466</sup> or mentally or physically disabled.<sup>467</sup>

Beside these protective measures, special legal provisions may restrict the admissibility of certain evidence. In Canada, criminal law was amended in order to better respect the constitutional rights of sexual assault complainants<sup>468</sup> – e.g. right to privacy, right to equality before the law – while safeguarding the constitutional rights of the accused to a fair trial.<sup>469</sup> According to these so called 'rape shield' provisions, a complainant's sexual history cannot be admitted as evidence if, by reason of the sexual nature of the activity/subject-matter of the charge, it might bias the judges and jurors' appreciation of the complainant's consent or credibility. For the evidence to be admitted at trial, its probative value must be assessed against any potential prejudicial effects.<sup>470</sup> Evidence of the complainant's sexual reputation in order to challenge or support the complainant's credibility is not admissible.<sup>471</sup> Likewise, the provisions limit the possibility of the defence to use the complainant's personal records as evidence.<sup>472</sup> The defence must specifically state how certain records would be 'likely relevant' to the case at trial.<sup>473</sup> The 'rape shield' laws have ultimately increased the probability of successful prosecution of sexual assault offences.<sup>474</sup>

Formal mechanisms handling complaints against the justice system are rare. One exception is a Canadian province that has established a complaints mechanism for persons subjected to crime who feel that they have not been treated fairly by the justice system. However, the complaints mechanism is only open to persons subjected to the most serious crimes, including sexual assault with the use of a weapon and aggravated sexual assault.<sup>475</sup>

#### *Assistance to persons subjected to rape/sexual offence*

The accessibility and quality of support services affects the recovery of individuals subjected to sexual offences. Support services are often provided in two ways: either via the state or through non-governmental initiatives. In the following, we focus on the ways in which the state can provide assistance, but also add a few examples of private initiatives. Moreover, it should be mentioned that the examples of support services presented in the chapter on domestic violence are also relevant, to a large extent, in the context of rape.<sup>476</sup> When comparing the two areas, it seems however that states have been more willing to adopt legally binding rights for victims of domestic violence than for rape survivors.

To ensure that individuals have access to support services, their number and mapping is of importance. Additionally, it is essential that services are provided in a culturally appropriate way<sup>477</sup> and that interpreters are available when the individual seeking support speaks a language other than the official one.<sup>478</sup> To better ensure the accessibility of services for all, they should moreover be able to accommodate for people with disabilities.<sup>479</sup>

#### **Multi-disciplinary support centres**

Before entering the more specific topic of assistance to rape survivors, examples of multi-disciplinary support centres, where several services are available in one place, deserves to be mentioned. *Such support centres have the potential to facilitate survivors' access to different services.* Moreover, specialised staffs from different areas learn from each other and together have a more holistic view of the needs of their clients. A good and well-known example is found in South Africa.<sup>480</sup> There, a joint initiative of governmental departments has established the Thuthuzela<sup>481</sup> care centres model.<sup>482</sup> So far, centres have been established in areas with high rates of rape and HIV. All women and children reporting a rape with the police are immediately ushered to a care centre (if one exists in the area) by ambulance.<sup>483</sup> Centres operate in a hospital environment and provide healthcare, police services, counselling and legal services under one roof. In addition, the centres cooperate closely with the sexual offences courts and the prosecution department. Ideally, the information required to secure a conviction is passed seamlessly from one person to another. The model has proved to be successful in eliminating secondary victimisation. It has further reduced the investigation time and increased the conviction rate in the areas where it operates.<sup>484</sup>

Canada provides another good example of multi-disciplinary community-based sexual assault centres. Most of them are members of the Canadian Association of Sexual Assault Centres (CASAC),<sup>485</sup> and as such must abide by the latter's code of ethics and principles by maintaining confidentiality of services and ensuring survivors' right to support, self-determination and advocacy. They usually offer 24-hour crisis phone lines; drop-in or telephone short-term counselling; but also support and information for the survivor's partners, friends and family; workshops; support groups for survivors of acquaintance sexual assault; referrals resources; advocacy for survivors of sexual assault who choose to involve the hospital, the police or court system; and educational presentations on sexual assault.<sup>486</sup> The sexual

assault centres are mostly non-governmental organisations, although some are partly funded by the state.

## Healthcare

Access to high quality healthcare, for physical as well as psychological injuries, is a crucial factor in the individual's recovery from a sexual offence. Additionally important are the provision of preventive medical measures to prevent pregnancy, sexually transmitted diseases and HIV. Sexual coercion usually prevents the use of contraceptive measures. It can also result in vaginal or anal bleeding and sexually transmitted infections, which increase the risk of HIV transmission.<sup>487</sup> The documentation of injuries is further vital to secure evidence for a criminal investigation and subsequent trial.

One way of ensuring appropriate care for persons who have been subjected to sexual offences is the establishment, within the public healthcare system, of *specialised sexual assault sections* whose staff is specifically trained to handle these cases without subjecting the patient to re-victimisation. For instance, a specialised team of physicians, nurses and psychologists can be efficient in meeting all the needs of the patient. It is also possible to enable healthcare staff to accompany the patient to the police to file a report, or to arrange for the police to go to the clinic to receive a report if the patient so wishes.<sup>488</sup>

In order to secure evidence in cases where the survivor is hesitant to report the sexual offence to the police, a *sexual assault evidence kit* can be helpful. The kit is a specially sealed box that allows hospital emergency rooms and sexual assault centres to collect evidence from a patient – female, male or child – and to store it for up to six months. With evidence preserved, the survivor has more time to decide whether to report the assault to the police or not. If the crime is subsequently reported, the evidence kit will be handed to the police.<sup>489</sup>

Another way of ensuring quality care for survivors of sexual offences is to introduce *healthcare protocols for all public healthcare providers*, to be followed in each case of sexual offence. This has been done in South Africa, where a national protocol makes special provision for dealing with survivors of sexual abuse, domestic violence and gender violence.<sup>490</sup> It is envisaged that every clinic will establish a working relationship with the nearest police officer and social welfare officer. A member of every clinic must receive training in the identification and management of sexual, domestic and gender-related violence. Clinic staff should in a confidential manner escort a rape survivor to a private room for counselling and examination. When a person alleges to have been raped or sexually assaulted, the allegation is assumed to be true and the patient should be treated with dignity. The patient should be given information on follow-up services, including counselling. The provision of antibiotics for the prevention of sexually transmitted diseases and emergency contraception to prevent pregnancy are part of the standard procedure. A female health worker should examine women who have been raped or abused. If this is not possible, another woman must be present during the examination. The patient is to be given information regarding the legal process and the right to lay charges. If the survivor indicates that she wishes to lay charges, the police are called to the clinic. Patient records must be kept according to protocol and with emphasis on confidentiality and accuracy.<sup>491</sup>

In South Africa, a country with a high prevalence of HIV/Aids,<sup>492</sup> another policy guideline for the healthcare sector deals specifically with the *management of the transmission of HIV and sexually transmitted infections in sexual assault cases*.<sup>493</sup> If the survivor presents herself within 72 hours of being raped, antiretroviral therapy (in the form of post exposure prophylaxis) must be offered to prevent HIV transmission. The survivor has to undergo an HIV test in order to obtain the drugs. When antiretroviral therapy is provided, the patient must visit the healthcare facility at regular intervals for check-ups and for obtaining the drugs. The therapy is free of charge when obtained at a public healthcare facility.<sup>494</sup>

It is crucial to ensure that lack of financial resources is not a barrier to access to quality treatment. The cost for healthcare could, for instance, be covered through ordinary public healthcare insurance schemes. It is also possible to establish specific criminal injuries compensation programmes covering medical care expenses for physical and mental injuries resulting from a crime.<sup>495</sup>

### **Legal assistance**

Survivors of sexual offences need legal advice and representation before, during and after trial to secure their rights in the process. However, the costs for such services often constitute a barrier to institute proceedings. State-funded legal assistance programmes, preferably with specialised lawyers who provide free legal services to those in need, can help to ensure equal access.<sup>496</sup> Beside individual legal assistance, state-funded victim and witness assistance programmes may provide more basic legal orientation for free. Often, these programmes are located in the courts and aim at enhancing the understanding and participation of complainants and witnesses in the court process. For instance, they may assist with courtroom orientation and information on the criminal justice system.<sup>497</sup>

Interest or advocacy groups for victims of crime can be created – at the community-level for instance – in order to accompany them through the criminal justice system by explaining criminal justice processes, by making resources available, by offering emotional support, by making referrals to other agencies that may be of assistance and by helping them obtain all necessary information.<sup>498</sup> Such associations can further focus on specific groups of persons subjected to crime to better assist them.<sup>499</sup>

### **Access to information**

In Canada, information directed to the population at large, and for sexual offence survivors in particular, is disseminated through various media channels. Information campaigns conducted by NGOs are encouraged and partly financed by the Canadian government.<sup>500</sup> Canada's victim service agencies, including governmental and non-governmental service providers, are particularly successful in taking into account specific needs of the population it serves. Some offer programmes targeting ethno-cultural or visible minority groups specifically,<sup>501</sup> and many provide services in other languages than English or French.<sup>502</sup> Moreover, the vast majority of services are able to accommodate persons with challenges in mobility, hearing or visual impairments.<sup>503</sup> The Canadian National Crime Prevention Strategy also provides financial support to projects targeting vulnerable groups, such as rural and remote communities.<sup>504</sup>

**Financial assistance**

A rape survivor may be in need of financial assistance to cover her or his expenses incurred after the crime. State-funded criminal injury compensation schemes are one way of securing financial support. These can either be located at regional levels<sup>505</sup> or at the central level of the state.<sup>506</sup> Benefits can cover a number of expenses, including healthcare, travel costs and protective measures.<sup>507</sup> It can also be possible to receive compensation for lost earning capacity, vocational training and physical injuries.<sup>508</sup> Dependents of the applicant may equally be eligible for support.<sup>509</sup> Financial costs for attending court, such as expenses for transportation, food or childcare, is often reimbursed separately.<sup>510</sup>

## **Domestic violence**

### *Introduction*

In this section, domestic violence legislation and policy are presented and analysed. The countries chosen for domestic violence are Bosnia-Herzegovina, Honduras, South Africa and Spain. These countries differ in size, religion, social and economic situation and legal culture. Yet, they all demonstrate good elements in the area of domestic violence.

As shown in chapter II, domestic violence involve a number of rights, including the right to life, freedom from torture, freedom from inhuman and degrading treatment, the right to health, right to security and liberty of persons, right to housing, right to private life, personal integrity and to equality and non-discrimination. The presentation starts with a survey of the good examples from the legal statutes and institutions in these states. Thereafter, the study continues with the education and information directed towards the general public. Finally, attention is drawn to the policies that implement the legislation and their estimated effects.

### *Domestic violence laws and their crucial elements*

Within the legal framework and in its implementation, domestic violence is addressed in various ways. Nevertheless, there are a number of common denominators in the respective legal acts. As has been mentioned, the countries selected as good examples do fulfil, to a large extent, the international standards relating to domestic violence, but they display different approaches to this matter. All of them have enacted specific laws and provisions addressing domestic violence and its prevention and criminalisation.

Laws on domestic violence contain a number of variables; the most important are outlined in the following. First of all, the definition of the concept of domestic violence can vary. Experience shows that the limits of the concept are important and that the wording can be decisive to avoid impunity. Secondly, there are examples in all countries of protective measures protecting women from further violence. These measures can take the form of restraining orders and the removal of the offender from the shared household. Thirdly, besides such measures, domestic violence per se can be criminalised. Criminal provisions relating to criminal responsibility and sentencing may be integrated into specific domestic violence or equality laws, or take the form of a general criminal offence such as assault, or of an aggravating factor in the sentencing of assault or other crimes.

The fourth variable, highly relevant in the context of both protective measures and criminal proceedings, concerns the police force, the prosecutors and the courts. These state institutions play a key role in the enforcement of the law, and their competency to handle domestic violence cases is vital. Some of the countries have also established specialised domestic violence units within these institutions in order to ensure the competent and professional handling of domestic violence cases. In addition, there are sometimes specific criminal procedural rules to be followed in domestic violence cases. Apart from protective measures and criminal provisions, victims of domestic violence can be assured the assistance of support services, including healthcare, shelters and economic support. Support services hence constitute the fifth variable in the surveyed legislation.

Accordingly, the variables in the legislation, as required by international human rights law, can be summarised by the following list:

Crucial elements on domestic violence legislation:

- Legal definition
- Protective measures
- Criminalisation
- Rights of complainants in court proceedings
- Institutions and procedures
- Assistance for persons subjected to domestic violence

#### *Legal definition*

The legal definition of domestic violence varies regarding the understanding of what ‘violence’ is, and what relationship is subsumed under the word ‘domestic’. The definition can moreover include further criteria as to the aim or context of the violence. This section covers definitions of domestic violence valid in the circumstances of protective measures. As will be shown later – under criminalisation – criminal law can define domestic violence in different terms. The following definitions do, however, represent the most extensive ones, and illustrate as such the states’ broad understanding of domestic violence:

<b>Example</b>
<p>“Domestic violence is any behaviour ... manifested in the use of physical, psychological, patrimonial and/or economical and sexual violence.”<sup>511</sup></p>
<p>This definition is coupled with detailed legal definitions of the types of violence. ‘Physical violence’ is an act or omission producing damage to a woman’s physical integrity.<sup>512</sup> ‘Psychological violence’ includes acts or omissions addressed to degrade, or control a person’s actions, behaviours, beliefs and decisions by, for instance, intimidation, manipulation, direct or indirect threat, humiliation, surveillance, isolation or confinement.<sup>513</sup> ‘Sexual violence’ is any conduct that entails threat or intimidation affecting the woman’s sexual integrity and self-determination, for example, unwanted sexual relations and denial of birth control.<sup>514</sup> ‘Patrimonial and/or economic violence’ include acts or omissions that implicate loss, transformation, negation, subtraction, destruction, retention of objects, personal documents, property, values, economic rights or resources destined to satisfy the woman’s needs or those of the family, including the detriment, reduction or negation that affect the woman’s incomes, or the non-fulfilment of alimony payments.<sup>515</sup></p>

The following example illustrates a definition with other criteria and a different wording:

<b>Example</b>
Gender violence “encompasses all acts of physical and psychological violence, including offences against sexual liberty, threats, coercion and the arbitrary deprivation of liberty”. <sup>516</sup>

As can be seen, these two definitions differ in their level of detail; one is more detailed, whereas the other leaves more room for interpretation. An additional difference is the non-inclusion of economic violence in the second example.

When it comes to the definition of ‘domestic’, most countries have a gender-neutral definition of domestic violence, meaning that under the law both women and men can be victims of such crime. However, one exception is found in Spain where this specific crime can only be directed towards women.<sup>517</sup> In Honduras, the protection offered to men subjected to domestic violence is more limited than the protection available for women in the same situation.<sup>518</sup>

The term ‘domestic’ is not always confined to intimate relationships between a man and a woman, but can also involve other relations, such as family ties by affinity, consanguinity or adoption, cohabitation not founded upon a sentimental relationship and same-sex relationships. Two examples illuminate some interesting features of the term:

<b>Example</b>
In the Federation of Bosnia-Herzegovina, protected persons include married and common-law spouses; formerly married and common-law spouses; foster parent and foster child; adoptive parent and adopted child; live-in relatives, blood relatives and relatives joined by adoption, guardian and protégé; as well as in-laws. <sup>519</sup> Thus, the law is gender-neutral and protects the extended family, including children.

<b>Example</b>
Unique features of the definition of domestic in South African law are the inclusion of persons sharing a residence without any other relationships and the inclusion of actual or perceived relationships of a romantic, intimate or sexual nature with any duration. <sup>520</sup> Additionally, in line with the Constitution, <sup>521</sup> heterosexual as well as same-sex relationships are protected. <sup>522</sup>

As we can see, the two definitions comprise a wider circle of persons, putting into focus the relationship, regardless of its formal name, between the perpetrator and the person subjected to the violence. Consequently, any protective measures can involve all these persons, and not only women in the role of a spouse or cohabitant. In the case of intimate relationships, it is also important to note that the protection offered covers both ongoing and former relationships.<sup>523</sup>

In many countries, it is not enough that a specific case falls within the scope of the terms ‘domestic’ and ‘violence’ to be labelled domestic violence. An additional element may be required in the form of intent, or of possible consequences of the act. In Honduras, “domestic violence is any behaviour associated with *an unequal power exercise*”.<sup>524</sup> ‘Unequal power exercise’ means any conduct aimed at *affecting, compromising or limiting the free development of a woman’s personality on the ground of her gender*.<sup>525</sup> A different solution is found in Bosnia-Herzegovina, where the focus lies not on intent but on possible consequences of the violence. Thus, domestic violence are acts “which *may seriously impede family members from enjoying their rights and freedoms in all areas of public and private life* which are based on equality”.<sup>526</sup> Yet, despite the different approaches in these two examples, they both have in common that they *distinguish domestic violence from other acts of violence by stressing the human rights and gender aspects and consequences of domestic violence*.

#### *Protective measures*

If a person is subjected to violence in her home and/or by a person close to her, she may need help from the society and the state to protect her from further violations. These protective measures can have different features and depend on the nature of the offence, and on the relationship between the victim and the offender. *It is essential that protective measures can be ordered both within and outside a criminal proceeding*. Other relevant aspects are the scope of persons that can request a protective measure, and the information given at the time of request. Additionally, the procedure of adopting a protective measure and the consequences of a violation of a protection order are important. As will be shown below, legal solutions display variations in regard to all these aspects.

Examples of measures that can be enforced in cases of domestic violence are removal of the perpetrator from the common residence,<sup>527</sup> restraining orders involving suspended communications or prohibition against acts of intimidation, stalking or harassment,<sup>528</sup> seizure of weapons,<sup>529</sup> altered parental rights such as custody or visiting rights,<sup>530</sup> order of alimony payment or temporary financial assistance<sup>531</sup> and assisted safe return home or to a temporary safe shelter for the person subjected to violence<sup>532</sup>. A few of these measures shall be commented upon further. In most countries, the list of protective measures is exhaustive, but courts can have the power to order additional measures where appropriate.<sup>533</sup> The different protective measures are normally complementary and can be combined as appropriate in each individual case.<sup>534</sup> The general rule can also be to impose all available protective measures in every case.<sup>535</sup>

The right to request a protective measure can belong either to the person who is subjected to the violence, or to third parties who have witnessed or heard about the violence. It can also be within the power of the authorities to initiate a measure in the line of their work. Examples of this are found in Bosnian-Herzegovinian law, where the abused person, her or his representative, the police, the prosecutor’s office, the foster agency, governmental organisations and NGOs have the right to apply for protective measures.<sup>536</sup> An interesting feature of the law is a provision whereby everyone – private persons as well as officials (e.g. healthcare providers, educational institutions and NGOs) – who learns about the occurrence of domestic violence is obliged to report the case to the police. An official person who fails to report a case of domestic violence shall be sentenced to a fine or to a prison sentence of a minimum of 50 days.<sup>537</sup> In contrast, the Honduran law limits the obligation to report cases of domestic violence to healthcare personnel.<sup>538</sup> The South African law allows for a wide range of persons to report domestic violence; however, when it is a third party who initiates protective measures, the (adult) person subjected to violence must give written consent.<sup>539</sup> When the victim is mentally retarded

or unconscious, is a minor or a person whom the court is satisfied is unable to provide the required consent written consent is not required.<sup>540</sup> A minor, or any person on behalf of a minor, may apply for a protection order without the assistance of a parent or guardian.<sup>541</sup>

To help the victim access the protective measures, it is also possible to provide for information on the measures and the alternatives involved. Spanish authorities have developed an extensive *model form for applications for protection orders*.<sup>542</sup> The form is intended for all types of applicants, whether the victim or someone else, and includes questions on all relevant circumstances such as previous denunciations, presence of children in the household, types of violence used, possible witnesses and already received medical attention. A list of all available protective measures makes it easy for the applicant to apply for the one or ones wanted. Additionally, the applicant has the possibility to request legal assistance, to choose to proceed in secret and to apply for social help and assistance.<sup>543</sup>

The procedure involving protective measures can be enclosed with secrecy provisions to protect the applicant's privacy and integrity. For example, the identity and personal data of the protected person, as well as of the relatives of the victim, can be protected.<sup>544</sup> Other examples are to conduct all hearings involving protective measures behind closed doors, and to prohibit the publishing of information about these proceedings.<sup>545</sup>

Due to the nature of domestic violence, it is necessary that these cases are dealt with with expediency by the authorities. In these cases an interim decision by a court can be efficient, but there is often a possibility for the police or another authority to enforce urgent protective measures without a court decision. In the latter case, a common rule seems to be that the case must be brought before a judge within 24 hours.<sup>546</sup> To ensure urgent rulings, the law may state that a judge must hear a case on protective measures as soon as possible after an application,<sup>547</sup> that courts must be available at all hours<sup>548</sup> or that a court hearing must be conducted within a certain time, for example within 72 hours<sup>549</sup>. In a situation of risk, or when the aggressor is caught in the midst of an act, the police will first arrest the aggressor without a warrant.<sup>550</sup>

In the consideration of a request for a protective measure, the courts have to abide by certain evidentiary standards. For example, South African courts can issue interim protection orders only when there is *prima facie* evidence that the respondent is or was committing an act of domestic violence, and that the complainant may suffer undue hardship if an order is not issued immediately.<sup>551</sup> At a subsequent court hearing, the court will consider any other relevant evidence.<sup>552</sup> In the context of Spain, courts are under an obligation to consider the proportionality and necessity of the protective measures, and respect the principles of contradiction, openness and a right to defence.<sup>553</sup>

A protection order may be issued for a certain period of time and then renewed again. There are examples of legislation requiring a minimum period of one month and a maximum of two years,<sup>554</sup> or a minimum of two months and a maximum of six months at a time<sup>555</sup>. There is also a possibility to set different time limits for different protective measures.<sup>556</sup> Another solution is that protection orders remain in force until they are set aside by a later court decision.<sup>557</sup>

Most countries give both parties a possibility to appeal court decisions on protective measures.<sup>558</sup> However, an appeal does not halt the enforcement of the ordered protective measure.<sup>559</sup> Even where orders may not be subject to appeal, the law can grant the courts the power to modify protection orders at any given time.<sup>560</sup>

Courts can also be involved when the perpetrator is violating a restraining order or another protection order. A breach may result in different sanctions. According to the Bosnian-Herzegovinian legislation, violations of protection orders are fined with approximately 1,300 to 6,500 USD, a large amount of money for most of the population.<sup>561</sup> The approach is different in Honduras, where the aggressor may be sentenced to one to three months of community service, or be charged with the crime of inobservance of the law.<sup>562</sup> A judge may also substitute the measure with another protective measure, or order that the aggressor is provisionally imprisoned.<sup>563</sup> In South Africa, all protection orders are instead coupled with the issuance of a warrant for the arrest of the respondent, to be executed immediately if a respondent acts in contravention of the order.<sup>564</sup>

### *Criminalisation*

Besides the enactment of protective measures, states are under an obligation to hold perpetrators criminally responsible for acts of domestic violence. Domestic violence must therefore be criminalised in national criminal law. The legal solutions vary in this context, with regard to where and how criminalisation is made, and with regard to sanctions and sentencing. Domestic violence can either be a crime in its own right, or constitute an aggravating factor in the sentencing of crimes committed against an intimate partner or family member. A combination of both solutions is also possible. As can be seen below, the definitions of domestic violence in criminal law may differ from the definitions governing protective measures. In the following, different legal models are presented together with applicable sanctions. Some notes are also made on evidentiary standards. First, however, it should be stressed that *these crimes constitute public offences* in all countries mentioned in this section. Thus, they are punishable even in the absence of the abused person's denunciation and/or cooperation.<sup>565</sup>

In countries where domestic violence constitutes a separate crime, variations are found in the scope of the provision as well as in the scope of protected persons. In Honduras, the crime of *intra-familial violence* is defined as the use of force, intimidation or persecution against a spouse/former spouse, cohabitant, adulteress/former adulteress or a person with whom the offender has a child. The sanction is one to three years of imprisonment.<sup>566</sup> The sanction rises up to two to four years of prison when an aggressor is found guilty of degrading treatment. Degrading treatment encompasses, for instance, severe corporal damage, the use of a deadly weapon, crimes committed in the presence of children and forcing the victim to take drugs.<sup>567</sup> The murder of a spouse or cohabitant is further subject to a specific provision and is sentenced with 30 to 40 years of imprisonment.<sup>568</sup>

Another legal model is found in Sweden, where crimes against an intimate partner can be sentenced as the crime of *gross violation of a woman's integrity*.<sup>569</sup> This provision is innovative by allowing several isolated acts, such as crimes against life, health, liberty or sexual liberty, to be adjudicated cumulatively as one crime.<sup>570</sup> It aims at facilitating the indictment of men abusing their partners, whether in marriage or cohabitation, in situations where the crimes committed if considered in isolation would not amount to more serious crimes.<sup>571</sup> By assessing all acts together, the court is able to attach more gravity to the acts as they are seen as elements of a repeated violation of the woman's integrity.<sup>572</sup> The acts can be committed over a longer period of time and the woman does not have to state the exact date for each act.<sup>573</sup> It is not a requirement that the aggressor has a previous conviction for any of the acts, even though previous convictions can be taken into account.<sup>574</sup> The prescribed sentence for gross violation of a woman's integrity ranges from six months to six years imprisonment.<sup>575</sup> Taken together, the legal provision and its interpretation encapsulate the specific nature of protracted domestic violence and ensure that the criminal sanction reflects the serious nature of this type of violence.<sup>576</sup>

With regard to evidentiary assessment in domestic violence cases, it is important to stress that none of the selected countries require corroborating evidence for a convicting judgment. Due to the nature of domestic violence, witnesses are often lacking. A requirement of witnesses would hence undermine the efforts to prosecute this type of violence. Consequently, the testimonies of the complainant and of the accused can be the only evidence present in the trial. Psychological and medical evidence, if available, can further assist in the verification of the complainant's statement.<sup>577</sup>

In the sentencing of crimes, domestic violence can be considered an aggravating factor. The insertion of domestic violence as an aggravating factor can either be done alongside a specific criminal figure for domestic violence, as is the case in Honduras and Sweden,<sup>578</sup> or instead of a provision targeting and defining domestic violence in particular, as is the case in Spain.<sup>579</sup> Where a specific criminal figure exists but is not applicable, or would result in a more lenient sentence, other criminal provisions apply together with aggravating factors. The Spanish criminal code is an example of how domestic violence can be considered an aggravating factor in sentencing. Already existing crimes, including assault, torture and deprivation of liberty, have been coupled with provisions on aggravated sentences if the victim is linked to the perpetrator by a sentimental relationship.<sup>580</sup> For example, in a case of injuries to physical and mental health, the sentence rises from a maximum of three years to five years of imprisonment if a sentimental relationship exists or existed.<sup>581</sup> Thus, the presence of a sentimental relationship significantly affects the length of the sentence. In addition, discriminatory motives, including on the ground of sex, are always considered an aggravating factor.<sup>582</sup> These changes were introduced within the framework of the gender violence law.<sup>583</sup>

Yet, another possibility is to introduce criminal sanctions for acts not covered by existing criminal figures. However, these sanctions are complementary to the criminal code in aiming at avoiding impunity for more lenient crimes. Honduras and Spain serve as examples in this regard. The Honduran domestic violence law includes criminal sanctions applicable in cases where the Penal Code does not apply.<sup>584</sup> The sentence is one to three months of community service.<sup>585</sup> The court can also order mandatory re-education therapy for the aggressor.<sup>586</sup> The Spanish gender violence law established the crime of mistreatment, inserted in the Criminal Code. The crime is any violence committed against a woman with whom the perpetrator is or was in an intimate relationship, where the violent act did not cause physical injury and falls outside the scope of other crimes. Possible sanctions include community service and suspended custody of children.<sup>587</sup> Threats and use of force considered minor are sentenced as a crime of misdemeanour, sanctioned with for example community service and fines.<sup>588</sup>

Sanctions for domestic violence, as shown above, vary depending on the gravity of the crime, but also on *the court's possibility to consider the crime as part of a more serious violation of the woman's integrity and rights*. In most cases, imprisonment is the only applicable sentence. It is important to stress though that none of the selected countries allow the substitution of a sanction of imprisonment with fines. However, less severe crimes, for instance where physical violence is absent, can sometimes be sanctioned with community service, fines and/or mandatory therapy for the aggressor. The possibility for the offender to obtain re-education and therapy is important also in the course of imprisonment. One way of ensuring that specialised programmes are carried out in practice is to make their creation mandatory.<sup>589</sup> The aggressor's conduct within rehabilitation programmes can further be considered in the evaluation of applications for parole or suspended sanctions.<sup>590</sup>

Together with the criminal case, the complainant normally has the possibility to claim civil compensation for damages. Compensation in domestic violence cases appears to be governed by general rules of

civil responsibility. Civil responsibility encompasses restitution, reparation for material damages and compensation for mental and physical injuries.<sup>591</sup> If the nature of the violence was patrimonial, the offender must restore all damages and may also be bound to cover several other expenses, including medical services and costs of living.<sup>592</sup>

#### *Rights of complainants in court proceedings*

Trials involving domestic violence are often very difficult for the complainant. As extremely intimate and painful details will be openly dealt with, the risks for intimidation and secondary victimisation increase. The fact that the accused is a person with whom the complainant is or has been involved with in an intimate relationship further adds to the emotional stress. For this reason, it is common that laws on domestic violence, or ordinary procedural laws, prescribe various protective measures that can be taken. For example, the Honduran domestic violence law entails specific procedural rights to protect the complainant.<sup>593</sup> Among the listed rights are the right to be treated with respect in examination and cross-examination, and the right to not have to confront the accused if that would cause emotional harm.<sup>594</sup> Another important right is the possibility to request that the trial is conducted behind closed doors.<sup>595</sup>

#### *Institutions and procedures*

The competency of the police force, the prosecutors and the courts to handle domestic violence cases determines the outcome of the case, and determines whether the woman who has been abused is subjected to 're-victimisation' or not. Thus, training and education of these public officials is of crucial importance. So is the creation of procedures adapted to handle women who have been beaten and to collect and secure evidence as soon as possible while safeguarding the dignity of the woman.

### **Police**

The police play the role of the first contact with the victim after the crime has been committed. It is to this institution victims turn with their stories and complaints. The level of professionalism demonstrated by the police officers at this first encounter influences the quality of the subsequent investigation, the willingness of the victim to cooperate, and ultimately, the possibility to achieve a convicting judgment. One way of approaching this form of crime is to organise the police force in a specialised unit dealing only with violence of this kind. That has been done in Spain where *specialised police units dealing with gender violence* have been set up.<sup>596</sup> A specific protocol, binding upon all police and security forces, establishes the order of work in these cases. The protocol contains procedures on risk assessment, information to victims, appropriate treatment of the victims and cooperation with the judiciary as well as standardised questionnaires.<sup>597</sup> Among other measures taken to improve the work of the police are portable guidelines on how to act with diligence in gender violence cases, and camouflaged cars in which victims can be transported to healthcare services or safely returned to their homes.<sup>598</sup> All police employed in the specialised units for gender violence have received training and education on gender violence.<sup>599</sup> Gender violence education is furthermore included in the initial training of all new policemen and policewomen.<sup>600</sup>

It can also be appropriate to educate all police employees in handling victims of domestic violence. All new police recruits in Honduras receive mandatory training within the ordinary police education, and already working policemen and women are trained within a special training programme.<sup>601</sup>

A step further is taken in the South African legislation. It is placing more explicit duties upon the police

force, the disregard of which may result in disciplinary hearings. Members of the police are obliged to assist the complainant<sup>602</sup> in the way he or she may require in the circumstances, including assisting or making arrangements for the said complainant to find suitable shelter and to obtain medical treatment.<sup>603</sup> The police on duty should hand the complainant a notice containing prescribed information, in the official language of the complainant's choice, if it is reasonable to do so.<sup>604</sup> The content of such a notice, including remedies and the right to lodge criminal charges, should be explained to the complainant.<sup>605</sup> Failure by a member of the police force to comply with an obligation of the domestic violence act constitutes misconduct and should lead to disciplinary hearings.<sup>606</sup>

### **Prosecutor**

The competency of the prosecutor who is handling a domestic violence case determines the chances of a subsequent conviction. Therefore, it is important to not disregard the need to train prosecutors on the specificities of gender-based violence, not only in order to increase their knowledge about the law, but also to enhance their understanding of the victim's situation. Spain, for example, has established a specific gender violence prosecutor, and special sections on violence against women in the prosecutor's office of every superior court.<sup>607</sup> Gender violence prosecutors appear in all proceedings, both criminal and civil, before the gender violence jurisdictions.<sup>608</sup> The national gender violence prosecutor supervises, evaluates and coordinates the performances of the prosecutor's gender violence sections. Regular reports on performance are sent to the attorney general.<sup>609</sup> In 2007, 42 new specialised prosecutors will be trained and hired for service throughout the country.<sup>610</sup>

### **Court**

The third relevant institution is the court, which has the ultimate saying in domestic violence cases. Two good examples in this area are Spain and Honduras. Both have established specialised courts for domestic violence cases in order to ensure the specialised handling of such cases.

To ensure accessibility, the Spanish *specialised judges* are distributed throughout the country. They are attached to the courts of first instance.<sup>611</sup> Judges have competence to hear cases on homicide, aggression, crimes against liberty, aggression to the foetus, crimes against sexual liberty, other crimes committed with the use of force and related crimes. A precondition for a case to be subsumed under the specialised court is, however, that the applicant is or has been related to the offender by a sentimental relationship.<sup>612</sup> Any case that might involve domestic violence must, on the other hand, be referred to the specialised court. If a judge who is adjudicating a civil case notices that the case involves any act of gender violence, he or she automatically loses his or her jurisdiction and has to refer the case to a specialised gender violence judge.<sup>613</sup> Mediation is not allowed in cases involving gender violence.<sup>614</sup>

The specialised judges have attended trainings and seminars, the latter with the objective of establishing common criteria in the application of the law.<sup>615</sup> A practical guide to the law directed at the judiciary has also been distributed to all courts.<sup>616</sup> One specialised gender violence judge affirmed that the advantage of creating special courts and procedures is above all the fast trials; they avoid backlogs, and the plaintiff has an immediate response, and is attended and listened to by trained professionals. She also stressed the dissuasive effect of the law: the aggressor knows that if he hits his partner he can be convicted in less than 48 hours.<sup>617</sup>

### *Assistance for persons subjected to domestic violence*

Access to and the quality of support services affect the recovery of individuals subjected to domestic violence as well as their ability to end or change the relationship with the aggressor. There seems to be two ways of dealing with assistance, either via the state or through private measures and organisations. Here we give an example of the ways in which the state can arrange support services for persons subjected to domestic violence. The example is taken from Spain. It should additionally be mentioned that the examples on support services in the chapter on rape are also relevant, to a large extent, in the context of domestic violence.

The Spanish law is the most far-reaching, and as such represents the best practice in this context. A positive feature of the Spanish law is that it establishes a number of rights of women subjected to gender violence. Thus, these *women should not be granted services on a discretionary basis, but as rights-holders with legal claims against the duty-bearers*. The legal rights include rights to social assistance, to free legal assistance, to financial assistance, to healthcare as well as employment and social security rights.<sup>618</sup> There are also some national institutions specifically set up to supervise the implementation of the legislation on domestic violence. The gender violence law emphasises that some victims may need specific treatment due to specific circumstances such as being part of a minority, being an immigrant, suffering from social exclusion or having a disability.<sup>619</sup>

### **Social Assistance**

According to Spanish law, individuals subjected to gender violence have a right to *multidisciplinary social services*. This means that they have a right to information, psychological care, social help, educational assistance for the family and to vocational training.<sup>620</sup> The gender violence law does not, however, establish a right to shelter, but victims are prioritised in waiting lists for subsidised housing and for public residences for the elderly.<sup>621</sup> Shelters are distributed throughout the whole country and often funded by each autonomous community.<sup>622</sup> Whereas local authorities run some shelters, others are run by non-governmental organisations. A combination of both also exists. Most shelters offer multidisciplinary services, including healthcare and social and legal services. They are normally open to children of the victims as well, which can be a determining factor for victims seeking their services.<sup>623</sup>

### **Access to Information**

Spain grants all victims of gender violence an explicit right to access information regarding their situation. Women should thus be aware of their rights, of the protection and security measures available and of existing emergency and support services. Information must be adapted to disabled women and be provided in a language that she understands.<sup>624</sup>

The national institutes of women in Honduras and Spain provide toll free 24-hour information and emergency phone services for persons subjected to gender violence.<sup>625</sup> Victims can call to ask for information about the options available to them, and for immediate help.<sup>626</sup> In Spain this has also been complemented with certain offices of assistance to persons subjected to violent crimes.<sup>627</sup> These offices provide information services and psychological assistance free of charge.<sup>628</sup> To guarantee access for persons who do not speak Spanish, interpreters are available.<sup>629</sup>

### **Legal Assistance**

Legal assistance is free for victims of crime who prove they are unable to afford the legal services needed. Legal assistance must however be provided immediately to victims of gender violence when the victim requests it; if after the assistance it is proved that the victim can pay for the services, the victim must then reimburse the expenses.<sup>630</sup> The Bar Associations shall guarantee specialised training for these procedures and cases.<sup>631</sup> In 2005, more than 8,000 women were granted legal assistance for cases relating to gender violence.<sup>632</sup>

### **Economic Assistance**

One of the biggest barriers of denouncing gender violence has been the abused woman's economical dependence on the offender. The possibility to obtain financial assistance is therefore established under the Spanish gender violence law.<sup>633</sup> If the woman demonstrates a lack of economic solvency and difficulty in finding a job, she receives a payment equivalent to six months of unemployment subsidy, or 18 months if she has family responsibilities. If she is disabled, the payment rises to 12 months or to 24 months if other family members are dependent on her.<sup>634</sup>

### **Employment and Social Security Rights**

The Spanish gender violence law adds a feature that is not present in other similar laws, namely labour rights and social security rights.<sup>635</sup> Women who have been subjected to gender violence have the right to reduce or accommodate their working hours. Moreover, they have the right to be replaced to another working place if possible.<sup>636</sup> Absences and late arrivals due to gender violence shall not be to the detriment of the woman but always be considered justified.<sup>637</sup> The same rights apply to both private and public employees.<sup>638</sup> A woman who wants to exercise the abovementioned rights has to present either a protection order or a statement from a prosecutor to her employer.<sup>639</sup>

### **Healthcare**

All individuals subjected to gender violence in Spain have a right to specialised healthcare, including physical and mental healthcare.<sup>640</sup> Treatment is provided free of charge, as all medical treatment provided by public health institutions. This also applies to foreign people in an irregular migration status provided they are registered (registration is not conditioned by the legality of their situations); if they are not registered, they still get emergency attention.<sup>641</sup>

There are no specific clinics for gender violence victims, but according to the law, the detection of and attention to gender violence should be treated as a matter of urgency. In each case of gender violence, a thorough anamnesis together with an individually adapted intervention plan must be made.

The healthcare staff should further evaluate the situation of risk in the individual case. Other relevant authorities shall also be consulted to ensure that the victim is properly attended to.<sup>642</sup>

A protocol on prevention and treatment of domestic violence in primary attention health institutions further assists healthcare providers to handle cases of domestic violence.<sup>643</sup> The protocol stresses the importance of confidentiality, and of consulting the patient alone in a separate room. It further lists a number of physical and psychological symptoms that may be signs of domestic violence. When any signs of domestic violence are present, a number of recommended questions should be asked by the

healthcare official. Additionally, the protocol emphasises the importance of registering all injuries and symptoms in the patient's file for evidentiary purposes.<sup>644</sup>

Administrative offices have to train their personnel in the detection of domestic violence and on how to provide adequate treatment. The inclusion in the professional curricula of all socio-sanitary professions of prevention, early detection, intervention and support for victims of violence is obligatory.<sup>645</sup>

Further measures to improve healthcare are envisaged for the years to come. According to the national plan of 2006, national protocols for forensic medicine will be developed, and the education of healthcare professionals is to be intensified in the coming years.<sup>646</sup>

### Information and education

The eradication of violence against women requires a change in attitudes, which in turn requires extensive education and information directed towards the general public. Education and information must further address men and women alike, from childhood and upwards. The change of attitudes is a permanent process as quick fixes do not exist. Depending on the basic conditions in a country, some strategies will differ. For instance, it is not enough to know that gender-based violence is criminal and that survivors' enjoy certain rights. As an example, in Bosnia-Herzegovina, a country where domestic violence was not discussed at all until after the war in the 1990s, information must also aim at changing the perception of domestic violence as normal behaviour within relationships.<sup>647</sup> In the following, good examples on information and education measures, as well as measures against stereotyped gender roles in the media, are highlighted. As mentioned earlier, this section is equally relevant for the area of rape.

#### Example

The Spanish state has lodged a number of awareness-raising campaigns on gender-based violence. Examples include a photo campaign against gender violence featuring famous women as abused women,<sup>648</sup> and a TV advertising campaign with professional football players supporting the eradication of gender violence.<sup>649</sup> Involving and targeting the male-dominated sports community is a way of reaching out with information to men specifically.<sup>650</sup> Other campaigns have used comical caricatures to catch the attention of the public.<sup>651</sup> Additionally, a movie on violence against women has been distributed to all Spanish high schools. Publications on gender violence are also disseminated to, for instance, parents' associations.<sup>652</sup> The positive effect of media coverage is demonstrated in Spain where the 'calling effect' of the new law is believed to have contributed to an increase in the number of complaints with more than 2,000 between 2004 and 2005. This implies that women who know about the law are more likely to take steps to claim their rights by filing a complaint.<sup>653</sup> In 2006, the number of reported cases of gender violence passed 60,000 for the first time, an increase with 4% compared to 2005.<sup>654</sup>

<b>Example</b>
<p>Two countries, Spain and Bosnia-Herzegovina, require the integration of gender equality education into the curricula of the educational system at all levels.<sup>655</sup> Spanish local authorities are responsible for educating teachers on the subject, and the central government will develop a good practices guide on gender violence education.<sup>656</sup> Material aimed at the sensitisation of the educational community has been distributed.<sup>657</sup> The curricula of university education of teachers now include education on equality and gender violence.<sup>658</sup> In addition, both countries require the removal of all discriminatory gender stereotypes in educational material.<sup>659</sup> The Spanish school system's compliance with the gender violence law is scrutinised within the already existing framework of school inspections.<sup>660</sup> In Bosnia-Herzegovina, the failure to remove discriminatory content in educational material can result in fines.<sup>661</sup></p>

<b>Example</b>
<p>Spain and Bosnia-Herzegovina address the role of advertisement and media reporting in influencing the general perception of gender roles. Spain criminalises every kind of publicity that uses or addresses women in any degrading or discriminatory way.<sup>662</sup> Since the enactment of the law in 2005, the government watchdog on advertisement has received over 400 complaints concerning 180 campaigns. Sixteen campaigns were requested to withdraw.<sup>663</sup> Similarly, Bosnia-Herzegovina prohibits the public presentation of any person in an offensive, degrading or demeaning manner in regard to gender.<sup>664</sup></p>

### **Policy framework**

Policies and action plans regarding violence against women or crime prevention in general, when existing, often cover both domestic violence and sexual offences. Since a large number of sexual offences take place within sentimental relationships, specific domestic violence laws and policies may also apply.<sup>665</sup> Thus, as a consequence, the following section is highly relevant also in the context of rape.

All countries selected in regard to domestic violence acknowledge that this type of violence constitutes a serious human rights violation, against which the state is obliged to take all appropriate measures.<sup>666</sup>

In Spain, the government stresses that gender-based violence is a matter of discrimination on the ground of sex.<sup>667</sup> This is also done in Bosnia-Herzegovina, where a prohibition of violence against women is inserted in the gender equality law, which addresses discrimination on the grounds of sex in different areas of the society.<sup>668</sup> Moreover, the Spanish legislator recognises that violence against women is not just about the way that abuser's treat women, but about the image of women in the society at large.<sup>669</sup> The law demonstrates this view by addressing the problem of gender-based violence at all levels of the society.<sup>670</sup> Additionally, by choosing the term gender violence over domestic violence, the legislator intends to change the common perception of gender violence as a private and family-related issue. As the term gender violence is not limited to the private sphere, it implies that violence against women is a public problem.<sup>671</sup> Another reason behind the choice of the term gender violence is the legislator's will to emphasise that contrary to domestic violence this kind of violence is mainly directed against women on the basis of existing gender relations.<sup>672</sup>

The setting in which gender violence laws were adopted demonstrates the major role played by civil society, both in advocating for a law, and in assisting in the drafting process.<sup>673</sup> To take an example, several NGOs in Bosnia-Herzegovina formed a gender equality coalition in order to have a bigger impact on the drafting process. Through joint efforts including media outreach, partnerships with key persons within the state administration and the arrangement of a public forum for all stakeholders, the coalition managed to successfully take part in the legislative process and positively influence the content of the new law.<sup>674</sup> Non-governmental organisations seem to be important actors in the field of gender violence. Not only do they lobby for important changes in governmental policies and law, they also provide information and education, as well as services to survivors. In the best-case scenario, their services are complementary to already existing governmental services, and they receive part of their financing from the state. Nevertheless, in many cases, NGOs step in to do the work when the state fails to fulfil its obligations.

National action plans and other policy documents are important complements to legislation, and a means to transform the legal provisions into concrete actions. Almost all selected countries mandate the creation and evaluation of national action plans, and specify the institution(s) responsible for this task in the laws addressing domestic violence.<sup>675</sup> The national action plans cover a broad range of actions such as education of professional groups, sensitisation campaigns and the harmonisation of laws.<sup>676</sup> A common division of work seems to be that the relevant ministry is responsible for drafting the plan, whereas a national institution on women is in charge of its follow-up and evaluation. Thus, the establishment of national as well as regional institutions seems to form an important part of the policy framework.<sup>677</sup> These institutions may not only be responsible for the evaluation of existing action plans and policies, but also for capacity building and information to persons subjected to gender-based violence.<sup>678</sup> Another important task can be to ensure and enhance the cooperation between all affected institutions, both private and public.<sup>679</sup>

In order *to make action plans work, budget allocation is crucial.* The most efficient way to securing appropriate funding might be to include a specific allocation in the general state budget.<sup>680</sup> With regard to budgeting and fiscal accountability, an interesting South African study was recently conducted. An estimation of the costs of implementing the domestic violence act is done in order to enable advocacy for a particular budget, rather than merely demanding a resource. Furthermore, the determination of a cost allows comparison of budgets allocated for the implementation of other laws and policy. Such comparisons could be a useful test of the state's commitment to actually implement policies promoting the rights and interests of women.<sup>681</sup>

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## Chapter IV: Recommendations and Observations

Here follow concluding notes on the best practices in the areas dealt with. Each area is summarised in a simplified form to highlight the key recommendations emerging from the best practices that have been accounted for in the previous chapters.

### Termination of pregnancy

#### *Consent and authorisation*

- The woman is the primary decision-maker
- Minors do not need parental consent to undergo an abortion

#### *Criteria for abortion*

- The number of weeks set as a limit is not so low as to prevent women from undergoing legal abortions
- Abortions with medical method is available
- Valid reasons for abortion include economic and social circumstances, rape and incest, mental and physical health of the woman and foetal impairment
- When rape or incest are invoked as reasons, the woman's own statement is sufficient evidence
- There is no time limit for abortion when necessary to save the mother's life
- Interdisciplinary teams assess the woman's reasons, but their decision can be appealed

#### *Competent service providers*

- Abortions can only be carried out by registered healthcare professionals, either physicians or specially trained midwives and nurses
- Abortions can only be performed at accredited healthcare centres
- Healthcare centres transmit data on abortions to central authorities while maintaining confidentiality
- A national authority is responsible for the supervision of private and public healthcare facilities that carry out abortion

#### *Accessibility*

- Authorised healthcare institutions and staff are geographically spread throughout the country
- Non-discriminatory access is ensured

#### *Counselling and information*

- Information about available options, abortion methods and procedures, social services and contraception is always provided in oral and written form
- Counselling is available to all women prior to and after the abortion, but is not mandatory
- Medical follow-up consultations are scheduled after all abortions
- Healthcare regulations apply equally to abortion
- General information campaigns on reproductive health promoting equal and shared responsibilities of men and women in regard to sexuality are available

- Sexual education is mandatory in all schools and cover, among other areas, gender equality, contraceptives, sexually transmittable diseases and abortion
- Information is available in different languages and to people with disabilities
- Youth centres provide information and services adapted to the needs of young people

*Sanctions for violation of abortion legislation*

- Women who undergo illegal abortions are never criminalised
- Abortions without consent are criminalised
- Unauthorised persons and institutions who perform abortions are criminalised
- Authorised service providers who do not comply with laws and regulations are criminally liable
- If conscientious objection is permitted, referrals to other available service providers must be made

*Civil and administrative responsibility*

- Institutions such as committees, ombudsmen and disciplinary boards exist and can receive complaints concerning quality of healthcare
- Remedies include financial compensation, warnings and withdrawal of license

*Individual cost of abortion*

- Abortion is covered by public health insurance schemes
- Services cannot be denied on financial grounds
- Minors have access to services free of charge

*Reproductive health policies*

- Abortion is part of a general reproductive health policy
- Policies aim at reducing the number of abortions and promotes the use of contraceptives
- The government consults civil society on a regular basis
- Policies are regularly evaluated and followed-up through the use of indicators or other appropriate measures

**Non-Marital Cohabitation**

*Legal definition*

- If a *de facto* approach is chosen, the definition should be flexible and take different circumstances into account, including the existence of children and financial dependence
- Legislation should specify if it allows simultaneous marriage/other union

*Contracting out*

- Partners should have the possibility to contract out
- Before signing a contract, the partners should receive independent legal advice
- Unfair contracts can be set aside or varied by a court

*Maintenance*

- Maintenance after the dissolution of a customary union should be granted with regard to the respective roles and occupation of the partners during the relationship

*Children*

- The rights of children are not affected by the status of their parents' relationship
- The existence and care of children should however constitute an important factor in the definition of a customary union and in maintenance awards

*Other legal consequences*

- Customary unions should be integrated with other areas of law, including criminal law and social security law

*Ending the customary union*

- Formal registration of dissolution should not be required unless the contractual approach is chosen

*Property division upon separation*

- There are clear rules on personal property and property subject to division in the law
- The general rule should be that property subject to division is divided equally between the partners
- A court shall be able to consider circumstances such as the respective roles and occupation of the partners during the relationship in the division of property
- If more than one relationship exist, legal rules should provide for a just division of property in such cases

*Inheritance*

- A surviving partner of a customary union shall have inheritance rights
- If more than one relationship exist, legal rules should provide for a just division of the property of the deceased person among the surviving partners

*Legal remedies*

- Partners to a customary union shall have legal, non-discriminatory and geographical access to court for all matters relating to the union
- Judgements and decisions can be appealed
- Time bars should not be too narrow
- Legal aid shall be provided to those in need

*Information*

- Awareness-raising campaigns are launched at the introduction of new legal provisions
- Information is available from various sources, such as courts, legal community centres and registries

*Policy*

- The legal regulation of customary unions reflect the factual circumstances in the country
- Customary unions are coupled with general gender equality policies

## **Paternity determination**

### *Presumption rules*

- Adapted to reflect family constellations, e.g. customary unions

### *Administrative procedures*

- Conducted at the hospital at the time of birth
- Simplified by the absence of requirement of the father's consent
- Immediately connected to child support

### *Legal proceedings*

- Broad standing before the court, at a minimum mother, child and father
- Presumptions are rebuttable
- Paternity can be inferred from a refusal to undergo testing
- Possibility to appeal court decisions

### *Testing methods*

- Regulations ensure scientific quality and safety
- Safeguards exist to protect privacy and dignity of individuals
- Tests are only admissible as evidence in court if analysed at an accredited laboratory
- Tests can be taken at healthcare facilities in each community

### *Individual costs*

- Tests are free of charge within both administrative and judicial proceedings
- Eventual travel expenses are covered by the state
- There is a possibility to obtain legal aid

### *Information and education*

- General information campaigns are conducted
- Specific information is available in hospitals
- Public officials receive training and sensitisation

### *Policies*

- Paternity is explicitly connected to gender equality policies
- There are institutions responsible for evaluations and follow-ups

## Rape

### *Legal definition and criminalisation*

- Legal definitions of rape and other sexual offences are gender neutral
- Sexual offences are treated equally whether occurring within or outside a sentimental relationship
- Rape, as well as other sexual offences, are public offences
- The definitions of sexual offences are, directly or indirectly, based on the lack of consent
- The sexual act is defined broadly and penetration is not a prerequisite
- Consent is not implied by lack of resistance
- Corroborating evidence is not required for conviction
- Specific age limits, under which consent is presumed to be lacking, protect young persons
- There is a possibility to obtain financial compensation within the criminal trial

### *Police/prosecutors/judges/Institutions and procedures*

- Specialised police units, with female and male police officers, handle cases of sexual offences
- National police guidelines detail how receiving police officers shall proceed in sexual offence cases
- Survivors are able to report a sexual offence in their own language
- It is possible to file an anonymous complaint for the police records
- A national database of sex offenders is established
- Sexual offences units are established within the national prosecuting authority
- All judges are trained on the nature and implications of sexual offences
- Specialised court sections are created to deal adequately with sexual offences

### *Rights of complainants in court proceedings*

- Evidentiary rules generally bar evidence on the survivor's sexual history and reputation
- Protective measures, such as the use of screens and hearings behind closed doors, ensure that the survivor is protected against secondary victimisation during trial

### *Assistance to persons subjected to rape/sexual offence*

- Multi-disciplinary support centres facilitate access to all relevant services
- Specialised sections dealing with sexual offences are established within the national health care system
- Survivors of sexual abuse are always examined by healthcare staff of their own sex
- All rape survivors are offered free emergency contraception, antiretroviral treatment and antibiotics against sexually transmitted diseases
- National healthcare protocols make special provision on how to treat survivors of sexual abuse, including for example the collection of evidence and psychological treatment
- A sexual assault evidence kit is available for the collection and storage of evidence
- Free legal assistance is available to survivors of sexual offences
- Financial costs arising out of the crime are reimbursed by the state
- Information to rape survivors is easily available in various languages
- Awareness-raising campaigns are launched in various media formats and languages

*Policy framework*

- National action plans and policies dealing with violence against women and/or crime prevention addresses rape and other sexual offences

**Domestic Violence**

*Legal definition*

- The term violence is defined broadly, and encompasses physical, psychological, patrimonial and/or economical and sexual violence
- Clear definitions of each type of violence are included in the law itself
- If the term domestic is confined to intimate relationships, intimate relationships should not be limited to marriage and cohabitation
- The definition mirrors the discriminatory aspects of domestic violence (e.g. unequal power exercise)

*Protective measures*

- A wide range of complementary protective measures are available, including removal from common residence and restraining orders
- The list of protective measures is not exhaustive
- The scope of persons that can request a protective measure is broad and the consent of the woman subjected to violence is not required
- Protective measures can be ordered within as well as outside a criminal proceeding
- The police can enforce urgent protective measures without a court decision
- The procedure of adopting a protective measure should be efficient, timely and respectful of the rights of the applicant and the offender
- A protection order is in force until revoked by a court
- Violations of protection orders are immediately responded to and are criminalised

*Criminalisation*

- All forms of domestic violence are criminalised
- Domestic violence constitutes both a specific crime and an aggravating factor for relevant crimes in the criminal code
- All cases of domestic violence are public offences
- Sentences should not be too lenient; imprisonment seems to be the appropriate sentence in most cases
- Sentencing should also prescribe mandatory therapy and re-education for the offender
- There is a possibility to obtain compensation within the criminal trial

*Police, prosecutors, courts*

- Specialised police units, with both male and female officers, handle cases relating to domestic violence
- Specific domestic violence case management protocols are in force
- All police officers receive training on gender-based violence
- Individuals reporting domestic violence to the police receive extensive information in a language they understand
- Failure by the police to abide with the standards in these cases may constitute misconduct
- Specialised prosecutors normally handle cases involving domestic violence
- All prosecutors receive training on gender-based violence
- Specialised judges, or courts, adjudicate cases involving domestic violence, also civil law matters
- All judges receive training on gender-based violence
- Mediation is prohibited in domestic violence cases

*Support services*

- All support services are accessible and available free of charge
- The state takes responsibility to fund and implement appropriate support services
- Social assistance, including shelters, is available
- Legal assistance is immediately provided free of cost
- Financial assistance is granted to women in need to ensure that they are not economically dependent on the aggressor
- Labour and social security rights protect women subjected to domestic violence
- Specialised healthcare is provided; healthcare authorities will automatically consult with other relevant authorities in cases of domestic violence

*Information and education*

- Information in different languages is provided via a toll-free number 24 hours a day
- Innovative information campaigns are launched targeting men and women alike
- Information is available in various languages
- School and university curricula mandates education on gender stereotypes, discrimination and gender-based violence
- Publicity that uses or addresses women in any degrading or discriminatory way is prohibited

*Policy framework*

- A national action plan exists and is regularly evaluated and revised
  - Clear budget allocations are made to ensure the fulfilment of the action plan
  - Cooperation between governmental and non-governmental actors is institutionalised
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## **Appendices**

### **Appendix 1**

This appendix includes five tables, i.e. one for each area: abortion, non-marital cohabitation, paternity determination, domestic violence and rape. Those tables present relevant data on the different countries included in this study.

ABORTION						
	Albania	Guyana	France	Sweden	South Africa	
<b>Population (millions)</b> Source: World Bank (2005)	3.1	751.2 thousands	60.7	9.0	45.2	
<b>Surface area (km<sup>2</sup>) (thousands)</b> Source: World Bank	28.75	215.00	551.5	450.3	1.2 million	
<b>GDP (US \$) (billions)</b> Source: World Bank (2005)	8.4	783.2 millions	2.1 trillions	354.1	240.2	
<b>GNI per capita, Atlas method, (US \$)</b> Source: World Bank (2005)	2,580.00	1,010.00	34,810.00	41,060.00	4,960.00	
<b>Legal system</b>	Civil law	Common law with some influences of Roman-Dutch law	Civil law	Civil law	Based on Roman-Dutch law and English common law	
<b>Religion</b> Source: CIA world fact book	Muslim 70%, Albanian Orthodox 20%, Roman Catholic 10% (only estimates as no current statistics exist)	Christian 50%, Hindu 35%, Muslim 10%	Roman Catholic 83-88%	Lutheran 87%	Zion Christian 11.1%, Pentecostal/Charismatic 8.2%, Catholic 7.1% are the major groups (2001 census)	

<p><b>Ratified International Human Rights Instruments</b></p>	<p>ICESCR, ICCPR but not OP, CEDAW + OP, CAT + OP, ICERD, CRC but not OP</p> <p>ECHR + Protocols except no. 9, 10 and 13, ESC (has accepted 64 out of 98 revised paragraphs but not signed the collective complaints protocol), CPT, Framework Convention for the Protection of National Minorities</p>	<p>ICESCR, ICCPR + OP 1, ICERD, CEDAW but not OP, CRC</p> <p>Belem do Para</p>	<p>CEDAW (with reservations) + OP, ICESCR<sup>1</sup>, ICCPR<sup>2</sup> + OP 1 and 2, ICERD, CAT + OP (signed, not ratified), CRC<sup>3</sup> + OP on armed conflicts and OP on the sale of children, children prostitution and pornography.</p> <p>ECHR + Protocols no. 1, 4, 6 and 7, European Social Charter (ESC), CPT</p>	<p>CEDAW + OP, ICESCR, ICCPR + OP, ICERD, CAT + OP, CRC + OP on armed conflicts</p> <p>ECHR, ESC + all protocols, CPT, Framework Convention for National Minorities</p>	<p>ICCPR + OP 1 and 2, ICERD, CEDAW + OP, CRC</p> <p>African Charter on Human and Peoples' Rights + Protocol on the Rights of Women in Africa, African Charter on the Rights and Welfare of the Child</p>
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<sup>1</sup> Declarations:

(2) The Government of the Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits.

<sup>2</sup> Declarations and reservations:

(8) In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.

<sup>3</sup> Declarations and reservation made upon signature and confirmed upon ratification:

(1) The Government of the French Republic declares that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of French legislation relating to the voluntary interruption of pregnancy.

(2) The Government of the Republic declares that, in the light of article 2 of the Constitution of the French Republic, article 30 is not applicable so far as the Republic is concerned.

<p><b>Constitutionally protected human rights</b></p>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Right to enjoy the healthcare from the state in an equal manner</li> <li>- Right to health insurance</li> <li>- Freedom of information</li> </ul>	<p>- No specified rights</p>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Protection of health</li> <li>- Freedom of information</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Freedom from torture and corporal punishment</li> <li>- Freedom of information</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to dignity</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Right to make decisions concerning reproduction</li> <li>- Right to reproductive healthcare</li> </ul>
<p><b>Life expectancy at birth (years)</b> Source: UNDP, Human Development Index (2004)</p>	<p>73.9</p>	<p>63.6</p>	<p>79.6</p>	<p>80.3</p>	<p>47.0</p>
<p><b>Maternal mortality ratio adjusted (per 100,000 births)</b> Source: UNDP, Human development Index (2000)</p>	<p>55</p>	<p>170</p>	<p>17</p>	<p>2</p>	<p>230</p>
<p><b>Contraceptive prevalence rate (% of married women ages 15-49), modern and traditional methods</b> Source: UNDP, Human development Index (1996-2004)</p>	<p>75 Modern methods account for 8 % Source: Albania Reproductive Health Survey (2002)</p>	<p>37</p>	<p>75</p>	<p>-</p>	<p>56</p>

<b>Number of abortions</b>	10,517 (2004) Source: European health for all database, WHO Europe	-	208,759 (2003) Source: European health for all database, WHO Europe	34,978 (2005) Source: Socialstyrelsen	-
<b>Public health expenditure (% of GDP)</b> Source: UNDP, Human Development Index (2003)	2.7	4.0	7.7	8.0	3.2
<b>Abortions per 1000 live births</b> Source: European health for all database, WHO Europe	244.46 (2004)	-	274.15 (2003)	341.37 (2004)	-

CUSTOMARY UNIONS				
	Trinidad and Tobago	Croatia	France	New Zealand
<b>Population (millions)</b> Source: World Bank (2005)	1.3	4.4	60.7	4.1
<b>Surface area (km<sup>2</sup>) (thousands)</b> Source: World Bank	5.1	56.5	551.5	270.5
<b>GDP (US \$) (billions)</b> Source: World Bank (2005)	14.8	37.4	2.1 trillions <sup>4</sup>	109.00
<b>GNI per capita, Atlas method, (US \$)</b> Source: World Bank (2005)	10,440.00	8,060.00	34,810.00	25,960.00
<b>Legal system</b>	Common law	Civil law	Civil law	Common law
<b>Religion</b> Source: CIA world fact book	Roman Catholic 26% and Hindu 22.5% are the two biggest religious groups (2000 census)	Roman Catholic 87.8%	Roman Catholic 83-88%	Anglican 14.9%, Roman Catholic 12.4%, Presbyterian 10,9%, are the biggest religious groups (2001 census)

<sup>4</sup> Declarations:

(2) The Government of the Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits.

<sup>5</sup> Declarations and reservations:

(8) In the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned.

<b>Ratified International Human Rights Instruments</b>	CEDAW but not OP, ICESCR, ICCPR + OP 1, ICERD, CRC but not OP.  Belem do Para.	ICESCR, ICCPR + OP 1 and 2, CEDAW + OP, ICERD, CRC + OP 1 and 2  ECHR + Protocols No.1-8 and 11-14, ESC + Protocol No.1 (accepted 40 of the 72 paragraphs of the ESC and 3 of the 4 Articles of Protocol No.1), Framework Convention for the Protection of National Minorities, CPT.	CEDAW (with reservations) + OP, ICESCR <sup>6</sup> , ICCPR <sup>5</sup> + OP 1 and 2, ICERD, CAT + OP (signed, not ratified), CRC <sup>6</sup> + OP on armed conflicts and OP on the sale of children, children prostitution and pornography.  ECHR + Protocols no. 1, 4, 6 and 7, ESC, CPT	ICERD, ICESCR, ICCPR + OP, CEDAW, CAT, CRC + OP 2
<b>Constitutionally protected human rights</b>	- Equality and non-discrimination - Right to privacy - Right to protection of the family	- Equality and non-discrimination - Right to privacy - Right to found a family - Right to efficient legal remedy if a human right is violated	- Equality and non-discrimination	- Non-discrimination - Right to justice and judicial review
<b>Number of customary unions</b>	-	-	204,000 (2005) <sup>7</sup>	118,000 (1996) <sup>8</sup>

<sup>6</sup> Declarations and reservation made upon signature and confirmed upon ratification:

(1) The Government of the French Republic declares that this Convention, particularly article 6, cannot be interpreted as constituting any obstacle to the implementation of the provisions of French legislation relating to the voluntary interruption of pregnancy.

(2) The Government of the Republic declares that, in the light of article 2 of the Constitution of the French Republic, article 30 is not applicable so far as the Republic is concerned.

<sup>7</sup> Ministère de la Justice, Infostats Justice no 89, <<http://www.justice.gouv.fr>>.

<sup>8</sup> Statistics New Zealand, New Zealand Official Yearbook 2000, Marriage and Divorce, and Family Legislation, available at <<http://www.stats.govt.nz/quick-facts/people/marriage-divorce-family-legislation.htm>>.

<b>PATERNITY</b>					
	<b>Costa Rica</b>	<b>Iceland</b>	<b>South Africa</b>	<b>Australia</b>	
<b>Population (millions)</b> Source: World Bank (2005)	4.3	295.1 thousands	45.2	20.3	
<b>Surface area (km<sup>2</sup>) (thousands)</b> Source: World Bank	51.1	1.03	1.2 millions	7.7 millions	
<b>GDP (US \$) (billions)</b> Source: World Bank (2005)	19.4	15.0	240.2	700.7	
<b>GNI per capita, Atlas method, (US \$)</b> Source: World Bank (2005)	4,590.00	46,320.00	4,960.00	32,220.00	
<b>Legal system</b>	Civil law	Civil law	Based on Roman-Dutch law and English common law	Common law	
<b>Religion</b> Source: CIA world fact book	Roman Catholic 76.3%, Evangelical 13.7% are the two major groups	Lutheran Church of Iceland 85.5%	Zion Christian 11.1%, Pentecostal/Charismatic 8.2%, Catholic 7.1% are the major groups (2001 census)	Catholic 26.4%, Anglican 20.5%, other Christian 20.5% are the major groups (2001 census)	

<p><b>Ratified International Human Rights Instruments</b></p>	<p>ICCPR + OP, ICESCR, ICERD, CEDAW, CRC, ILO No. 169 + other ILO Conventions  ACHR, Belem do pará</p>	<p>ICCPR + OP 1 and 2, ICESCR, ICERD, CEDAW + OP, CRC + OP 1 and 2, CAT  ECHR, ECAT, ESC (signed but not ratified revised charter, not bound by collective complaints procedure)</p>	<p>ICCPR + OP 1 and 2, ICERD, CEDAW + OP, CRC  African Charter on Human and Peoples' Rights + Protocol on the Rights of Women in Africa, African Charter on the Rights and Welfare of the Child</p>	<p>ICERD, ICCPR + OP 1 and 2, ICESCR, CEDAW (not the OP), CAT (not the OP), CRC + OP on the involvement of children in Armed Conflict</p>
<p><b>Constitutionally protected human rights</b></p>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Protection of the family</li> <li>- Right to privacy</li> <li>- Right to complain (amparo)</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Protection of the family</li> <li>- Right to privacy</li> <li>- Rights of children to legal protection and care</li> <li>- Right to court determination of civil rights and obligations</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to dignity</li> <li>- Right to privacy</li> <li>- Right to name and nationality</li> <li>- Right of the child to family care or parental care</li> <li>- The principle of the best interest of the child</li> <li>- Access to courts</li> </ul>	<p>Human Rights and Equal Opportunities Commission Act (not strictly constitutional)</p>

<b>DOMESTIC VIOLENCE AND RAPE</b>					
	<b>Bosnia and Herzegovina</b>	<b>South Africa</b>	<b>Canada</b>	<b>Spain</b>	<b>Honduras</b>
<b>Population (millions)</b> Source: World Bank (2005)	3.9	45.2	32.3	43.4	7.2
<b>Surface area (km (thousands))</b> Source: World Bank	51.21	1.2 million	10.0 million	505.4	112.1
<b>GDP (US \$) (billions)</b> Source: World Bank (2005)	9.4	240.2	1.1 trillion	1.1 trillion	8.0
<b>GNI per capita, Atlas method, (US \$)</b> Source: World Bank (2005)	2,440.00	4,960.00	32,600.00	25,360.00	1,190.00
<b>Legal system</b>	Civil law	Based on Roman-Dutch law and English common law	Common law (except Quebec where civil law system prevails)	Civil law	Civil law with increasing influences from common law
<b>Religion</b> Source: CIA world fact book	Muslim 40%, Orthodox 31%, Roman Catholic 15%, other 14%	Zion Christian 11.1%, Pentecostal/Charismatic 8.2%, Catholic 7.1% are the major groups (2001 census)	Roman Catholic 42.6%, Protestant 23.3% (2001 census)	Roman Catholic 94%	Roman Catholic 97%, Protestant 3%

<p><b>Ratified International Human Rights Instruments</b></p>	<p>CEDAW + OP (no reservations), CAT, ICESCR, ICCPR, ICERD, CRC  ECHR, CPT, ESC (only signed not ratified).</p>	<p>ICCPR + OP 1 and 2, ICERD, CEDAW + OP, CRC  African Charter on Human and Peoples' Rights + Protocol on the Rights of Women in Africa, African Charter on the Rights and Welfare of the Child</p>	<p>ICESCR, ICCPR + OP 1 and 2, ICERD, CEDAW + OP, CAT (but not the OP), CRC + OPs  (American Declaration of the Rights and Duties of Man)</p>	<p>ICCPR + OP 1 and 2, ICESCR, CEDAW + OP, ICERD, CAT + OP, CRC and OP on the Sale of Children, child prostitution and child pornography  ECHR, CPT, ESC</p>	<p>ICCPR + OP 1 and 2, ICESCR, CEDAW (not the OP), ICERD, CAT, CRC and OP on the Sale of Children, child prostitution and child pornography  ADRDM, ACHR, Inter-American Convention on forced disappearances of persons  Belém do Pará</p>
<p><b>Constitutionally protected human rights</b></p>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Right to privacy</li> <li>- Right to shelter</li> <li>- Right to health</li> <li>- Right to social protection</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to dignity</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Freedom from violence from public and private sources</li> <li>- Right to bodily and psychological integrity</li> <li>- Right to privacy</li> <li>- Right to housing</li> <li>- Right to healthcare</li> <li>- Right to social security and assistance</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to life</li> <li>- Right to liberty and security of person</li> <li>- Freedom from cruel treatment</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to physical and moral integrity</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Right to personal and family privacy</li> <li>- Right to petition and legal protection of rights</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to physical, psychological and moral dignity</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Right to personal intimacy, honour and family</li> <li>- Right to social security</li> <li>- Right to health protection</li> <li>- Right to housing</li> </ul>

<sup>9</sup> Consejo General del Poder Judicial, Sección de Estadística, La Violencia Domestica en la Estadística Judicial, Año 2005; Consejo General del Poder Judicial, Sección de Estadística, La Violencia Domestica en la Estadística Judicial, Año 2004, <<http://www.poderjudicial.es/ever-suite/GetRecords?Template=cgpi/principal.htm>>.

<b>Number of reported cases of domestic violence and rape</b>	-	-	-	82,750 reported cases of domestic violence (2005)	-
<b>Public health expenditure (% of GDP)</b> Source: UNDP, Human development Index (2003)	4.8	3.2	6.9	5.5	4.0
<b>Maternal mortality ratio adjusted (per 100,000 births)</b> Source: UNDP, Human development Index (2000)	31	230	6	4	110
<b>Life expectancy at birth (years)</b> Source: UNDP, Human Development Index (2004)	74.3	47.0	80.2	79.7	68.1

<b>RAPE</b>			
	<b>South Africa</b>	<b>Canada</b>	<b>Spain</b>
<b>Population (millions)</b> Source: World Bank (2005)	45.2	32.3	43.4
<b>Surface area (km<sup>2</sup>) (thousands)</b> Source: World Bank	1.2 millions <sup>*</sup>	10.0 millions <sup>*</sup>	505.4
<b>GDP (US \$)(billions)</b> Source: World Bank (2005)	240.2	1.1 trillions <sup>*</sup>	1.1 trillions <sup>*</sup>
<b>GNI per capita, Atlas method, (US \$)</b> Source: World Bank (2005)	4,960.00	32,600.00	25,360.00
<b>Legal system</b>	Based on Roman-Dutch law and English common law	Common law (except Quebec where civil law system prevails)	Civil law
<b>Religion</b> Source: CIA world fact book	Zion Christian 11.1%, Pentecostal/Charismatic 8.2%, Catholic 7.1% are the major groups (2001 census)	Roman Catholic 42.6%, Protestant 23.3% (2001 census)	Roman Catholic 94%

<p><b>Ratified International Human Rights Instruments</b></p>	<p>ICCPR + OP 1 and 2, ICERD, CEDAW + OP, CRC</p> <p>African Charter on Human and Peoples' Rights + Protocol on the Rights of Women in Africa, African Charter on the Rights and Welfare of the Child</p>	<p>ICESCR, ICCPR + OP 1 and 2, ICERD, CEDAW + OP, CAT (but not the OP), CRC + OPS</p> <p>(American Declaration of the Rights and Duties of Man)</p>	<p>ICCPR + OP 1 and 2, ICESCR, CEDAW + OP, ICERD, CAT + OP, CRC + OP on the Sale of Children, child prostitution and child pornography</p> <p>ECHR, CPT, ESC</p>
<p><b>Constitutionally protected human rights</b></p>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to dignity</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Freedom from violence from public and private sources</li> <li>- Right to bodily and psychological integrity</li> <li>- Right to privacy</li> <li>- Right to housing</li> <li>- Right to healthcare</li> <li>- Right to social security and assistance</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to life</li> <li>- Right to liberty and security of person</li> <li>- Freedom from cruel treatment</li> </ul>	<ul style="list-style-type: none"> <li>- Equality and non-discrimination</li> <li>- Right to physical and moral integrity</li> <li>- Right to life</li> <li>- Freedom from torture</li> <li>- Right to personal and family privacy</li> <li>- Right to petition and legal protection of rights</li> </ul>
<p><b>Number of reported cases of rape</b></p>	<p>54.026 rapes and attempted rapes (2005-2006)<sup>10</sup></p> <p>9.085 indecent assaults (2005-2006)<sup>11</sup></p>	<p>23.000 sexual assaults (2005)<sup>12</sup></p>	<p>6382 sexual offences (2006)<sup>13</sup></p>

<b>Adult HIV prevalence rate (adults above 15 living with HIV/Aids)</b> Source: UNICEF, country profiles	18,8%	0,3 %	0,6%
<b>Public health expenditure (% of GDP)</b> Source: UNDP, Human development Index (2003)	3.2	6.9	5.5
<b>Maternal mortality ratio adjusted (per 100,000 births)</b> Source: UNDP, Human development Index (2000)	230	6	4

<sup>10</sup> South African Police Service, Department of Safety and Security, Crime Statistics for rape from 2001 to 2006, available at [http://www.saps.gov.za/statistics/reports/crimestats/2006/\\_pdf/category/rape.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2006/_pdf/category/rape.pdf).

<sup>11</sup> South African Police Service, Department of Safety and Security, Crime Statistics from 2001 to 2006, [http://www.saps.gov.za/statistics/reports/crimestats/2006/\\_pdf/category/indecen\\_t\\_assault.pdf](http://www.saps.gov.za/statistics/reports/crimestats/2006/_pdf/category/indecen_t_assault.pdf).

<sup>12</sup> Statistics Canada – Catalogue no. 85-002, vol. 26, no. 4, <http://www.statcan.ca/english/freepub/85-002-XIE/85-002-XIE2006004.pdf>.

<sup>13</sup> Instituto de la Mujer, Estadísticas en violencia sexual según comunidades autónomas, available in Spanish at <http://www.mtas.es/mujer/mujeres/cifras/tablas/Wdelccaa.XLS>.

## Appendix 2

### Gender equality legislation

#### Gender equality legislation

Many of the countries surveyed in the present report have enacted more general gender equality laws.<sup>1</sup> These laws aim at ensuring equality between the sexes through the establishment of legal conditions on gender equality in a number of fields. If properly implemented, such legislation has the potential to play an important role in the legal and factual enhancement of gender equality. In particular, the integration and coordination of actions taken to eliminate discrimination against women ensure a more efficient and holistic approach among all actors. Although the scope of the laws and their norms differ from one country to another, a number of common key elements are identified and exemplified in the following.

- Recognition of the state's obligations in the field of gender equality and justice

As an example, a gender equality act may specifically proclaim the equality of the sexes and recognise that the state, with all its institutions, is responsible to promote and guarantee the equality of rights between men and women in conformity with the CEDAW.<sup>2</sup>

- Prohibition and definition of direct and indirect gender discrimination in all areas

Gender discrimination can be defined as “any distinction, exclusion, restriction or preference based on gender, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and freedoms in all spheres of society under equal terms”.<sup>3</sup> Direct discrimination refers to situations where an individual has been, is or may be treated less favourably than another individual in the same situation on the basis of sex.<sup>4</sup> In contrast, indirect discrimination is a situation where an apparently neutral norm, criterion or practice, equal for all, puts persons of one sex at a disadvantage compared with persons of the other sex.<sup>5</sup>

Areas covered by prohibitions of discrimination may include, for instance, education, healthcare, employment, political participation and decision-making, housing, land rights, social security and family life.<sup>6</sup>

- Prohibition and definition of sexual harassment

Unlawful acts of sexual harassment may include requests for sexual intercourse, sexual contact or other forms of sexual activity that contain an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment. Additionally, repeated, unwelcome or offensive use of language, visual material or physical behaviour of a sexual nature may constitute unlawful sexual harassment.<sup>7</sup>

- Prohibition and definition of gender-based violence

As a complement to other laws targeting gender-based violence, and as recognition of gender-based violence being a form of discrimination, a gender equality law may entail an absolute prohibition of all gender-based violence in both public and private life.<sup>8</sup> An example of a broad definition of gender-based violence is the following: “[A]ny act causing physical, mental, sexual or economic damage or suffering, as well as threats of such actions, which interfere with the enjoyment of rights and freedoms based on gender equality, in public and private life.”<sup>9</sup>

- Remedies for women subjected to prohibited discriminatory acts

Remedies entailed in a gender equality law may include a general right to instigate civil court proceedings coupled with a right to obtain compensation if a violation is found.<sup>10</sup> In sexual harassment cases, the law can demand that the harasser is fired without any labour benefits, and/or prescribe a penal sentence of imprisonment.<sup>11</sup> Other consequences for perpetrators, or persons who have not discharged their duties under the law, can be a liability to pay fines.<sup>12</sup>

- Temporary special measures to enhance equality

Many gender equality laws make exceptions for temporary special measures taken to promote equality in certain areas such as the labour market and in political representation. Thus, preferential treatment of women is allowed and does not constitute discrimination when undertaken to pursue a legitimate aim, i.e. to enhance equality.<sup>13</sup>

- Outline of the responsibilities of governmental and state institutions

An important feature of gender equality laws is the explicit division of responsibilities for envisaged measures of implementation. For instance, it is possible to assign specific tasks to ministries responsible for areas where discrimination is prohibited.<sup>14</sup>

- Required measures to be taken by the relevant authorities

Common measures include the eradication of gender-stereotyped education material and the launch of awareness-raising campaigns to the general public.<sup>15</sup> Additionally, the development of public policies and the disaggregation of statistical data are often required.<sup>16</sup> Failure to take appropriate steps to prevent discrimination, to eliminate stereotypical content of curricula or to disaggregate statistics by gender may result in fines.<sup>17</sup>

- Creation of specific and specialised national institutions

In order to ensure the implementation of a gender equality law, it seems common to establish a specialised national institution within the framework of the law. Such an institution is often responsible for supervision and follow-up, coordination of private and public stakeholders and promotion of the law and its envisaged measures.<sup>18</sup> It is also possible to establish gender equality institutions at a local level to review the implementation of the law locally, and to investigate complaints.<sup>19</sup> Moreover, national institutions may possess the power to investigate cases of discrimination *ex officio* at the request of citizens, NGOs or ministries.<sup>20</sup>

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<sup>1</sup> See e.g. Albania: Law no. 9198 of 26 February 2004 on an Equal Gender Society; Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), available at <<http://www.ilo.org/dyn/natlex/docs/SERIAL/64146/69205/F195754431/BIH64146.pdf>>; Costa Rica: Ley 7142 (1990), Ley de Promocion de la Igualdad Social de la Mujer, available in Spanish at <<http://www.inamu.go.cr/derechos/leyes/ley7142.doc>>; Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000), available in Spanish at <<http://www.inam.gob.hn/>>; Iceland: Act on the Equal Status and Equal rights of Women and Men (2000), available at <[http://eng.felagsmalaraduneyti.is/media/acrobat-enskar\\_sidur/act-equal-status.PDF](http://eng.felagsmalaraduneyti.is/media/acrobat-enskar_sidur/act-equal-status.PDF)>; New Zealand: The Human Rights Act (1993), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>.

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- <sup>2</sup> Costa Rica: Ley 7142 (1990), Ley de Promocion de la Igualdad Social de la Mujer, arts. 1-2.
- <sup>3</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 3.
- <sup>4</sup> Ibid.
- <sup>5</sup> Ibid.
- <sup>6</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), arts. 2, 5, 7-8, 11, 13-14 and 16; Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000), arts. 2-3, 31, 44, 46, 48, 74, 76 and 86.
- <sup>7</sup> New Zealand: Human Rights Act (1993), Part 2, Section 62(1)-(2).
- <sup>8</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 17.
- <sup>9</sup> Ibid.
- <sup>10</sup> Ibid.
- <sup>11</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 27; Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000), art. 60.
- <sup>12</sup> Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000), art. 86.
- <sup>13</sup> Albania: Law no. 9198 of 26 February 2004 on an Equal Gender Society, art. 10(d); Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 3; Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000), art. 81; Iceland: Act on the Equal Status and Equal rights of Women and Men (2000), art. 22; New Zealand: Human Rights Act (1993), Sections 73-74.
- <sup>14</sup> Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000).
- <sup>15</sup> Albania: Law no. 9198 of 26 February 2004 on an Equal Gender Society, arts. 1-10 and 12; Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 17; Costa Rica, Ley 7142 (1990), Ley de Promocion de la Igualdad Social de la Mujer, arts. 17-18.
- <sup>16</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 21.
- <sup>17</sup> Ibid, art. 28.
- <sup>18</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), arts. 22-23; Honduras: Decreto 34-2000, Ley de Igualdad de Oportunidades para la Mujer (2000), art. 7; see also Instituto Nacional de la Mujer at <[www.inam.gob.hn/](http://www.inam.gob.hn/)>; Iceland: Act on the Equal Status and Equal rights of Women and Men (2000), art. 3.
- <sup>19</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 24; Iceland: Act on the Equal Status and Equal rights of Women and Men (2000), art. 10.
- <sup>20</sup> Bosnia and Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 25.

## End Notes

<sup>1</sup> The notion of ‘best practices’ is further explained below.

<sup>2</sup> The understanding of the term ‘best practices’ in this report corresponds to the one used by UNESCO in its collection of Best Practices in International Migration: “By calling activities ‘Best Practices’ it is suggested that they have potentials for replication; that other ideas can originate from them; and that they can serve as an inspiration for generating policies and initiatives elsewhere.” (See <[www.unesco.org/migration](http://www.unesco.org/migration)>).

<sup>3</sup> Many of the countries surveyed in the report have enacted more general gender equality laws. Parts of these laws are also accounted for in the thematic chapters. However, appendix 2 offers a more comprehensive overview covering key elements of gender equality legislation in the surveyed countries.

<sup>4</sup> See e.g. Raoul Wallenberg Institute for Human Rights and Humanitarian Law, C. Johnsson, J. Grimheden, K. Nowak, J. Svedberg and A. Algård, *A Study on Methods and Tools for Analysis in the Work on Human Rights* (Lund, 2005), UNDP, *Indicators for Human Rights and Human Rights Based Approaches to Development in UNDP Programming: A Users Guide* (Final Draft Version March 2006); M. Green, ‘What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement’, 23 *Human Rights Quarterly* (2001) p. 1065.

<sup>5</sup> K. Tomasevski, *Preliminary report of the Special Rapporteur on the right to education*, submitted in accordance with Commission on Human Rights Resolution 1998/33, E/CN.4/1999/49, paras. 42-74; K. Tomasevski, *Human Rights Obligations in Education - The 4-A Scheme* (Wolf Legal Publishers, 2006).

<sup>6</sup> *Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health*, A/58/427 (2003), para. 53; *The right of everyone to enjoy the highest attainable standard of physical and mental health, Report of the Special Rapporteur, Paul Hunt*, E/CN.4/2004/49, paras. 41-42.

<sup>7</sup> See appendix 1 for country data on this matter.

<sup>8</sup> Legal duties of states arising under human rights treaties are often described as a three-layered obligation; to *respect, protect and fulfil*. The respect, protect and fulfil scheme was originally introduced by A. Eide, see Commission on Human Rights, *Report on the right to adequate food as a human right, A. Eide, Special Rapporteur on the Right to Food*, E/CN.4/Sub.2/1987/23, paras. 66-69. See also e.g. K. Källström and A. Eide, ‘Article 23’, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International, The Hague, 1999), p. 502; M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Kehl, 2005), pp. 37-40; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht January 22-27 1997, para. 6.

<sup>9</sup> This scheme was originally developed by K. Tomasevski (former United Nations Special Rapporteur on the right to education); see e.g. K. Tomasevski, *Human rights obligations: making education available, accessible, acceptable and adaptable*, Right to Education Primers no. 3, <<http://www.right-to-education.org>>, pp. 12-17.

<sup>10</sup> Throughout this chapter, services refer to both medical reproductive health services, including abortion, and legal or administrative complaints mechanisms.

<sup>11</sup> The terms termination of pregnancy and abortion are used as synonymous hereafter.

<sup>12</sup> See e.g. The Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights, para. 41, where a woman’s right to the widest range of family planning services is reaffirmed. However, no definition of family planning methods is provided and it is unclear whether the term also refers to abortion. The Programme of Action of the International Conference on Population and Development (ICPD), Cairo 1994, para. 7.12, provides another example of vague wording in stating that a full range of safe and effective methods should be made available in regard to family-planning. The Beijing Platform for Action, 1995, para. 94, provides another example of non-clarity in acknowledging every individual’s right to be informed and have access to safe, effective, affordable and acceptable family planning methods and other methods for regulation of fertility *which are not against the law*.

<sup>13</sup> See e.g. CEDAW, Concluding Observations, Colombia, A/54/38 (1999), para. 393; CEDAW, Concluding Observations, Sri Lanka, A/57/38 (2002), para. 283; CESCR, Concluding Observations, Nepal, E/C.12/1/Add.66 (2001), para. 55; CESCR, Concluding Observations, Chile, E/C.12/1/Add.105 (2004), para. 53; HRC, General Comment no. 28, *Equality of rights between men and women*, CCPR/C/21/Rev.1/Add.10 (2000), para. 11; HRC, Concluding Observations, Peru, CCPR/C/79/Add.72 (1996), para. 15.

<sup>14</sup> See e.g. CEDAW, Concluding Observations, Sri Lanka, A/57/38 (2002), para. 283; CESCR, Concluding Observations, Nepal, E/C.12/1/Add.66 (2001), para. 55; CESCR, Concluding Observations, Chile, E/C.12/1/Add.105 (2004), para. 52.

<sup>15</sup> See e.g. CEDAW, Concluding Observations, Sri Lanka, A/57/38 (2002), para. 283.

<sup>16</sup> See e.g. CESCR, Concluding Observations, Nepal, E/C.12/1/Add.66 (2001), para. 55; HRC, General Comment no. 28, *Equality of rights between men and women*, CCPR/C/21/Rev.1/Add.10 (2000), para. 10; HRC,

Concluding Observations, Mauritius, CCPR/CO/83/MUS (2005), para. 9; HRC, Concluding Observations, Paraguay, CCPR/C/PRY/CO/2 (2006), para. 10.

<sup>17</sup> See e.g. CEDAW, Concluding Observations, Colombia, A/54/38 (1999), para. 393; HRC, Concluding Observations, Mauritius, CCPR/CO/83/MUS (2005), para. 9; HRC, Concluding Observations, Paraguay, CCPR/C/PRY/CO/2 (2006), para. 10.

<sup>18</sup> See e.g. CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 24(m).

<sup>19</sup> See e.g. CEDAW, General Recommendation no. 24, *Women and Health* (article 12), 20<sup>th</sup> session, paras. 14 and 31(c); CEDAW, Concluding Observations, Luxembourg, A/52/38/Rev.1, Part II (1997), para. 210; CEDAW, Concluding Observations, Colombia, A/54/38 (1999), para. 393; CEDAW, Concluding Observations, Andorra, A/56/38 (2001), para. 48; ICESCR, Concluding Observations, Nepal, E/C.12/1/Add.66 (2001), para. 33; HRC, General Comment no. 28, *Equality of rights between men and women*, CCPR/C/21/Rev.1/Add.10 (2000), para. 20; HRC, Concluding Observations, Peru, CCPR/C/79/Add.72 (1996), para. 15; HRC, Concluding Observations, Mauritius, CCPR/CO/83/MUS (2005), para. 9. In addition, the 4<sup>th</sup> World Conference on Women urges states to consider the review of laws containing punitive measures against women who have undergone illegal abortions (Beijing Declaration and Programme of Action (1995), para. 106 (K)).

<sup>20</sup> See e.g. CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session, para. 22; CEDAW, General Recommendation no. 24, *Women and Health* (article 12), 20<sup>th</sup> session, para. 14; CEDAW, Concluding Observations, Turkey, A/52/38/Rev.1 (1997), para. 184.

<sup>21</sup> See e.g. HRC, General Comment no. 28, Equality of rights between men and women (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 11; CEDAW, General Recommendation no. 19, Violence against women, A/47/38 (1992), para. 22; CEDAW, General Recommendation no. 24, *Women and Health* (Article 12), 20<sup>th</sup> session 1999, para. 22. See also United Nations General Assembly, *Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment*, A/55/290 (2000), para. 5.

<sup>24</sup> United Nations Special Rapporteur on the Right to the Highest Attainable Standard of Health - Report of the Special Rapporteur, Paul Hunt, U.N. E/CN.4/2004/49, February 16, 2004, para. 30.

<sup>25</sup> CESCR, General Comment no. 14, *The right to the highest attainable standard of health* (article 12), E/C.12/2000/4, para. 35.

<sup>26</sup> See e.g. CEDAW, General Recommendation no. 24, *Women and Health* (article 12), 20<sup>th</sup> session, para. 11; CEDAW, Concluding Observations, St Lucia, CEDAW/C/LCA/CO/6 (2006), paras. 31 and 33; HRC, *Huamán v. Peru*, No. 1153/2003. In addition, the 4<sup>th</sup> World Conference on Women has stated that abortion, when not against the law, should be safe (Beijing Declaration and Platform for Action (1995), para. 106 (K)).

<sup>27</sup> See *Huamán v Peru*, Annex, Views of the Human Rights Committee, 85<sup>th</sup> session, CCPR/C/85/D/1153/2003, Nov. 2005, paras. 6-8.

<sup>28</sup> See Concluding Observations of the Human Rights Committee: Ireland, U.N. Doc. A/55/40 (2000), paras. 23–24; Concluding Observations on Morocco, U.N. Doc. CCPR/CO/82/MAR (2004), para. 29; Concluding Observations on Sri Lanka, U.N. Doc. CCPR/CO/79/LKA (2003), para. 12; and *Huamán v. Peru*, supra note 12, para. 6.3.

<sup>29</sup> Committee against Torture, Conclusion and Recommendations of the Committee against Torture: Chile, U.N. Doc. CAT/C/CR/32/5 (2004), paras. 6(j), 7(m).

<sup>30</sup> See Committee against Torture, Conclusion and Recommendations of the Committee against Torture: Peru, U.N. Doc. CAT/C/PER/CO/4, May 2006, para. 23 [*Spanish*].

<sup>31</sup> See e.g. CEDAW, Concluding Observations, Antigua and Barbuda, A/52/38/Rev.1, Part II (1997), para. 258; CEDAW, Concluding Observations, Eritrea, CEDAW/C/ERI/CO/3 (2006), paras. 22-23; CESCR, Concluding Observations, Colombia, E/C.12/1/Add.74 (2001), paras. 24 and 45; CESCR, Concluding Observations, Nepal, E/C.12/1/Add.66 (2001), paras. 32, 33 and 55; HRC, Concluding Observations, Poland, CCPR/C/79/Add.110 (1999), para. 11; CRC, Concluding Observations, Colombia, CRC/C/COL/CO/3 (2006), para. 70.

<sup>32</sup> CRC, General Comment no.4, *Adolescent health and development in the context of the Convention on the Rights of the Child*, 33<sup>rd</sup> session, 2003, paras. 7 and 27.

<sup>33</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14.2 (c).

<sup>34</sup> Special Session of the African Union, Conference of Ministers of Health 18-22 September 2006, *Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights 2007-2010*, Sp/MIN/CAMH/5(I).

<sup>35</sup> *Ibid*, p. 13.

<sup>36</sup> *Paton v. United Kingdom* (1980), *R.H. v. Norway* (1992), *Boso v. Italy* (2002) and *VO. v. France* (2002).

<sup>37</sup> *Open Door and Dublin Well Woman v. Ireland* (1992).

<sup>38</sup> *Paton v. United Kingdom* (1980), *R.H. v. Norway* (1992) and *Boso v. Italy* (2002).

- <sup>39</sup> *Tysiac v. Poland* (2007), paras. 105-108, and 114-130. See also Amicus brief by the Center for Reproductive Rights in the case of *Tysiac v. Poland*, 21 September 2005, para. 13. Accessible on <<http://www.crlp.org/pdf/AmicusECHR.92005.pdf>>.
- <sup>40</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (*entered into force* 18 July 1978), [hereinafter American Convention], art. 4.
- <sup>41</sup> Inter-American Commission on Human Rights, White and Potter (“Baby Boy Case”), Resolution No. 23/81, Case No. 2141, U.S., 6 March 1981, OAS/Ser.L/V/II.54, Doc. 9 Rev. 1, 16 October 1981, para. 19 and 30.
- <sup>42</sup> See generally IACHR: Third Report on the Situation of Human Rights in Colombia, Ch.XII, OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (26 February 1999), paras. 49-52; Fifth Report on the Situation of Human Rights in Guatemala, Ch. XIII, OEA/Ser.L/V/II.111, Doc.21 (6 April 2001); and Third Report on the Situation of Human Rights in Paraguay, Ch. VIII, OEA/Ser.L/V/II.110, Doc.52 (9 March 2001).
- <sup>43</sup> See generally Paulina Ramirez v. Mexico, at <[http://www.reproductiverights.org/ww\\_lac\\_mexico.html](http://www.reproductiverights.org/ww_lac_mexico.html)>.
- <sup>44</sup> See *ibid.*, and ‘Center and Partners Reach Landmark Settlement in Mexican Abortion Case’, at <[http://www.reproductiverights.org/ww\\_lac\\_mexico.html](http://www.reproductiverights.org/ww_lac_mexico.html)>.
- <sup>45</sup> Throughout this report, the terms customary union and *de facto* relationship are used interchangeably. These terms have been chosen over the term cohabitation, which is mainly used in Europe.
- <sup>46</sup> CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session, para. 13; HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10, paras. 2-4; CESCR, General Comment no. 16, *The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3), E/C.12/2005/4, paras. 9 and 41.
- <sup>47</sup> CRC, General Comment no. 5, General measures of implementation of the Convention on the Rights of the child (arts. 4, 42 and 44(6)), 34<sup>th</sup> session, para. 12; CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session, paras. 19-20; CESCR, General Comment No. 16, *The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3), E/C.12/2005/4, para. 22.
- <sup>48</sup> ‘*De facto* relationships’ are used as a synonym to cohabitation in this context. See e.g. CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session, paras. 13, 18 and 33; CEDAW, Concluding Observations, Czech Republic, A/53/38 (1998), para. 198; CEDAW, Concluding Observations, Romania, A/55/38 (2000), para. 318.
- <sup>49</sup> CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session, paras. 18-20, 28, 30, 31 and 33.
- <sup>50</sup> See e.g. CEDAW, Concluding Observations, New Zealand, A/58/38/Rev.1 (1998), paras. 277-278; CEDAW, Concluding Observations, Belize, A/54/38 (1999), paras. 40 and 63.
- <sup>51</sup> HRC, General Comment no. 19, *Protection of the family, the right to marriage and equality of the spouses*, 39<sup>th</sup> session, para. 2. Subsequent jurisprudence clarifies that no analogies between marriage and customary unions can be drawn in the interpretation of art. 23 of the ICCPR, which deals explicitly with marriage. HRC, M. Balaguer Santacana v. Spain, No. 417/1990, para. 10.4.
- <sup>52</sup> HRC, *Danning v. The Netherlands*, No. 180/1984, paras. 13-14. The ruling in *Danning v. the Netherlands* has later been upheld in HRC, *Sprenger v. the Netherlands*, No. 395/1990 and *Hoofdman v. the Netherlands*, No. 602/1994.
- <sup>53</sup> CESCR, Concluding Observations, Dominican Republic, E/C.12/1/Add.16 (1997), para. 15.
- <sup>54</sup> See e.g. *Lebbink v. The Netherlands* (2004), para. 36.
- <sup>55</sup> Paternity determination in regard to artificial insemination lies outside the scope of this study.
- <sup>56</sup> CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session, para. 20.
- <sup>57</sup> *Ibid.*, para. 19.
- <sup>58</sup> HRC, General Comment no. 17, *Rights of the child* (art. 24), 35<sup>th</sup> session, paras. 5-6; HRC, General Comment no. 19, *The family*, 39<sup>th</sup> session, para. 9; HRC, General Comment no. 28, *Equality of rights between men and women*, CCPR/C/21/Rev.1/Add.10, paras. 25-26; HRC, M. Balaguer Santacana v. Spain, No. 417/1990, para. 10.4.
- <sup>59</sup> HRC, M. Balaguer Santacana v. Spain, No. 417/1990, paras. 10.2 and 10.4.
- <sup>60</sup> CRC, General Comment no. 7, *Implementing child rights in early childhood*, CRC/C/GC/7, paras. 18-19.
- <sup>61</sup> CRC, Concluding Observations, Italy, CRC/124/36 (2003), para. 169; CRC, Concluding Observations, Haiti, CRC/C/15/Add.202 (2003), paras. 34-35.
- <sup>62</sup> CRC, Concluding Observations, Trinidad and Tobago, CRC/C/TTO/CO/2 (2006), paras. 37-38.
- <sup>63</sup> See e.g. *Kroon v. The Netherlands* (1994) and *Nylund v. Finland* (declared inadmissible in 1999).
- <sup>64</sup> *Nylund v. Finland* (declared inadmissible in 1999).
- <sup>65</sup> *Mikulic v. Croatia* (2002), paras. 57-66.
- <sup>66</sup> Relevant non-binding instruments include the United Nations Declaration on the Elimination of Violence against Women, A/RES/48/104, 1994, the Beijing Declaration and Platform for Action, 1995, 4<sup>th</sup> World Conference on Women (see in particular Beijing Platform for Action, D. Violence against Women), and the

Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights (see in particular paras. 18 and 38).

<sup>67</sup> See in particular CEDAW, General Comment no. 19, *Violence against women*, A/47/38 (1992) and CEDAW, A.T. v. Hungary, No. 2/2003, paras. 9.3 and 9.6.

<sup>68</sup> See e.g. CEDAW, General Comment no. 19, *Violence against women*, A/47/38 (1992), para. 15; HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 20.

<sup>69</sup> HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 11.

<sup>70</sup> HRC, General Comment no. 20, Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), 44<sup>th</sup> session (1992), para. 3.

<sup>71</sup> See Committee against Torture, “Conclusion and Recommendations of the Committee against Torture: Togo,” U.N. Doc. CAT/C/TGO/CO/1, May 2006, para. 20 [*French*] and Guatemala, U.N. Doc. CAT/C/GTM/CO/4, May 2006, paras. 16(b) and 17 [*Spanish*].

<sup>72</sup> CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 23; HRC, Concluding Observations, Mauritius, CCPR/CO/83/MUS (2005), para. 10.

<sup>73</sup> CEDAW, General Recommendation no. 21, *Equality in marriage and family relations*, 13<sup>th</sup> session (1994), para. 40; HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 24.

<sup>74</sup> CEDAW, General Recommendation no. 24, *Women and Health*, 20<sup>th</sup> session (1999), paras. 12, 15, 18 and 31; CESCR, general Comment no. 14, *The right to the highest attainable standard of health*, E/C.12/2000/4, paras. 3, 21, 35, 36 and 51.

<sup>75</sup> For a list of health consequences of intimate partner violence and sexual violence by any perpetrator see e.g. World Bank Policy Research Working Paper 3438, October 2004, A. Morrison, M. Ellsberg, S. Bott, *Addressing Gender-Based Violence in the Latin-American and Caribbean Region: A Critical review of Interventions*, p. 17 (Table 1.3). On methods for estimating the socio-economic costs of GBV see the same report at pp. 18-21. See also International Centre for Research on Women (ICRW), *How to make the law work? Budgetary implications of domestic violence policies in Latin America*, Synthesis paper July 2003, pp. 9-12.

<sup>76</sup> See e.g. CEDAW, Concluding Observations, Czech Republic, A/57/38, part III (2002), paras. 95-96; CEDAW, Concluding Observations, Estonia, A/57/38, part I (2002), para. 98.

<sup>77</sup> See e.g. CEDAW, Concluding Observations, Czech Republic, A/57/38, part III (2002), paras. 95-96; CEDAW, Concluding Observations, Malaysia, CEDAW/C/MYS/CO/2 (2006), para. 21; HRC, Concluding Observations, Azerbaijan, CCPR/CO/73/AZE (2001), para. 17; HRC, Concluding Observations, Sri Lanka, CCPR/CO/79/LKA (2003), para. 20.

<sup>78</sup> See e.g. CEDAW, Concluding Observations, Estonia, A/57/38, part I (2002), para. 98; CEDAW, Concluding Observations, Japan, A/58/38, part II (2003), para. 36; HRC, Concluding Observations, Mali, CCPR/CO/77/MLI (2003), para. 12; HRC, Concluding Observations, Sri Lanka, CCPR/CO/79/LKA (2003), para. 20; CESCR, Concluding Observations, Georgia, E/C.12/1/Add.83 (2002), para. 18; CESCR, Concluding Observations, Guatemala, E.C.12/Add.93 (2003), paras. 21 and 39. See also the Declaration on the Elimination of Violence against Women, United Nations General Assembly Resolution 48/104 (1993), A/RES/48/104, arts. 1-2, where violence against women is recognised to include physical as well as psychological violence.

<sup>79</sup> See e.g. CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 24 (j); CEDAW, Concluding Observations, Portugal, A/57/38, part I (2002), para. 320; CESCR, Concluding Observations, Poland, E/C.12/1/Add.82 (2002), para. 18; CESCR, Concluding Observations, Georgia, E/C.12/1/Add.83 (2002), paras. 18 and 36; CESCR, Concluding Observations, Guatemala, E.C.12/Add.93 (2003), para. 34.

<sup>80</sup> See e.g. CEDAW, Concluding Observations, Japan, A/58/38, part II (2003), para. 361.

<sup>81</sup> See e.g. CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), paras. 16 and 24 (g); CRC, General Comment no. 3, *HIV/AIDS and the rights of the children*, CRC/GC/2003/3, paras. 36-37; CRC, General Comment no. 4, *Adolescent health*, para. 37.

<sup>82</sup> See e.g. CRC, General Comment no. 4, *Adolescent health*, para. 37.

<sup>83</sup> See e.g. CEDAW, Concluding Observations, Czech Republic, A/57/38, part III (2002), para. 95; CEDAW, Concluding Observations, Iceland, A/57/38, part I (2002), paras. 245-246; CEDAW, Concluding Observations, Japan, A/58/38, part II (2003), para. 361.

<sup>84</sup> See e.g. CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 24 (r) (ii); CEDAW, Concluding Observations, Uruguay, A/57/38, part I (2002), paras. 196-197; CEDAW, Concluding Observations, Brazil, A/58/38, part II (2003), paras. 104 and 106; HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 24; CESCR, Concluding Observations, Brazil, E/C.12/1/Add.87 (2003), paras. 28 and 53.

- <sup>85</sup> See e.g. CEDAW, Concluding Observations, Belgium, A/57/38, part II (2002), para. 151.
- <sup>86</sup> See e.g. CEDAW, Concluding Observations, Portugal, A/57/38, part I (2002), para. 320.
- <sup>87</sup> CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 24(b).
- <sup>88</sup> See e.g. CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 24; CEDAW, A.T. v. Hungary, No. 2/2003, para. 9.6; CESCR, General Comment no. 16, *The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2005/4, para. 27; HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 11; CAT, “Conclusion and Recommendations of the Committee against Torture: Togo,” U.N. Doc. CAT/C/TGO/CO/1, May 2006, para. 20 and Guatemala, U.N. Doc. CAT/C/GTM/CO/4, May 2006, paras. 16(b) and 17.
- <sup>89</sup> See e.g. CEDAW, General Recommendation no. 19, *Violence against women*, A/47/38 (1992), para. 24 (e, f, l and t); HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), paras. 5 and 24.
- <sup>90</sup> See e.g. CRC, Concluding Observations, Cape Verde, CRC/C/15/Add.168 (2001), para. 40.
- <sup>91</sup> See e.g., ICCPR, art. 14(1).
- <sup>92</sup> CEDAW, A.T. v. Hungary, No. 2/2003, para. 9.6.
- <sup>93</sup> See e.g. HRC, General Comment no. 28, *Equality of rights between men and women* (article 3), CCPR/C/21/Rev.1/Add.10 (2000), para. 20.
- <sup>94</sup> See e.g. X and Y v. the Netherlands (1985); E and others v. the United Kingdom (2002); M.C. v. Bulgaria (2004).
- <sup>95</sup> E and others v. the United Kingdom (2002); M.C. v. Bulgaria (2004); Aydin v. Turkey (1997), paras. 83 and 86.
- <sup>96</sup> S.W. v. United Kingdom, 21 Eur. Ct. H.R. 363 (1995), para. 43.
- <sup>97</sup> X and Y v. the Netherlands (1985), paras. 22-23.
- <sup>98</sup> M.C. v. Bulgaria (2004), paras. 159, 163, 170-171 and 181-182.
- <sup>99</sup> Ibid, paras. 166 and 179-182.
- <sup>100</sup> Ibid, para. 151. See also Aydin v Turkey (1997) and X and Y v Netherlands (1985).
- <sup>101</sup> Ibid, para. 183.
- <sup>102</sup> Special Rapporteur on women’s rights of the Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: the Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, Doc. 44, March 7, 2003 [hereinafter Ciudad Juarez Report], paras. 122 and 128.
- <sup>103</sup> See generally, Flor de María Hernández Rivas v. El Salvador, Case 10.911, Report No. 7/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev., at 188 (1994); María Dolores Rivas Quintanilla v. El Salvador, Case 10.772, Report No. 6/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev., at 181 (1994); Ana, Beatriz and Celia González Pérez v. Mexico, Case 11.565, Report No. 53/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 1097 (2000).
- <sup>104</sup> Rosa Marta Cerna Alfaro and Ismael Hernández Flores v. El Salvador, Case 10.257, Report No. 10/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.81 rev.1 Doc. 6, at 125 (1992).
- <sup>105</sup> Leonor La Rosa Bustamante v. Peru, Case 11.756, Report No. 54/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 198 (1998).
- <sup>106</sup> Ana, Beatriz and Celia González Pérez v. Mexico, Case 11.565, Report No. 53/01, Inter-Am. C.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev. at 1097 (2000); Raquel Martí de Mejía v. Perú, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 (1996) at 157 and 186; and Report on the situation of human rights in Haiti, OEA/Ser.L/v/II.88 Doc. 10 rev. (1995), at paras. 133-136.
- <sup>107</sup> See Maria Mamérita Mestanza Chávez v. Peru, Case 12.191, Report No. 66/00, IACHR (2000). In 2001, Peru admitted the violations and in 2002, it agreed to indemnify the victim’s surviving husband and children, investigate and prosecute those responsible for the violations and to modify discriminatory legislation and practices.
- <sup>108</sup> Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, Inter-Am. C.H.R. OEA/Ser.L/V/II.111 Doc. 20 (2000), paras. 57-64.
- <sup>109</sup> See Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, Inter-Am. C.H.R. OEA/Ser.L/V/II.111 Doc. 20 (2000), paras. 55-56. See also Ciudad Juarez Report, paras. 69-87.
- <sup>110</sup> The due diligence standard was articulated by the Inter-American Court of Human Rights to describe state responsibility for failure to prevent and respond to human rights violations committed by non-state actors. See Velásquez Rodríguez v. Honduras, case 7920, Inter-Am. C.H.R. 35, OEA/ser.L./V./III.19, doc. 13, para. 172 (1988).
- <sup>111</sup> Inter-American Commission on Human Rights, “Report on the Situation of Human Rights in Mexico,” OEA/Ser.L/V/II.100, Doc. 7 rev. 1, September 24, 1998, para. 756.

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- <sup>112</sup> Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, Inter-Am. C.H.R. OEA/Ser.L/V/II.111 Doc. 20 (2000), para. 61.
- <sup>113</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, O.A.U. Doc. CAB/LEG/66.6, art. 1(j): "Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war."
- <sup>114</sup> Ibid, art. 4(a-j).
- <sup>115</sup> Ibid, art. 2.
- <sup>116</sup> South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996), section 5 (1)(2), Albania: Law No. 8876 of 4 April 2002 on reproductive health, arts. 6, 8, 9, 18 and 19, Law No. 8045 of 7 December 1995 on the Interruption of Pregnancy, art. 2(6), France: Public Health Code, art. L2212-1; Guyana: The Medical Termination of Pregnancy Act (1995), arts. 8(3) and 8(4), Sweden: The Abortion Act (1974: 595), art. 1
- <sup>117</sup> Guyana: Medical Termination of Pregnancy Act (1995), art. 8 (1).
- <sup>118</sup> In Albania, written consent is only required when the pregnant woman is a minor (Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 6.) The woman's husband or parent is then encouraged to participate in the decision, but the final decision still rests with the woman. In France, written consent by the woman is required in any case, whether she is minor or adult (Public Health Code art. L2212-5.).
- <sup>119</sup> In France, the pregnant woman must visit a physician twice and, after the first visit, submit her written consent to the medical intervention (Public Health Code art. L2212-5).
- <sup>120</sup> Albania: Law No. 8045 of 7 December 1995 on the Interruption of Pregnancy, art. 8.
- <sup>121</sup> Sweden: The National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 5; France: C.E., Ass., 31 Oct 1980, *Lebas*; Guyana: Medical Termination of Pregnancy Act (1995), arts. 8 (3) and 8 (4); South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996), section 5(3).
- <sup>122</sup> Sweden: The Secrecy Act, 1980:100, section 14, para. 4.
- <sup>123</sup> France: Public Health Code, art. L2212-7.
- <sup>124</sup> Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 10.
- <sup>125</sup> France: Public Health Code, art. L2212-1.
- <sup>126</sup> Guyana: The Medical Termination of Pregnancy Act (1995), art. 5, available at <[http://www.gina.gov.gy/gina\\_pub/laws/Laws/cap3205.pdf](http://www.gina.gov.gy/gina_pub/laws/Laws/cap3205.pdf).
- <sup>127</sup> South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996), section 2(1)(a).
- <sup>128</sup> Sweden: The Abortion Act (1974:595), Section 3.
- <sup>129</sup> Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, arts. 9 and 11.
- <sup>130</sup> Sweden: The Abortion Act (1974:595), arts. 3 and 6.
- <sup>131</sup> South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996) as amended by Act 38 of 2004, sections 2(1)(b) and 2(1)(c).
- <sup>132</sup> Guyana: Medical Termination of Pregnancy Act (1995), arts. 6-7.
- <sup>133</sup> France: Public Health Code, art. L2213-1.
- <sup>134</sup> One physician, one lawyer and one social worker.
- <sup>135</sup> The team consists of one chairman, two physicians, one behaviourist and one layman.
- <sup>136</sup> The foetus is deemed viable when it is able to survive outside of the uterus. The authorising team has the discretion to decide on the viability of the foetus.
- <sup>137</sup> One physician, one lawyer and one social worker.
- <sup>138</sup> The team consists of one chairman, two physicians, one behaviourist and one layman.
- <sup>139</sup> The authorising team has the discretion to decide on the viability of the foetus.
- <sup>140</sup> Physical and mental.
- <sup>141</sup> The team consists of one chairman, two physicians, one behaviourist and one layman.
- <sup>142</sup> France: The team consists of two physicians (one of the two physicians being a obstetrician gynaecologist (Public Health Code, art. L2213-1.)) and a social worker or a psychologist.
- <sup>143</sup> The team consists of one chairman, two physicians, one behaviourist and one layman.
- <sup>144</sup> Two physicians and a physician specialised in antenatal medicine.
- <sup>145</sup> Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 11; Guyana, Medical Termination of Pregnancy Act (1995), art. 6(2); South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996) as amended by Act 38 of 2004, section 2(b)(iv); Sweden: the National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 4, art. 2.
- <sup>146</sup> This is the case in Sweden for example, see the National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 4, art. 2.

- <sup>147</sup> Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 11; Sweden: The National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 4; South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996) as amended by Act 38 of 2004, section 2(1)(iii); Guyana: E-mail conversation with H. K. Singh, Guyanese lawyer, 11/10-2006.
- <sup>148</sup> See e.g. France: Public Health Code, art. R2212-10; Sweden: The National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4.
- <sup>149</sup> WHO, Safe Abortion: Technical and Policy Guidance for Health Systems (2003), pp. 32-34.
- <sup>150</sup> Ibid, pp. 35-39. A combination of the drugs Mifepristone and prostaglandin appears to be the most commonly used.
- <sup>151</sup> Albania: Ministry of Health, *The long-term strategy for the development of the Albanian health system* (2004), available at <<http://www.moh.gov.al/PdfStrategji/English%20Version.pdf>>, last visited 14/11-2006>, p. 19, Ministry of Health, *Towards a healthy country with healthy people- public health and health promotion strategy 2002-2010* (2002), available at <[http://www.moh.gov.al/PdfStrategji/strategjia\\_versioni\\_i\\_fundit.pdf](http://www.moh.gov.al/PdfStrategji/strategjia_versioni_i_fundit.pdf)>, p. 25; South Africa: Department of Health, An Evaluation of the Implementation of the Choice of Termination of Pregnancy Act (2000), pp. 8-9.
- <sup>152</sup> Ibid.
- <sup>153</sup> Albania: Ministry of Health, *The long-term strategy for the development of the Albanian health system* (2004), available at <<http://www.moh.gov.al/PdfStrategji/English%20Version.pdf>>, p. 19.
- <sup>154</sup> Interview with E. Dhembo, Lecturer, Faculty of Social Sciences, University of Tirana, previously gender and reproductive health trainer at the Gender Alliance for Development Centre in Tirana, 7/11/2006; Interview with E. Gjebrea Hoxha, Executive Director, Albanian Centre for Population and Development, 7/11/2006, Tirana. See also Ministry of Health, *The long-term strategy for the development of the Albanian health system* (2004), available at <<http://www.moh.gov.al/PdfStrategji/English%20Version.pdf>>, pp. 19-21 and 30.
- <sup>155</sup> Ministry of Health, *Towards a healthy country with healthy people- public health and health promotion strategy 2002-2010* (2002), available at <[http://www.moh.gov.al/PdfStrategji/strategjia\\_versioni\\_i\\_fundit.pdf](http://www.moh.gov.al/PdfStrategji/strategjia_versioni_i_fundit.pdf)>, p. 25.
- <sup>156</sup> South Africa: Department of Health, An Evaluation of the Implementation of the Choice of Termination of Pregnancy Act (2000), p. 14.
- <sup>157</sup> Ibid, p. 10.
- <sup>158</sup> Albania: Interview with E. Dhembo, Lecturer, Faculty of Social Sciences, University of Tirana, previously gender and reproductive health trainer at the Gender Alliance for Development Centre in Tirana, 7/11/2006; Interview with E. Gjebrea Hoxha, Executive Director, Albanian Centre for Population and Development, 7/11/2006, Tirana.
- <sup>159</sup> South Africa: Department of Health, An Evaluation of the Implementation of the Choice of Termination of Pregnancy Act (2000), p. 10.
- <sup>160</sup> France: Public Health Code, art.L2223-2; South Africa: The Choice on Termination of Pregnancy Act (1996), section 10(1)(c).
- <sup>161</sup> Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, arts. 2, 4, 13-14, Ministry of Health, Regulation no. 103, Udhezim per zbatimin e ligjit "per nderprerjen e shattzenesise, of 29 April 1996; South Africa: The Choice on Termination of Pregnancy Act (Act 92 of 1996) as amended by Act 38 of 2004, section 6, and Department of Health, Patient Rights Charter, available at <<http://www.doh.gov.za/docs/legislation/patientsright/chartere.html>>, last visited 8/3-2007>; Sweden: National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 2.
- <sup>162</sup> Ibid.
- <sup>163</sup> Sweden: National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 2, Lag (1998:531) om yrkesverksamhet på hälso- och sjukvårdens område, section 2, para.2, Administration Act (1986:223), para.8, and Government Proposition 1998/99:4, Stärkt patientinflytande, p. 49.
- <sup>164</sup> Albania: Ministry of Health, Regulation no. 103, Udhezim per zbatimin e ligjit per nderprerjen e shattzenesise, of 29 April 1996; France: Public Health Code, art. L2212-3. In Albania, extensive standardised information sheets are attached to the abortion regulations.
- <sup>165</sup> For instance, in Albania, healthcare staff must inform all women about family planning and the standardised information sheets provided to every woman requesting an abortion correspondingly include information on contraceptives. See Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 14, and Ministry of Health, Regulation no. 103, Udhezim per zbatimin e ligjit "per nderprerjen e shattzenesise, of 29 April 1996.
- <sup>166</sup> France: Public Health Code, art.L2212-9; Sweden: National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 2.
- <sup>167</sup> South Africa: The Choice on Termination of Pregnancy Act 92 of 1996, section 4; Sweden: Abortion Act (1974:595), para. 2.

- <sup>168</sup> Guyana: Medical Termination of Pregnancy Act (1995), art. 4; Compare with France: Public Health Code, art. L2212-3.
- <sup>169</sup> Guyana: Medical Termination of Pregnancy Act (1995), art. 4, and F. E. Nunes and Y. M. Delph, 'Making Abortion Law Reform Work: Steps and Slips in Guyana', *Reproductive Health Matters* 9 (1997), pp. 72-73.
- <sup>170</sup> Sweden: The Abortion Act (1974:595), para. 2.
- <sup>171</sup> United Nations Population Division, World Contraceptive Use 2005, <[http://www.un.org/esa/population/publications/contraceptive2005/2005\\_World\\_Contraceptive\\_files/WallChart\\_WCU2005.pdf](http://www.un.org/esa/population/publications/contraceptive2005/2005_World_Contraceptive_files/WallChart_WCU2005.pdf)>, last visited 4/10-2006.
- <sup>172</sup> Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana.
- <sup>173</sup> Ibid.
- <sup>174</sup> Ibid, Albanian Institute of Public Health, Albanian Institute of Statistics, Albania Ministry of Health, Centre for Disease Control and Prevention (Georgia, USA), USAID, UNFPA and UNICEF, *Albania Reproductive Health Survey 2002*, Final Report (2005), pp. 209, 224-227.
- <sup>175</sup> Swedish National Institute of Public Health, <[www.sexaktuellt.com](http://www.sexaktuellt.com)>.
- <sup>176</sup> At the end of 2005, 3 303 000 private individuals paid for a household connection to the Internet. See the Swedish National Post and Telecom Agency, *The Swedish Telecommunications Market 2005, PTS-ER-2006:23*, <<http://www.pts.se/Dokument/dokument.asp?Sectionid=&Itemid=5819&Languageid=EN>>.
- <sup>177</sup> See <<http://www.sjukvardsradgivningen.se/1177/campaignfirstpage.aspx?c=17811>>.
- <sup>178</sup> Albania: Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana; South Africa: Department of Education, National Curriculum Statement, Grades 10-12, General, Life Orientation (2003), see e.g. pp. 9-11, available at <<http://www.education.gov.za/Curriculum/SUBSTATEMENTS/Life%20Orientation.pdf>>; Sweden: Swedish National Agency for Education, *Nationella kvalitetsgranskningar 1999, Skolverkets rapport nr 180*, pp. 93-99.
- <sup>179</sup> Ibid.
- <sup>180</sup> Albania: Interview with E. Dhembo, Lecturer, Faculty of Social Sciences, University of Tirana, previously gender and reproductive health trainer at the Gender Alliance for Development Center in Tirana, 7/11/2006; Sweden: RFSU, *Låt stå! - De ska kunna sin grej* (2004), <[http://www.rfsu.se/lat\\_sta!\\_-\\_de\\_ska\\_kunna\\_sin\\_grej.asp](http://www.rfsu.se/lat_sta!_-_de_ska_kunna_sin_grej.asp)>.
- <sup>181</sup> Sweden: Ibid.
- <sup>182</sup> Albania: Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11-2006, Tirana; Sweden: The Forum for Swedish Youth Centres, *Policy programme for Sweden's Youth Centres* (in English), <<http://www.fsum.org/>>, The Secrecy Act (1980:100), section 14, art. 4.
- <sup>183</sup> Albania: Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 12; France: Public Health Code, art. L2212-10; Guyana: Medical Termination of Pregnancy Act (1995), art. 14; South Africa: The Choice on Termination of Pregnancy Act 92 of 1996, section 7; Sweden: Regulation (2001:707) on patient register at the National Board of Health [förordning om patientregister hos Socialstyrelsen], paras. 4 and 6.
- <sup>184</sup> Albania: Medical Termination of Pregnancy Act (1995), arts. 2 (3) and 3, Ministry of Health, Regulation no. 103, Udhezim per zbatimin e ligjit "per nderprerjen e shattzenesise, of 29 April 1996; France: Public Health Code, art. L2212-10; Guyana: Medical Termination of Pregnancy Act (1995), arts. 5-7; South Africa: The Choice on Termination of Pregnancy Act 92 of 1996, section 2(2). The Choice on Termination of Pregnancy Amendment Act 38 of 2004, sections 1, 6 and 7; Sweden: The Abortion Act (1974:595), para. 5, The National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 2, para. 1.
- <sup>185</sup> Albania, art. 2(4), TOP Act.
- <sup>186</sup> Sweden: The Abortion Act (1974:595), para.5; The National Board of Health and Welfare's Regulations and General Guidelines on Abortion, SOSFS 2004:4, section 2, para. 1.
- <sup>187</sup> Sweden: Lag (1998:531) om yrkesverksamhet på hälso- och sjukvårdens område, section 6, para. 1.
- <sup>188</sup> Sweden: Health and Medical Services Act (Hälso- och sjukvårdslag), 1982:763, para.2.
- <sup>189</sup> Ibid., para. 2 (a).
- <sup>190</sup> Sweden: The Secrecy Act (Sekretesslagen), 1980:100. See in particular section 7 with provisions on secrecy to protect the individual's personal life and section 14, para.4 on minors.
- <sup>191</sup> The legal regulation contains specific rules restricting the collection of information concerning abortions. See Regulation (2001:707) on patient register at the National Board of Health [förordning om patientregister hos Socialstyrelsen], paras. 4 and 6.
- <sup>192</sup> Secrecy Act (1980:100), chapter 7, arts. 1(a) and 1(c).
- <sup>193</sup> South Africa: The Choice on Termination of Pregnancy Act 92 of 1996, section 2(2). The Choice on Termination of Pregnancy Amendment Act 38 of 2004, sections 1, 6 and 7, included registered nurses who have undergone the required training in the category of professionals who may perform terminations of pregnancy

within the first 12 weeks of gestation. Previously such terminations could only be performed by medical practitioners or registered midwives who have undergone the required training.

<sup>194</sup> K. Dickson-Tetteh and D. L. Billings, *Abortion Care Services Provided by Registered Midwives in South Africa*, International Family Planning Perspectives, Volume 28, Number 3, September 2002, available in English but with French summary at <<http://www.guttmacher.org/pubs/journals/2814402.html>>.

<sup>195</sup> Mhlanga, "Abortion: development and impact in South Africa" British Medical Bulletin 2003; 67:115-126, p. 121.

<sup>196</sup> South Africa: The Choice on Termination of Pregnancy Act 92 of 1996, section 3; The Choice on Termination of Pregnancy Amendment Act 38 of 2004, section 2.

<sup>197</sup> South Africa: The Choice on Termination of Pregnancy Act 92 of 1996, sections 3 and 7-9; The Choice on Termination of Pregnancy Amendment Act 38 of 2004, sections 3-5.

<sup>198</sup> Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana; Interview with L. Ndreu, Head of the Legal Department, Ministry of Health of Albania, 8/11/2006, Tirana.

<sup>199</sup> In 1999, private clinics were granted the right to perform abortions until the end of the 12<sup>th</sup> gestational week.

<sup>200</sup> Interview with E. Gjebrea Hoxha, Executive Director, Albanian Centre for Population and Development, and A. Musta, Gynecologist, Albanian Centre for Population and Development, 7/11/2006, Tirana.

<sup>201</sup> The need for a more efficient system of supervision, licensing and accreditation is also addressed in the long-term strategy for the development of the Albanian health system. See Ministry of Health, *The long-term strategy for the development of the Albanian health system* (2004), available at <<http://www.moh.gov.al/PdfStrategji/English%20Version.pdf>>, pp. 11-15.

<sup>202</sup> Interview with E. Gjebrea Hoxha, Executive Director, Albanian Centre for Population and Development, and A. Musta, Gynecologist, Albanian Centre for Population and Development, 7/11/2006, Tirana.

<sup>203</sup> Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana.

<sup>204</sup> Sweden: The Abortion Act (1974:595), para.1. If a woman is refused an abortion before the end of the 18<sup>th</sup> week, the matter must be referred to the National Board of Health and Welfare for review. See The Abortion Act (1974:595), para. 4.

<sup>205</sup> Guyana: Medical Termination of Pregnancy Act (1995), art. 11.

<sup>206</sup> France: Public Health Code, art. L2212-8. However, public hospitals and, in general, private hospitals that participate in the provision of healthcare public service may not refuse to perform abortion on their premises. See Public Health Code, art. L2212-6.

<sup>207</sup> See e.g. F. E. Nunes and Y. M. Delph, 'Making Abortion Law Reform Work: Steps and Slips in Guyana', *Reproductive Health Matters* 9 (1997), p. 72.

<sup>208</sup> Albania: Criminal Code of the Republic of Albania, Law No. 7895 (1995) as amended until Law No. 8733 (2001), Section V, arts. 93-96; France: Public Health Code art. L2222-2 and Penal Code, art. 223-10; Guyana: Medical Termination of Pregnancy Act (1995), arts. 9 and 12 and Criminal Code, sections 79-81; South Africa: The Choice on Termination of Pregnancy Act (1996), sections 10 (1) (a),(b) and (d), and 10(2); Sweden: The Abortion Act (1974:595), arts. 9-10.

<sup>209</sup> Ibid.

<sup>210</sup> Albania: Law No. 8876 of 4 April 2002 on reproductive health, art. 17.

<sup>211</sup> South Africa: Department of Health, Patient Rights Charter, available at <<http://www.doh.gov.za/docs/legislation/patientsright/chartere.html>>.

<sup>212</sup> South Africa: Constitution of the Republic of South Africa, Act 108 of 1996, section 27(1)(a), available at <<http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1>>.

<sup>213</sup> South Africa: Ibid, section 167.

<sup>214</sup> Albania: Law No. 8876 of 4 April 2002 on reproductive health.

<sup>215</sup> Ibid, arts. 5-6, and 8-13.

<sup>216</sup> Ibid, art. 17.

<sup>217</sup> Hälso- och sjukvårdens ansvarsnämnd (HSAN), <<http://www.hsan.se/>> .

<sup>218</sup> Lag (1998:1656) om patientnämndsverksamhet m.m., arts. 1 and 2.

<sup>219</sup> Patientskadelag (1996:799), art. 12.

<sup>220</sup> Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana; Law No. 8045 of 7 December 1995 on the interruption of pregnancy, art. 19.

<sup>221</sup> Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana.

<sup>222</sup> Interview with E. Dhembo, Lecturer, Faculty of Social Sciences, University of Tirana, previously gender and reproductive health trainer at the Gender Alliance for Development Centre in Tirana, 7/11/2006.

- <sup>223</sup> Interview with N. Sinoimeri, Head of the Reproductive Health Unit, Ministry of Health of Albania, 7/11/2006, Tirana.
- <sup>224</sup> Hälso- och sjukvårdslag (1982:763), art. 26.
- <sup>225</sup> Lag (1994:137) om mottagande av asylsökande m.fl., para. 1; Förordning (1996:1357) om statlig ersättning för hälso- och sjukvård till asylsökande, para. 2; Förordning (1994:362) om vårdavgifter m.m. för vissa utlänningar, paras. 2-7.
- <sup>226</sup> SOU 2005:90, *Utländska kvinnors rätt till abort*, p. 32.
- <sup>227</sup> Socialstyrelsen, *Skilnader i kostnader mellan olika typer av preventivmedel- Problem och åtgärdsförslag inom oförändrad kostnadsram*, 2005, p. 23.
- <sup>228</sup> Lag (1994:137) om mottagande av asylsökande m.fl., para. 1; Förordning (1996:1357) om statlig ersättning för hälso- och sjukvård till asylsökande, para. 2; Förordning (1994:362) om vårdavgifter m.m. för vissa utlänningar, paras. 2-7.
- <sup>229</sup> SOU 2006:78, *Hälsa, vård och strukturell diskriminering*, p. 139, pp. 158-159; SOU 2005:90, *Utländska kvinnors rätt till abort*.
- <sup>230</sup> HRC, 4<sup>th</sup> Session, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt - Mission to Sweden, A/HRC/4/28/Add.2 (28/02/2007), paras. 72-75.
- <sup>231</sup> F. E. Nunes and Y. M. Delph, 'Making Abortion Law Reform Happen in Guyana: A Success Story', *Reproductive Health Matters* 9 (1997), p. 12.
- <sup>232</sup> Ibid, p. 12.
- <sup>233</sup> Ibid, pp. 14-15.
- <sup>234</sup> F. E. Nunes and Y. M. Delph, 'Making Abortion Law Reform Happen in Guyana: A Success Story', *Reproductive Health Matters* 9 (1997), pp. 18-20.
- <sup>235</sup> Regeringens Proposition 2002/03:35, Mål för folkhälsan, p.75.
- <sup>236</sup> Ibid, pp. 75-76.
- <sup>237</sup> Albania: Ministry of Health of Albania, *National Contraceptive Security Strategy* (2003), available at <[http://www.moh.gov.al/pdf2/CS\\_Plan\\_Eng\\_FINAL.pdf](http://www.moh.gov.al/pdf2/CS_Plan_Eng_FINAL.pdf)> and Ministry of Health of Albania, *The National Strategy on Prevention and Control of HIV/AIDS in Albania, 2004-2010* (2003), available at <<http://www.moh.gov.al/PdfStrategji/AIDS%20STRATEGY%20ENGLISH.pdf>>, pp. 31-32, and 39-40, Ministry of Health, *Towards a healthy country with healthy people- public health and health promotion strategy 2002-2010* (2002), available at <[http://www.moh.gov.al/PdfStrategji/strategjia\\_versioni\\_i\\_fundit.pdf](http://www.moh.gov.al/PdfStrategji/strategjia_versioni_i_fundit.pdf)>, France: Ibid, art. L2214-2, and art. L1411-2; South Africa: Department of Health, *Strategic Priorities for the National Health System 2004-2009* (2004), p. 9, available at <<http://www.doh.gov.za/docs/policy-f.html>>, Department of Health, *Contraception Policy Guidelines* (2002), pp. 14-17, Department of Health, *Policy Guidelines for Youth and Adolescent Health* (2001), pp. 36-42.
- <sup>238</sup> Ibid.
- <sup>239</sup> See e.g. Albania: Ministry of Health of Albania, *National Contraceptive Security Strategy* (2003), available at <[http://www.moh.gov.al/pdf2/CS\\_Plan\\_Eng\\_FINAL.pdf](http://www.moh.gov.al/pdf2/CS_Plan_Eng_FINAL.pdf)>, Ministry of Health of Albania, *The National Strategy on Prevention and Control of HIV/AIDS in Albania, 2004-2010* (2003), available at <<http://www.moh.gov.al/PdfStrategji/AIDS%20STRATEGY%20ENGLISH.pdf>>, pp. 31-32; South Africa: Department of Health, *Monitoring Review, Progress Report on the Implementation of the Comprehensive HIV and AIDS Care, Management and Treatment Programme* (September 2004), p. 11, available at <<http://www.doh.gov.za/docs/hiv-aids-progressrep.html>>, and Department of Health, *Strategic Priorities for the National Health System 2004-2009* (2004), p. 9, available at <<http://www.doh.gov.za/docs/policy-f.html>>. The allocation of funds to both male and female condoms, as part of the HIV/AIDS policy framework, is likely to be a contributing factor to an increased condom usage in South Africa.
- <sup>240</sup> South Africa: Department of Health, *Contraception Policy*, pp. 14-17.
- <sup>241</sup> Ibid, pp. 89 et seq.
- <sup>242</sup> Albanian Institute of Public Health, Albanian Institute of Statistics, Albania Ministry of Health, Centre for Disease Control and Prevention (Georgia, USA), USAID, UNFPA and UNICEF, *Albania Reproductive Health Survey 2002*, Final Report (2005).
- <sup>243</sup> South Africa: Department of Health, *An Evaluation of the Implementation of the Choice on Termination of Pregnancy Act* (2000), and Elize Delpont, e-mail correspondence 20/2/2007.
- <sup>244</sup> South Africa: Department of Health, *An Evaluation of the Implementation of the Choice of Termination of Pregnancy Act* (2000), p. 15.
- <sup>245</sup> Over the last 20 years, legislation has been enacted in, for example, the following countries: Costa Rica, Sweden, Denmark, Germany, Australia, The Netherlands, Hungary and Portugal. Note that the legal effects arising from a customary union varies greatly from country to country. In Europe, there is also a tendency of

- extending the protection to same-sex unions. See e.g. ILGA Europe, <[http://www.ilga-europe.org/europe/issues/marriage\\_and\\_partnership/same\\_sex\\_marriage\\_and\\_partnership\\_country\\_by\\_country#](http://www.ilga-europe.org/europe/issues/marriage_and_partnership/same_sex_marriage_and_partnership_country_by_country#)>
- <sup>246</sup> New Zealand: The Property (Relationships) Act (2002), section 2 (B)(1). available at <<http://rangi.knowledge-basket.co.nz/gpacts/reprint/text/2002/an/002.html>>; France: Civil Code, art. 515-1; Croatia: same sex marriages are regulated in another law, though. See Zakon o istospolnim zajednicama, 14 July 2003, Narodne novine no.116/2003. Available in Croatian at <<http://www.nn.hr/clanci/sluzbeno/2003/1584.htm>>, and in English at <<http://www.iglhr.org/site/iglhr/content.php?type=1&id=73>>.
- <sup>247</sup> This is the case in Trinidad and Tobago. See Cohabital Relationships Act (1998), art. 2(1). The complete text of the act is available in English at <<http://www.ttparliament.org/bills/acts/1998/a1998-30.pdf>>.
- <sup>248</sup> This is the case in France and New Zealand. See France: Civil Code, art. 515-1; New Zealand: The Property (Relationships) Act (2002), section 2 (B)(1).
- <sup>249</sup> This is the case in Croatia. See Zakon o istospolnim zajednicama, 14 July 2003, Narodne novine no.116/2003.
- <sup>250</sup> New Zealand has a flexible system where the court is instead free to attach such weight to any matter, as it deems appropriate. The Property (Relationships) Act (2002), section 2(B)(3)(a) and (b).
- <sup>251</sup> Civil Code, art. 515-1.
- <sup>252</sup> Civil Code, art. 515-2.
- <sup>253</sup> Both Croatia and New Zealand has a requirement of three years while Trinidad and Tobago requires five years of living together. Trinidad and Tobago: Cohabital Relationships Act (1998), art. 7; Croatia: Obiteljski Zakon (hereinafter: Family Act), 16 July 2003, Narodne novine no.116/2003, art. 3. It replaced the 1999 Family Act “with the purpose of consolidating the legislation on human rights with the provisions of the European Union” (cf. Combined second and third periodic reports of Croatia, CEDAW/C/CRO/2-3) and was revised in 2004, but the definition of non-marital union remains unchanged. Available in Croatian at <<http://www.nn.hr/clanci/sluzbeno/2003/1583.htm>>; New Zealand: The Property (Relationships) Act (2002), section 1(C)(2)(b).
- <sup>254</sup> Trinidad and Tobago: Cohabital Relationships Act (1998), art. 7.
- <sup>255</sup> New Zealand: The Property (Relationships) Act (2002), sections 14(A)(2) and 85.
- <sup>256</sup> Croatia: Obiteljski Zakon (hereinafter: Family Act), 16 July 2003, Narodne novine no.116/2003, art. 3. This act replaced the 1999 Family Act “with the purpose of consolidating the legislation on human rights with the provisions of the European Union” (cf. Combined second and third periodic reports of Croatia, CEDAW/C/CRO/2-3). It was revised in 2004, but the definition of non-marital union remains unchanged. Available in Croatian at <<http://www.nn.hr/clanci/sluzbeno/2003/1583.htm>>.
- <sup>257</sup> This is the case in Trinidad and Tobago. See Cohabital Relationships Act (1998), art. 7.
- <sup>258</sup> Ibid, art. 10 (1) (a) and (b).
- <sup>259</sup> The Property (Relationships) Act (2002), section 2(B)(2). For an example of legal reasoning concerning the existence of a *de facto* relationship, see e.g. the judgement of OM v. SF (FAM: 2005-000266, 10 February 2006), available at <<http://www.justice.govt.nz/family/legislation/decisions.asp>>.
- <sup>260</sup> The Property (Relationships) Act (2002), section 2(B)(3)(a) and (b).
- <sup>261</sup> Trinidad and Tobago: Cohabital Relationships Act (1998), art. 2(1); New Zealand: The Property (Relationships) Act (2002), sections 52(A) and (B) .
- <sup>262</sup> Civil Code, art. 515-2.
- <sup>263</sup> See Family Act, art. 3 for heterosexual partners, and Zakon o istospolnim zajednicama (hereinafter Act on Same-Sex Unions), 22 July 2003, Narodne novine no.115/2003, art. 1 for homosexual partners.
- <sup>264</sup> See for instance in Croatia: art. 249(2) of the 1999 Family Act (Obiteljski Zakon, hereinafter: Family Act), 16 July 2003, Narodne novine no. 116/2003, available in Croatian at <<http://www.nn.hr/clanci/sluzbeno/2003/1583.htm>>, cited in Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined second and third periodic reports of Croatia, CEDAW/C/CRO/2-3, 27 October 2003.
- <sup>265</sup> New Zealand: The Property (Relationships) Act (2002), section 21; Trinidad and Tobago: Cohabital Relationships Act (1998), arts. 25 (1) and 29(1).
- <sup>266</sup> New Zealand: The Property (Relationships) Act (2002), section 21F; Trinidad and Tobago: Cohabital Relationships Act (1998), art. 28(1).
- <sup>267</sup> Ibid.
- <sup>268</sup> Croatia: art. 249(2) of the 1999 Family Act (Obiteljski Zakon (hereinafter: Family Act), 16 July 2003, Narodne novine no. 116/2003, art. 3, available in Croatian at <<http://www.nn.hr/clanci/sluzbeno/2003/1583.htm>>).
- <sup>269</sup> Civil Code, art. 515-4.
- <sup>270</sup> Trinidad and Tobago: Cohabital Relationships Act (1998), art. 25(1); New Zealand: The Property (Relationships) Act (2002), section 21.

- <sup>271</sup> The Family Proceedings Act (1980), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; Trinidad and Tobago: Cohabital Relationships Act (1998), art. 10(1)(a) (i) and (ii). In this context, the act defines a child as a child under the age of 12 years or a physically disabled or mentally ill child under the age of 18 years; Croatia: arts. 3, 217 of the 1999 Family Act.
- <sup>272</sup> New Zealand: The Family Proceedings Act (1980), section 64, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; Trinidad and Tobago: Cohabital Relationships Act (1998), art. 15(1)(a), (b) and (c). In this context, the act defines a child as a child under the age of 12 years or a physically disabled or mentally ill child under the age of 18 years.
- <sup>273</sup> New Zealand: The Family Proceedings Act (1980), section 64, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; Trinidad and Tobago: Cohabital Relationships Act (1998), art. 10(1)(a)(i) and (ii). In this context, the act defines a child as a child under the age of 12 years or a physically disabled or mentally ill child under the age of 18 years, art. 15(1)(a), (b) and (c).
- <sup>274</sup> Cohabital Relationships Act (1998), art. 10(1)(a)(i) and (ii). In this context, the act defines a child as a child under the age of 12 years or a physically disabled or mentally ill child under the age of 18 years.
- <sup>275</sup> Trinidad and Tobago: Cohabital Relationships Act (1998), arts. 17 and 19. Croatia: art. 222 of the 1999 Family Act.; New Zealand: The Family Proceedings Act (1980), section 70A, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>.
- <sup>276</sup> Croatia: Supra note 85, Obiteljski Zakon (hereinafter: Family Act), 16 July 2003, Narodne novine no. 116/2003, art. 99(1), Constitution of the Republic of Croatia, adopted by the Parliament 22 Dec. 1990 (*Narodne novine*, no. 56), art. 63; France: Civil Code, art. 371-1; New Zealand: The Care of Children Act (2004), section 4, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>.
- <sup>277</sup> New Zealand: The Care of Children Act (2004), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>, section 4. France: Civil Code, art. 371-1.
- <sup>278</sup> Ministry of Justice, *Government Response to Law Commission Report on New Issues in Legal Parenthood*, <<http://www.justice.govt.nz/pubs/reports/2006/govt-response-law-commission-legal-parenthood/chapter-5.html>>.
- <sup>279</sup> Cohabital Relationships Act (1998), art. 24(2). The complete text of the act is available in English at <<http://www.tparliament.org/bills/acts/1998/a1998-30.pdf>>.
- <sup>280</sup> Ibid, art. 29(2).
- <sup>281</sup> Respectively Code of Criminal Procedure, article 244 and 2003 Penalty Execution Act granting to cohabitants the same visitation right as spouses have.
- <sup>282</sup> New Zealand: The Domestic Violence Act (1995), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>, section 4(1); Trinidad and Tobago: Sexual Offences (Amendment) Act (2000), arts. 3-5 (amending sections 2, 4 and 4A of the Sexual Offences Act), available at <<http://www.tparliament.org/bills/acts/2000/a2000-31.pdf>>; Domestic Violence Act (1999), section 3, available at <<http://www.tparliament.org/bills/acts/1999/a1999-27.pdf>>.
- <sup>283</sup> Croatia: Social Welfare Act 1997; Health Protection Act 2001; France: Social Security Code (Code de la sécurité sociale), art. L766-1-1.
- <sup>284</sup> General Taxation Code (Code général des impôts), art. 6. French version available at <<http://www.legifrance.gouv.fr>>.
- <sup>285</sup> In Croatia it is required that the property division is registered for it to be valid in relation to a third party. Art. 249(2) of the 1999 Family Act. Obiteljski Zakon (hereinafter: Family Act), 16 July 2003, Narodne novine no. 116/2003, art. 3. It replaced the 1999 Family Act “with the purpose of consolidating the legislation on human rights with the provisions of the European Union” (cf Combined second and third periodic reports of Croatia, CEDAW/C/CRO/2-3) and was revised in 2004, but the definition of non-marital union is unchanged. Available in Croatian at <<http://www.nn.hr/clanci/sluzbeno/2003/1583.htm>>. The New Zealand law demands that the contract is signed and witnessed by a third party, as well as preceded by counselling. The Property (Relationships) Act (2002), section 21 F. In Trinidad and Tobago, partners can enter a separation agreement on the division of property. The agreement must be in writing and witnessed by an attorney-at-law. See Cohabital Relationships Act (1998), arts. 26-28.
- <sup>286</sup> Croatia: Obiteljski Zakon (hereinafter: Family Act), 16 July 2003, Narodne novine no. 116/2003, art. 249; New Zealand: The Property (Relationships) Act (2002), sections 1(C)(1) and (3).
- <sup>287</sup> The Property (Relationships) Act (2002), section 8(1).
- <sup>288</sup> Ibid, section 9.
- <sup>289</sup> That is the case in the Trinidad and Tobago legislation, see Cohabital Relationships Act (1998), art. 2(1).
- <sup>290</sup> Civil Code, art. 515-5-1 and 515-5-2, listing the property which remains the individual property of each partner after the conclusion of a contract forming the customary union.

- <sup>291</sup> New Zealand: The Property (Relationships) Act (2002), sections 15 and 15(A); Trinidad and Tobago: Cohabitation Relationships Act (1998), arts. 10 (1)(a) and (b) and 21
- <sup>292</sup> The Property (Relationships) Act (2002), sections 52(A) and 52(B).
- <sup>293</sup> Under the Croatian 2003 Inheritance Act, cohabitants enjoy the same rights as spouses. The Act does not require any minimum duration of the cohabitation, but it stipulates that the surviving partner is entitled to inherit only if the cohabitation meets the criteria required for a marriage to be valid. See Nove Nasljednopravno Uredjenje (new Inheritance Act). Opća redakcija Mihajlo Dika. Zgb., Narodne Novine, 2003, art. 8, sec.2. In New Zealand, the right to inheritance is connected to initiating a procedure at the right time before the competent authority. The Administration Act (1969), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>, section 77.
- <sup>294</sup> The Property (Relationships) Act (2002), sections 61, 62 and 75.
- <sup>295</sup> Administration Act (1969), section 77 (C), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; The Property (Relationships) Act (2002), sections 52(A) and (B).
- <sup>296</sup> The Distribution of Estates Act (2000), available at <<http://www.ttparliament.org/bills/acts/2000/a2000-28.pdf>>.
- <sup>297</sup> Ibid, art. 2 (amending the Succession Act).
- <sup>298</sup> Ibid. See also H. Thompson-Ahye, *The Law and the Cohabitant in Trinidad and Tobago: Balancing Whose Interests? Pursuing Whose Priorities?*, Paper presented at the 12<sup>th</sup> World Conference of the International Society of Family Law (ISFL), July 2005, Salt Lake City, pp. 10-11.
- <sup>299</sup> Ibid, art. 3(c) (amending section 25 of the Administration of Estates Ordinance).
- <sup>300</sup> Code général des impôts, art. 777bis (loi no 99-944 du 15 novembre 1999). The surviving partner benefits from a 75,000 euros deduction, then 40% rate for the first 15,000 euros and 50% afterwards, and 20% tax deduction on the actual cash value of the residence of the deceased partner on the day of the death. Available in French at <<http://www.legifrance.gouv.fr>>.
- <sup>301</sup> Civil Code, arts. 515-6, 763, 831-3 and 831-3. These protective provisions were added in 2006 when the law of succession was reformed.
- <sup>302</sup> Croatia: Constitution, art. 26; France: Nouveau code de procédure civile, art. 543. Exceptions to the rule exist: in order to improve the justice system and relieve the tribunals, certain judgements cannot be appealed. They are judgements issued in disputes involving 4000 euros or less. (Code de l'organisation judiciaire, art. R311-2 and L-331-2). Those judgements can however be brought before the *Cour de cassation*, court of last resort in civil cases, judging on points of law and procedure, not on facts; New Zealand: The Family Proceedings Act (1980), sections 174-175, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; Trinidad and Tobago: Cohabitation Relationships Act (1998), art. 3(1).
- <sup>303</sup> Trinidad and Tobago: Ibid, art. 3(2).
- <sup>304</sup> Croatia: arts. 3, 217, 222 and 249(2) of the 1999 Family Act; New Zealand: The Property (Relationships) Act (2002), sections 24(1)(c) and 75; Trinidad and Tobago: Cohabitation Relationships Act (1998), art. 8.
- <sup>305</sup> Code de l'organisation judiciaire, art. L312-2.
- <sup>306</sup> The Family Courts Act (1980), section 11, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>.
- <sup>307</sup> See e.g. Bastide de la M., Rt. Hon. Mr. Justice, President of the Caribbean Court of Justice, *Caseflow Management in a Unified Family Court: A Caribbean Experiment*, presentation at the Commonwealth Law Conference 2005, <<http://www.caribbeancourtofjustice.org/speeches/president/CLC05.pdf>>.
- <sup>308</sup> New Zealand: The Family Proceedings Act (1980), available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; Trinidad and Tobago: The Family Proceedings Act (2004), available at <<http://www.ttparliament.org/bills/acts/2004/a2004-02.pdf>>.
- <sup>309</sup> France: Aide Juridique, information leaflet by the Ministry of Justice, available at <<http://www.justice.gouv.fr/publicat/aidejuridi.pdf>>; New Zealand: Legal Services Act (2000), sections 7, 9 and 15, available at <[http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes)>; Knight Ross, Barrister and member of the New Zealand Law Society's Family Law Section, email exchange 7 December 2006; Trinidad and Tobago: Dennis Janet, Attorney at Law and Mediator at the Family Court, email exchange 1 December 2006.
- <sup>310</sup> In France, PACS agreements can be filed at any of the 473 *tribunaux d'instance* (462 in France and 11 overseas, in the DOM-TOM), or abroad at a French consular or diplomatic office. See Civil Code, art. 515-3. Addresses of the *tribunaux d'instance* are available on the website of the Ministry of Justice at <<http://www.justice.gouv.fr>>. In New Zealand, 58 family courts are spread throughout the country; each of them is attached to a district court. See Family Courts of New Zealand homepage, *Quick Facts*, <<http://www.justice.govt.nz/family/about/facts.asp>>.

- <sup>311</sup> Bastide de la M., Rt. Hon. Mr. Justice, President of the Caribbean Court of Justice, *Caseflow Management in a Unified Family Court: A Caribbean Experiment*, presentation at the Commonwealth Law Conference 2005, <<http://www.caribbeancourtofjustice.org/speeches/president/CLC05.pdf>>, p. 2.
- <sup>312</sup> Lambert Peterson, B.A., Magistrate, Family Court of Trinidad and Tobago, *All things to all (wo)men: the family court of Trinidad and Tobago pilot project*, Conference paper, International Society of Family Law, 12<sup>th</sup> World Conference 2005, <<http://www.law2.byu.edu/isfl/saltlakeconference/papers/author.htm>>, p. 3.
- <sup>313</sup> France: K. Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe', 26:1 *Law and Policy* (January 2004) pp. 33-55; New Zealand: Knight Ross, Barrister and member of the New Zealand Law Society's Family Law Section, e-mail exchange 7 December 2006.
- <sup>314</sup> France: Tribunal d'Instance du premier arrondissement de Paris, telephone conversation 19 January 2007; New Zealand: Family Courts of New Zealand web page, *How can I get help?* <<http://www.justice.govt.nz/family/court/get-help.asp>>.
- <sup>315</sup> France: See information on the Ministry of Justice website at <<http://www.justice.gouv.fr/motscles/mcm5.htm>>; New Zealand: Legal Services Agency web page, *Community Law Centres*, <<http://www.lsa.govt.nz/general/community.htm>>. Two out of the 27 centres are still pilot centres. The Legal Services Agency has a role in the establishment of community law centres, but they are individually managed.
- <sup>316</sup> New Zealand: Legal Services Agency web page, *Community Law Centres*, <<http://www.lsa.govt.nz/general/community.htm>>.
- <sup>317</sup> Citizens Advice Bureaux web page, *About us*, <<http://www.cab.org.nz/about/index.html>>.
- <sup>318</sup> Citizens Advice Bureaux web page, *Social Policy*, <<http://www.cab.org.nz/issues/index.html>>.
- <sup>319</sup> Legal Services Agency web page, *Research*, <<http://www.lsa.govt.nz/general/research.htm>>.
- <sup>320</sup> Dennis Janet, Attorney at Law and Mediator at the Family Court, e-mail conversation 1 December 2006.
- <sup>321</sup> Radhica Seunarine, Court Librarian at the Family Court of Trinidad and Tobago, e-mail conversation 7 December 2006; Dennis Janet, Attorney at Law and Mediator at the Family Court, e-mail conversation 16 December 2006.
- <sup>322</sup> The Property (Relationships) Act (2002).
- <sup>323</sup> Statistics New Zealand, *New Zealand Official Yearbook 2000, Marriage and Divorce, and Family Legislation*, available at <<http://www.stats.govt.nz/quick-facts/people/marriage-divorce-family-legislation.htm>>.
- <sup>324</sup> Statistics New Zealand, *Demographic Trends 2004, Marriage and Divorce*, available at <<http://www.stats.govt.nz/analytical-reports/dem-trends-04/part-3.htm>>.
- <sup>325</sup> E. Bartlett, Ministry of Justice of New Zealand, *Family Court Statistics 2004*, available at <<http://www.justice.govt.nz/pubs/reports/2006/family-court-statistics-2004/chapter-2-3.html#242>>.
- <sup>326</sup> In 1990, the Central Statistical Office estimated that more than 40,000 couples lived in customary unions. See H. Thompson-Ahye, *The Law and the Cohabitant in Trinidad and Tobago: Balancing Whose Interests? Pursuing Whose Priorities?*, Paper presented at the 12<sup>th</sup> World Conference of the International Society of Family Law (ISFL), July 2005, Salt Lake City, p. 2.
- <sup>327</sup> S. Sheppard, 'How TT's laws cover common-law union', *Trinidad and Tobago's Newsday*, 22 January 2006, <<http://newsday.co.tt/news/0,33909.html>>.
- <sup>328</sup> H. Thompson-Ahye, *The Law and the Cohabitant in Trinidad and Tobago: Balancing Whose Interests? Pursuing Whose Priorities?*, Paper presented at the 12<sup>th</sup> World Conference of the International Society of Family Law (ISFL), July 2005, Salt Lake City, pp. 2-10.
- <sup>329</sup> D. Hrabar, 'Legal Status of Cohabitants in Croatia', in J. Scherpe and N. Yassari (eds.), *Die Rechtsstellung nichtehelicher Lebensgemeinschaften: The Legal Status of Cohabitants* (Mohr Siebeck, 2005), pp. 399-400.
- <sup>330</sup> According to D. Hrabar, 'Legal Status of Cohabitants in Croatia', in *Beiträge zum ausländischen und internationalen Privatrecht* (Max-Planck-Institut für ausländisches und internationales Privatrecht) p. 403.
- <sup>331</sup> French Constitution adopted by referendum 28 Sept 1958, promulgated 4 October 1958, Titre V, art. 34. Available in English at <<http://www.assemblee-nationale.fr/english/8ab.asp>>.
- <sup>332</sup> Civil Code, arts. 515-1 to 515-7: on contractual non-marital unions (*Pacte de Solidarité Civile*) and 515-8: on *de facto* unions (*concubinage*). For a complete English version of the Civil Code, see: <<http://195.83.177.9/code/liste.phtml?lang=uk&c=22>>. As mentioned, this report only deals with the contractual union due to the limited protection offered to *de facto* unions under French law.
- <sup>333</sup> Rapport d'information no. 3383 déposé devant l'Assemblée Nationale par la Commission des affaires culturelles, familiales et sociales lors des discussions parlementaires. Available in French at <<http://www.assemblee-nationale.fr/11/rap-info/i3383.asp>>.
- <sup>334</sup> See e.g. J-P. Michel: "Il n'est pas acceptable que plusieurs millions de nos concitoyens se trouvent ainsi privés d'un cadre légal nouveau leur offrant une sécurité juridique qu'ils appellent de leurs vœux." At <<http://www.assemblee-nationale.fr/11/propositions/pion1118.asp>>.

- <sup>335</sup> Civil Code, art. 515-3-1. PACS is written in the margin of the birth certificate of each partner with indication of the identity of the other partner. For non-French nationals born outside of France, similar information is entered into the register held in the court office of the *tribunal de grande instance de Paris*.
- <sup>336</sup> See Institut National des Statistiques (INSEE), <<http://www.insee.fr>>.
- <sup>337</sup> The scope of this study is limited to procedures leading to a paternity determination in accordance with the terms of reference provided by the Commissioner. Paternity determination may also be relevant in other contexts such as immigration. However, that lies outside the reach of this study, which is focusing on paternity determination as a means to enhance gender equality.
- <sup>338</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>; Australian Government, *Changes to the Family Act, A New Family Law System*, Fact sheet 2 (2006); Costa Rica: Ley 8101 (2001), Ley de Paternidad Responsable; Iceland: Act in Respect of Children (2003), available at <<http://www.barn.is/page.asp?id=128&pid=35>>.
- <sup>339</sup> Costa Rica: Ley 5476, Código de Familia (1973), art. 69, available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>.
- <sup>340</sup> Iceland: Act in Respect of Children (2003), art. 2; South Africa: Children's Act, Act 38 of 2005, sections 20 and 21(1)(a), available at <<http://www.info.gov.za/gazette/acts/2005/a38-05.pdf>>; Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12, 69P-Q, <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>. In the Australian context, the word parentage is used instead of paternity. Hence, the legal provisions have been made gender neutral as parentage encompasses both mother and father.
- <sup>341</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12, 69P, <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>.
- <sup>342</sup> Ibid, Part VII, Division 12, 69Q.
- <sup>343</sup> Australia: Child Support Agency, <<http://www.csa.gov.au/payee/parentage.aspx>>.
- <sup>344</sup> Australia: CRC, Initial reports of States parties due in 1993: Australia. 01/02/96, CRC/C/8/Add.31, para. 279; South Africa: E. Delpont, telephone conversation 20 February 2007.
- <sup>345</sup> See e.g. Australia: NSW Registry of Birth, Death and Marriages, <<http://www.bdm.nsw.gov.au/births/registerABirth.htm>>; South Africa: E. Delpont, telephone conversation 20 February 2007.
- <sup>346</sup> See e.g. Australia: NSW Registry of Birth, Death and Marriages, <<http://www.bdm.nsw.gov.au/births/addFathersDetToBirth.htm#ApplicationForm>>. A statutory declaration from the father has to be signed by both parents and witnessed by a qualified witness, normally a lawyer.
- <sup>347</sup> Iceland: Act in Respect of Children (2003), available at <<http://www.barn.is/page.asp?id=128&pid=35>>, art. 1.
- <sup>348</sup> Iceland: Act in Respect of Children (2003), available at <<http://www.barn.is/page.asp?id=128&pid=35>>, art. 7.
- <sup>349</sup> Iceland: see *Statement concerning the paternity of a child and a request for the acknowledgement of paternity and child support*, available at <<http://dkm.is/forms/>>.
- <sup>350</sup> Iceland: Act in Respect of Children (2003), art. 7.
- <sup>351</sup> Ibid, art. 4; See also *Request of blood analysis (DNA)*, available at <<http://dkm.is/forms/>>.
- <sup>352</sup> Iceland: Act in Respect of Children (2003), art. 4.
- <sup>353</sup> Costa Rica: Ley 8101 (2001), Ley de Paternidad Responsable. Note also that this law is only applicable to births after 28 April 2001.
- <sup>354</sup> Ibid, arts. 1 (reforming art. 54 of the Ley Orgánica del Tribunal Supremo de Elecciones y del registro Civil, Ley 3504 (1965)), and 2 (addendum to art. 54 bis of the Ley Orgánica del Tribunal Supremo de Elecciones y del registro Civil, Ley 3504 (1965)).
- <sup>355</sup> Ibid.
- <sup>356</sup> Costa Rica: National Institute of Women (INAMU), *Las preguntas más frecuentes sobre la ley de paternidad responsable*, pp. 13 and 17.
- <sup>357</sup> See e.g. Costa Rica: Ley 5476, Código de Familia (1973), art. 95, available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>.
- <sup>358</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part X, 94 and 96AA, available at <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>; Family Court web page, *Appeal Procedures* (Booklet), pp. 2-3, <[http://www.familycourt.gov.au/presence/resources/file/eb000a47a115acb/Appeal\\_procedures.pdf](http://www.familycourt.gov.au/presence/resources/file/eb000a47a115acb/Appeal_procedures.pdf)>; Costa Rica: Ley 5476, Código de Familia (1973), art. 98 bis (m), available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>; Iceland: Act in Respect of Children (2003), art. 78; South Africa: Children's Act No. 38 (2005), section 51.

- <sup>359</sup> Costa Rica: Ley 5476, Código de Familia (1973), arts. 91-99. See full text in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>; Iceland: Act in Respect of Children (2003), art. 10; Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12, 69U, [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/).
- <sup>360</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12, 69U, <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>.
- <sup>361</sup> Costa Rica: Ley 5476, Código de Familia (1973), art. 72, available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>.
- <sup>362</sup> Iceland: Act in Respect of Children (2003), art. 21. In this respect, the national laws of Iceland, Sweden and Finland are very similar. None of the countries allow a man who thinks that he is the natural father of a child to instigate proceedings challenging the biological paternity of an already registered father.
- <sup>363</sup> Iceland: Government of Iceland, Ministry of Justice and Ecclesiastical Affairs, *Iceland's Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights Pursuant to Article 40 of the Covenant* (2004), paras. 7(3) and 122. The report is available at <<http://dkm.is/media/Skyrslur/ICCPRofficial.pdf>>.
- <sup>364</sup> South Africa: Children's Act, Act 38 of 2005, section 26 (2), available at <<http://www.info.gov.za/gazette/acts/2005/a38-05.pdf>>.
- <sup>365</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12., 69W (1); See e.g. the case of TNL & CYT (2005) FamCA 77 (23 February 2005), paras. 25-32.
- <sup>366</sup> Australia: the case of TNL & CYT (2005) FamCA 77 (23 February 2005), paras. 33-34.
- <sup>367</sup> Costa Rica: Ley 5476, Código de Familia (1973), arts. 98-98 bis, available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>; Iceland: Act in Respect of Children (2003), art. 15.
- <sup>368</sup> Iceland: Act in Respect of Children (2003), art. 15. Nevertheless, the affected parties can appeal an order to the Supreme Court.
- <sup>369</sup> Australia: see e.g. the case between G (respondent) and H (appellant), Appeal No. 20 of 1992 File No. B8999 of 1991 (1993) FLC 92-380 16 Fam LR 525 Children, para. 18; Costa Rica: Ley 5476, Código de Familia (1973), art. 98, available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>; South Africa: Children's Act, Act 38 of 2005, section 37, available at <<http://www.info.gov.za/gazette/acts/2005/a38-05.pdf>>.
- <sup>370</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12, 69Y-69Z, <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>, and the case between G (respondent) and H (appellant), Appeal No. 20 of 1992 File No. B8999 of 1991 (1993) FLC 92-380 16 Fam LR 525 Children, paras. 20 and 34-37; Costa Rica: Ley 5476, Código de Familia (1973), art. 98, available in Spanish at <<http://www.poder-judicial.go.cr/salasegunda/normativa>>; South Africa: Children's Act, Act 38 of 2005, section 37, available at <<http://www.info.gov.za/gazette/acts/2005/a38-05.pdf>>.
- <sup>371</sup> South Africa: Children's Act, Act 38 of 2005, section 36, available at <<http://www.info.gov.za/gazette/acts/2005/a38-05.pdf>>.
- <sup>372</sup> Australia: Family Law Regulations 1984, Part IIA, Parentage testing procedures and reports, 21N, available at <[http://www.austlii.edu.au/au/legis/cth/consol\\_reg/flr1984223/](http://www.austlii.edu.au/au/legis/cth/consol_reg/flr1984223/)>; Costa Rica: National Institute of Women (INAMU), *Frequent questions regarding the law of responsible paternity*, p. 25; Iceland: *Paternity Analysis Form*, available at <<http://dkm.is/forms/>>; South Africa: Human genetics policy guidelines for the management and prevention of genetic disorders, birth defects and disabilities (Department of Health) 41, available at <<http://www.doh.gov.za/docs/policy/humangenetics.pdf>>, and National Health Laboratory Service, Parentage testing, pp. 3-4, available at <[http://www.nhls.ac.za/diag\\_parentage.html](http://www.nhls.ac.za/diag_parentage.html)>.
- <sup>373</sup> Costa Rica: Ley 8101 (2001), Ley de Paternidad Responsable, art. 1 (reforming art. 54 of the Ley Orgánica del Tribunal Supremo de Elecciones y del registro Civil, Ley 3504 (1965). Australia: Family Law Regulations 1984 no. 426 as amended, Part IIA, Parentage testing procedures and reports, 21D, available at <[http://www.austlii.edu.au/au/legis/cth/consol\\_reg/flr1984223/](http://www.austlii.edu.au/au/legis/cth/consol_reg/flr1984223/)>. See also NATA's web page for more detailed information on accreditation, <<http://www.nata.asn.au/>>, and NATA's media statement on paternity testing, <<http://www.nata.asn.au/index.cfm?objectid=93137E40-01BF-A672-24368AA3B97F53E2>>. Iceland: Genetic examinations in paternity cases are carried out by the Department of Pathology at the University Hospital of Iceland. See *Paternity Analysis Form*, available at <<http://dkm.is/forms/>>.
- <sup>374</sup> See e.g. Australia: Report by the Australian Law Reform Commission, reflecting the law as at 14 March 2003. ALRC 96 Essentially Yours: The Protection of Human Genetic Information in Australia, Chapters 10, paras. 10.18 and 11, para.11.15s. Available at <<http://beta.austlii.edu.au/au/other/alrc/publications/reports/96/index.html>>.
- <sup>375</sup> Ibid, 35.102-35.107; Australian Law Reform Commission, ALRC 96: *Essentially Yours: The Protection of Human Genetic Information in Australia*, Government Response to Recommendations, p. 39, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~3NEWFinal\\_response\\_6\\_December\\_2005.pdf/\\$file/3NEWFinal\\_response\\_6\\_December\\_2005.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~3NEWFinal_response_6_December_2005.pdf/$file/3NEWFinal_response_6_December_2005.pdf)>; Family Law Act 1975,

amendments up to Act No. 151 of 2006, Part VII, Division 12, 69ZC,

<[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>.

<sup>376</sup> Australia provides an example of this with a Privacy Act and a specific Privacy Commissioner. See Privacy Act 1988, amendments up to Act no. 170, Part III, Division 2, and Part IV, divisions 2-3, available at <<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/frameLodgmentAttachments/409069FCA BD20271CA25725C008385B5>>; Privacy Commissioner's web site, <<http://www.privacy.gov.au/>>.

<sup>377</sup> See e.g. Australia: Medical Board of Australian Capital Territory, <<http://www.medicalboard.act.gov.au/pages/content.asp?IntContId=145&IntCatId=12>>; or Australian Medical Council's list of medical boards, <<http://www.amc.org.au/board.asp>>; South Africa: Health Professions Amendment Bill (2006), available at <<http://www.ecdo.gov.za/uploads/files/230906110836.pdf>>.

<sup>378</sup> Costa Rica: National Institute of Women (INAMU). Frequent questions regarding the law of responsible paternity, p. 25.

<sup>379</sup> See e.g. Australia: Genetic Technologies Ltd,

<<http://www.gtg.com.au/HumanDNATesting/index.asp?menuid=070.100.090>>.

<sup>380</sup> Australia: Family Court of Australia, Annual Report 2005/2006, Part 3, Report on court performance, pp. 39-42, available at

<[http://www.familycourt.gov.au/presence/resources/file/eb00004ba45722b/Part\\_3\\_Court\\_Performance\\_AR06.pdf](http://www.familycourt.gov.au/presence/resources/file/eb00004ba45722b/Part_3_Court_Performance_AR06.pdf)>.

<sup>381</sup> Costa Rica: National Institute of Women (INAMU), Frequent *questions regarding the law of responsible paternity*, p. 23.

<sup>382</sup> Costa Rica: Ramirez, Suiyen, Identity Constructions and Life Project Area, National Institute of Women (INAMU), e-mail conversation, 4 January 2007.

<sup>383</sup> See e.g. Costa Rica: Universidad de Costa Rica, Consultorios Jurídicos,

<[http://www.ucr.ac.cr/consultorios\\_juridicos.php](http://www.ucr.ac.cr/consultorios_juridicos.php)>.

<sup>384</sup> Costa Rica: Instituto Nacional de las Mujeres (INAMU), Servicios que brinda el INAMU y otras instituciones, Consultorio de Paternidad Responsable, Niñez y Adolescencia,

<<http://www.inamu.go.cr/servicios/>>.

<sup>385</sup> Costa Rica: Tribunal Supremo de Elecciones, Inscripción de nacimiento de persona nacida en una institución hospitalar, <[http://www.tse.go.cr/servicios/nac\\_hosp.htm](http://www.tse.go.cr/servicios/nac_hosp.htm)>.

<sup>386</sup> South Africa: Foundation for Human Rights, *The Role of the Foundation for Human Rights in the "16 Days of Activism" Campaign (2003-2005) Report 2005*, pp. 16-17, available in English at

<[http://www.fhr.org.za/article.php?a\\_id=7&PHPSESSID=7247013853b00ffc95ffe399fa38a35f](http://www.fhr.org.za/article.php?a_id=7&PHPSESSID=7247013853b00ffc95ffe399fa38a35f)>.

<sup>387</sup> See e.g. Australia: Genetic Technologies Ltd,

<<http://www.gtg.com.au/HumanDNATesting/index.asp?menuid=070.100.130>>.

<sup>388</sup> Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 12, 69X (4),

<[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>; State and territory legislation on the status of children are available in full text at

<[http://www.weblaw.edu.au/weblaw/display\\_page.phtml?WebLaw\\_Page=Children+%26+the+Law](http://www.weblaw.edu.au/weblaw/display_page.phtml?WebLaw_Page=Children+%26+the+Law)>.

<sup>389</sup> Australia: Details of the procedure available on the website of DNALabs, a NATA accredited centre, at

<<http://www.dnalabs.com/>>.

<sup>390</sup> Australia: Commonwealth Legal Aid Priorities, para. 1.4,

<[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(0C3FC6E500CE9F81CFAAA22DF670141F\)~Legal\\_Aid\\_Priorities\\_and\\_Guidelines\\_2004-2008.pdf/\\$file/Legal\\_Aid\\_Priorities\\_and\\_Guidelines\\_2004-2008.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(0C3FC6E500CE9F81CFAAA22DF670141F)~Legal_Aid_Priorities_and_Guidelines_2004-2008.pdf/$file/Legal_Aid_Priorities_and_Guidelines_2004-2008.pdf)>.

<sup>391</sup> Australia: Commonwealth Legal Aid Guidelines, Family Law Guidelines, Guideline 8, Paternity, para. 8.1.

<sup>392</sup> Costa Rica: I. Vega, *Inscripción de los hijos e hijas de madres solteras y paternidad responsable. Estudio exploratorio realizado con mujeres atendidas en el Hospital de las Mujeres y el Hospital San Juan de Dios*, University of Costa Rica, 2001, available in Spanish at

<<http://ccp.ucr.ac.cr/libros/paternidad/pdf/paternidad.pdf>>.

Iceland: Act in Respect of Children (2003), art. 7, available at <<http://www.barn.is/page.asp?id=128&pid=35>>, and *Statement concerning the paternity of a child and a request for the acknowledgement of paternity and child support*, available at <<http://dkm.is/forms/>>.

<sup>393</sup> Ibid.

<sup>394</sup> Ibid.

<sup>395</sup> Consejo nacional de la Niñez y la Adolescencia (National Council of the Child and Youth). See Ley 8101 (2001), Ley de Paternidad Responsable, art. 6, and Ley 7739 (1998) Codigó de la Niñez y la Adolescencia, arts. 170-178.

<sup>396</sup> Costa Rica: Ramirez, Suiyen, Identity Constructions and Life Project Area, National Institute of Women (INAMU), e-mail conversation, 4 January 2007.

<sup>397</sup> Australia: Family Court of Australia: <<http://www.familycourt.gov.au/presence/connect/www/home/>>, specific information for children (with focus on divorce/splitting up), links and contacts to all Family Court of

- Australia locations and family law registries, which, attached to each family court, answer enquiries of a procedural and practical nature, and make forms available. For information on legal centres, see e.g. chapter 4: *Supporting Access to Justice for Cases With Merit*, pp. 88-89, available at <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~0ch+4+amended+access+to+justice+chapter.pdf/\\$file/0ch+4+amended+access+to+justice+chapter.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~0ch+4+amended+access+to+justice+chapter.pdf/$file/0ch+4+amended+access+to+justice+chapter.pdf)>. Information on family centres is available on the website of the Australian Government (Attorney General Department) at <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_Familyrelationshipcentres](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_Familyrelationshipcentres)>.
- <sup>398</sup> Costa Rica: Ramírez, Suiyen, Identity Constructions and Life Project Area, National Institute of Women (INAMU), e-mail conversation, 4 January 2007.
- <sup>399</sup> Costa Rica: Instituto Nacional de las Mujeres, Comisión de Paternidad Responsable, *Las preguntas más frecuentes sobre la ley de paternidad responsable* (2005), available at <<http://www.inamu.go.cr/Documentacion/publicaciones/Documentos/2005/Paternidad.pdf>>.
- <sup>400</sup> Iceland: Act in Respect of Children (2003), art. 1; Government of Iceland, Iceland's Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights pursuant to Article 40 of the Covenant (April 2004), paras. 121-122; Australia: Family Law Act 1975, amendments up to Act No. 151 of 2006, Part VII, Division 1, 60B(2)(a), <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>; Australian Government, *Changes to the Family Act, A new family law system*, Fact sheet 2 (2006); Costa Rica: Ley 7739 (1998) Código de la Niñez y la Adolescencia, art. 30, available in Spanish at <[http://www.pgr.go.cr/scij/busqueda/normativa/normas/nrm\\_repartidor.asp?param1=NRTC&nValor1=1&nValor2=43077&nValor3=45411&strTipM=TC](http://www.pgr.go.cr/scij/busqueda/normativa/normas/nrm_repartidor.asp?param1=NRTC&nValor1=1&nValor2=43077&nValor3=45411&strTipM=TC)>.
- <sup>401</sup> Australia: Australian Government, *Changes to the Family Act, A new family law system*, Fact sheet 2 (2006).
- <sup>402</sup> Ibid; Family Law Act 1975, amendments up to Act No. 151 of 2006, <[http://www.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/)>.
- <sup>403</sup> Australia: Australian Bureau of Statistics (Australian Bureau of Statistics 2001, Births, Australia, 2000, cat. no. 3301.0, ABS, Canberra): <<http://www.abs.gov.au/ausstats/abs@.nsf/7d12b0f6763c78caca257061001cc588/acf29854f8c8509eca2571b00010329b!OpenDocument>>.
- <sup>404</sup> Australia: Australian Law Reform Commission, ALRC 96: *Essentially Yours: The Protection of Human Genetic Information in Australia*, (this report reflects the law as at 14 March 2003), Part I. Other Contexts, p. 35. Parentage Testing, <<http://www.austlii.edu.au/au/other/alrc/publications/reports/96/index.html>>.
- <sup>405</sup> Costa Rica: National Institute of Women (INAMU), *Responsible Paternity Law number 8101* (2001), p. 3, available in English at <<http://www.inamu.go.cr/Documentacion/publicaciones/Legislacion/2001/responsible-paternity-law.pdf>>.
- <sup>406</sup> Ibid, p. 5; National Institute of Women (INAMU), *Frequent questions regarding the law of responsible paternity*, pp. 9-11; Ley 8101 (2001), Ley de Paternidad Responsable, art. 6.
- <sup>407</sup> Costa Rica: Ley 7739 (1998) Código de la Niñez y la Adolescencia, arts. 5, 23 and 30, available in Spanish at <[http://www.pgr.go.cr/scij/busqueda/normativa/normas/nrm\\_repartidor.asp?param1=NRTC&nValor1=1&nValor2=43077&nValor3=45411&strTipM=TC](http://www.pgr.go.cr/scij/busqueda/normativa/normas/nrm_repartidor.asp?param1=NRTC&nValor1=1&nValor2=43077&nValor3=45411&strTipM=TC)>.
- <sup>408</sup> Costa Rica: National Institute of Women (INAMU), *Responsible Paternity Law number 8101* (2001), p. 4, available in English at <<http://www.inamu.go.cr/Documentacion/publicaciones/Legislacion/2001/responsible-paternity-law.pdf>>.
- <sup>409</sup> Costa Rica: National Institute of Women (INAMU), *Responsible Paternity Law number 8101* (2001), pp. 2-3, available in English at <<http://www.inamu.go.cr/Documentacion/publicaciones/Legislacion/2001/responsible-paternity-law.pdf>>.
- <sup>410</sup> Costa Rica: INAMU, *Responsabilidades compartidas en la crianza de las niñas e niños*, available in Spanish at <<http://www.inamu.go.cr/acciones/proyectos-de-vida/responsabilidades.php#politicas>>. See also T. Aguilar, *Costa Rica: Ley de Paternidad Responsable cambia patrones de población*, available at the Inter American Institute of Human Rights official web site, <[http://www.iidh.ed.cr/comunidades/DerechosMujer/noticia\\_despliegue.aspx?Codigo=2489](http://www.iidh.ed.cr/comunidades/DerechosMujer/noticia_despliegue.aspx?Codigo=2489)>.
- <sup>411</sup> South Africa: A contra-example is the South African law the Sexual Offence Bill aims at replacing. Common law addresses the issue of rape with a gender-specific perspective in that it sets an irrefutable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse (as cited in clause 2(7)(a) of the Bill). In order to better protect women, a provision of the Bill specifically addresses the case of female victims: clause 1(1)(a) protects women against indecent acts involving contact with their breasts.
- <sup>412</sup> Canada: Criminal Code, sections 271-278. For a complete English version, see <<http://lois.justice.gc.ca/en/C-46/index.html>>. With the same aim of dealing more efficiently with the issue of rape, or 'sexual assault', the Criminal Code was subsequently significantly amended in 1992 and 1997.
- <sup>413</sup> Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), arts. 178-183, available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>.

- <sup>414</sup> South Africa: Sexual Offence Bill, clauses 1, 3 and 4.
- <sup>415</sup> Canada: Criminal Code, section 273.1(1) defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question”.
- <sup>416</sup> Spain distinguishes between the crime of sexual aggression which involves violence or intimidation and sexual abuse where neither violence nor intimidation is involved but where the consent of the victim is lacking. The absence of consent is thus expressly referred to as a constituting element of the offence of sexual abuse (see Código Penal, arts.178-183.). South Africa does not refer to the notion of consent but of ‘unlawfulness’ (Sexual Offences Bill, clause 2); nevertheless, a comparison of Canadian and South African legislations indicates that what would constitute a lack of consent in Canada would be qualified as unlawful in South Africa.
- <sup>417</sup> Canada: Criminal Code, sections 265(3) and 273.1(2); Spain, Código Penal, arts.178, 180(1)(4), 181(3) and (4), 182(2) and 183(2); South Africa, Sexual Offences Bill, clauses 2(2)(a) and 2(3)(a), (b) and (c). Coercive circumstances can include the application, threat or fear of application of force to the complainant or to another person as well as the exercise and abuse of trust or authority.
- <sup>418</sup> Canada: Criminal Code, section 265(3); South Africa, Sexual Offences Bill, clauses 2(2)(b) and 2(4). Fraud can include acts committed under false pretences or by fraudulent means. In South Africa, the intentional failure of a person to disclose that he or she is infected by a life-threatening sexually transmissible infection is considered as a fraud. This provision thus targets the HIV/Aids epidemic.
- <sup>419</sup> Canada: Criminal Code, section 273.1(2); South Africa: Sexual Offences Bill, clauses 2(5)(a) to (e). In South Africa, where a person is at the time of the act asleep; unconscious; in an altered state of consciousness; under the influence of any medicine, alcohol or drug; or mentally impaired, he or she is considered to be incapable in law of appreciating the nature of the act, i.e. he or she cannot consent to the act.
- <sup>420</sup> Canada: see Supreme Court judgements, R v. M. (1994), 89 C.C.C. (3d) 96 (S.C.C.), and R. v. Ewanchuk (1999), 131 C.C.C. (3d) 481, para. 31.
- <sup>421</sup> Canada: R. v. Ewanchuk (1999), 131 C.C.C. (3d) 48 (S.C.C.), para. 42.
- <sup>422</sup> Canada: Criminal Code, section 273.2.
- <sup>423</sup> Canada: Criminal Code, section 150.1 (14 years); Spain: Código Penal, art. 181(2) (13 years); South Africa: Sexual Offences Bill, clause 2(5)(f) (12 years).
- <sup>424</sup> Canada: Criminal Code, section 153. In these cases, the age limit is 18 years instead of 14.
- <sup>425</sup> Canada: Criminal Code, section 150.1(4); South Africa: Sexual Offences Bill, clause 9. It is however common that mistake of age is prohibited as a defence when the minor is under a certain age, and when the accused was in a position of authority *vis-à-vis* the minor.
- <sup>426</sup> Canada: Criminal Code, section 278; South Africa, Sexual Offences Bill, clauses 2(6) and 5(b); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 1.
- <sup>427</sup> Canada: Criminal Code, section 278; South Africa, Sexual Offences Bill, clauses 2(6) and 5(b).
- <sup>428</sup> Spain: Ley Orgánica 1/2004 de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 33-41, amending the Penal Code. See further in the chapter on domestic violence and the section on its criminalisation.
- <sup>429</sup> Canada: Supreme Court, R. v. Chase, [1987] 2 S.C.R. 293, para. 302.
- <sup>430</sup> Spain: Código Penal, arts.178-183.
- <sup>431</sup> See e.g. Canada: House of Commons Debates, XVII at 20039 (Hon. Jean Chrétien).
- <sup>432</sup> Canada: Supreme Court, R. v. Chase, [1987] 2 S.C.R. 293, para. 302.
- <sup>433</sup> Spain: Código Penal, arts. 179, 182(1) and 183(2). For example, the penalty for sexual aggression is one to four years imprisonment; where the act involved penetration, the sanction is raised to six to 12 years imprisonment.
- <sup>434</sup> South Africa: Sexual Offences Bill, clause 2(1) provides: “A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.” See, in general, L. Artz and H. Combrinck, *Defining rape and sexual assault*, submission to the Portfolio Committee on Justice and Constitutional Development on the Criminal Law (Sexual Offences) Amendment Bill, August 2006.
- <sup>435</sup> South Africa: Sexual Offences Bill, clauses 1, 3, and 4. The offences are indecent acts (no penetration at all), sexual violation (penetration with an object) and oral genital sexual violation (oral penetration).
- <sup>436</sup> Canada: Criminal Code, sections 271-273.
- <sup>437</sup> Ibid.
- <sup>438</sup> Spain: Código Penal, arts. 178-183
- <sup>439</sup> See e.g. South Africa: Sexual Offences Bill, clause 18.
- <sup>440</sup> Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), arts. 109-126, available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>.

- <sup>441</sup> Canada: Most provincial police have a specialised sexual assault unit, for instance British Columbia, Saskatchewan, Newfoundland and Labrador, Ontario (e.g. Toronto: <<http://www.torontopolice.on.ca/sexcrimes/>>), Alberta (Calgary) and Manitoba (Winnipeg); Spain: Lola Cidoncha, Coordinator of the Center of Attention for Sexual Aggression Victims of Cádiz, Madrid, telephone conversation 29 January 2007.
- <sup>442</sup> Spain: Lola Cidoncha, Coordinator of the Center of Attention for Sexual Aggression Victims of Cádiz, Madrid, telephone conversation 29 January 2007.
- <sup>443</sup> Canada: *A Victim's Guide to the Canadian Criminal Justice System: Questions and Answers*, prepared by the Canadian Resource Centre for Victims of Crime, p. 25, available at <[http://www.crcvc.ca/docs/A\\_Victims\\_Guide\\_to\\_the\\_Canadian\\_CJS.pdf](http://www.crcvc.ca/docs/A_Victims_Guide_to_the_Canadian_CJS.pdf)>.
- <sup>444</sup> South Africa: South African Police Service, National Policy Guidelines for Victims of Sexual Offences, Support for Victims of Sexual Offences (1998), available at <[http://www.doj.gov.za/2004dojsite/policy/guide\\_sexoff/sexoff\\_guidelines1998.htm](http://www.doj.gov.za/2004dojsite/policy/guide_sexoff/sexoff_guidelines1998.htm)>.
- <sup>445</sup> South Africa: *ibid.*
- <sup>446</sup> See e.g. *Rape in America: A Report to the Nation*, Crime Victims Research and Treatment Center, Charleston, S.C., 1992; R. Hirschowitz, S. Worku and M. Orkin, 'Quantitative research findings on rape in South Africa', *StatsSA* 2000; R. Jewkes and N. Abrahams, 'The epidemiology of rape and sexual coercion in South Africa: an overview', 55:7 *Social Science and Medicine* (2002) pp. 1231-1244.
- <sup>447</sup> Canada: see e.g. Alberta Solicitor General and Public Security Home, *Information Guide for Victims of Sexual Assault*, available at <[http://www.solgen.gov.ab.ca/victim/downloads/sexual\\_assault\\_victims\\_guide.pdf](http://www.solgen.gov.ab.ca/victim/downloads/sexual_assault_victims_guide.pdf)>; South Africa: see leaflet published by South African Department of Justice, *Victims of Sexual Offences: What You Should Know!*, available at <[http://www.doj.gov.za/2004dojsite/brochure/1998\\_victims%20of%20sexual%20offences.pdf](http://www.doj.gov.za/2004dojsite/brochure/1998_victims%20of%20sexual%20offences.pdf)>.
- <sup>448</sup> South Africa: see leaflet published by the Department of Justice, *Victims of Sexual Offences: What You Should Know!*
- <sup>449</sup> Canada: *The Devastation of Sexual Assault*, February 2006, information paper prepared by the Canadian Resource Centre for Victims of Crime, available at: <[http://www.crcvc.ca/docs/sexual\\_assault.pdf](http://www.crcvc.ca/docs/sexual_assault.pdf)>.
- <sup>450</sup> Canada: Bill C-16, Sex Offender Information Registration Act (SOIRA), 16 February 2004, available at <<http://www.parl.gc.ca/37/3/parlbus/chambus/house/bills/summaries/c16-e.pdf>>.
- <sup>451</sup> *Ibid.* For information on the National Sex Offender Registry, see <[http://www.rcmp-grc.gc.ca/techops/nsor/index\\_e.htm](http://www.rcmp-grc.gc.ca/techops/nsor/index_e.htm)>.
- <sup>452</sup> South Africa: A Sexual Offences and Community Affairs (SOCA) Unit was established in 1999. Its responsibilities cover sexual offences, gender-based violence, child justice and maintenance. The National Prosecuting Authority was established in terms of the National Prosecuting Authority Act 32 of 1998. See, in general, <<http://www.info.gov/aboutgovt/justice/npa.htm>>.
- <sup>453</sup> South Africa: see <<http://www.info.gov.za/aboutgovt/justice/npa.htm#sexual>>.
- <sup>454</sup> South Africa: Department of Justice, National Policy Guidelines for Victims of Sexual Offences, National Guidelines for Prosecutors in Sexual Offence Cases (1998), available at <[http://www.doj.gov.za/2004dojsite/policy/guide\\_sexoff/sexoff\\_guidelines1998.htm](http://www.doj.gov.za/2004dojsite/policy/guide_sexoff/sexoff_guidelines1998.htm)>.
- <sup>455</sup> *Ibid.*
- <sup>456</sup> *Ibid.*
- <sup>457</sup> South Africa: see e.g. S. P. Walker and D. A. Louw, 'The South African court for sexual offences', 26 *International Journal of Law and Psychiatry* (2003) pp. 80-85. By May 2005, 54 sexual offences courts had been established. The conviction rate of these courts has been 62%.
- <sup>458</sup> South Africa: *ibid.*, p.81; Vera Institute of Justice, Bureau of Justice Assistance, *Thuthuzela Care Centres: Has Treatment of Rape Survivors Improved since 2000?, A Study of Rape Survivors in the Western Cape* (November 2004), pp. 2-5, available at <[http://www.vera.org/publication\\_pdf/380\\_728.pdf](http://www.vera.org/publication_pdf/380_728.pdf)>; UNICEF South Africa, *Thuthuzela Care Centres*, available at <[http://www.unicef.org/southafrica/hiv\\_aids\\_998.html](http://www.unicef.org/southafrica/hiv_aids_998.html)>.
- <sup>459</sup> Canada: Criminal Code, section 486.2; South Africa: Sexual Offences Bill, section 15(4).
- <sup>460</sup> South Africa: Sexual Offences Bill, section 15(4), and Criminal Procedure Act 51 of 1977 [SAPL4], section 170A(4): the Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries. Often, they are social workers by profession. See also, in general, <<http://www.info.gov.za/aboutgovt/justice/npa.htm#sexual>>.
- <sup>461</sup> Canada: Criminal Code, section 486.3; South Africa: Sexual Offences Bill, section 15(4).
- <sup>462</sup> Principle recalled in the Canadian Criminal Code, section 486(1).
- <sup>463</sup> Canada: Criminal Code, section 486; South Africa: Sexual Offences Bill: section 15(4).
- <sup>464</sup> Canada: Criminal Code, section 486.4; South Africa: Sexual Offences Bill: section 15(4).
- <sup>465</sup> Canada: Criminal Code, sections 486.1(2), 486.2(2) and 486.3(2); South Africa: Sexual Offences Bill, section 15(1)-(2).

<sup>466</sup> Ibid.

<sup>467</sup> Canada: Criminal Code, sections 486.1(1), 486.2(1) and 486.3(1). The Code distinguishes between cases where the protection is granted in principle and where it is a mere possibility for the judge. In the first series of cases, the judge may however decide not to grant the said protection where he or she thinks the order would interfere with the proper administration of justice.

<sup>468</sup> Canada: In 1992, subsequent to a Supreme Court judgement, Bill C-49 amended the Code and is codified as sections 276 and 277 of the Criminal Code. See also Supreme Court, R. v. Darrach, 2 S.C.R. 443 (2000), where the constitutionality of the new provisions were upheld.

<sup>469</sup> Canada: The provisions of this 'rape shield law' are said to offer the most important protection. It is argued that subsequent to their adoption, the number of reported cases of sexual assault has increased significantly (see *Sexual Assault and Offender Conviction Rates*, research project for the Sexual Assault Network, University of Ottawa, Faculty of Law, available at <<http://www.sanottawa.com/conviction.pdf>>). This analysis is however contested (see for instance *Sexual Assault in Canada, Sociological Explanations for Crime and Deviance*, Crim 204, Tricia Sutton, Spring 1999, available at <<http://web.mala.bc.ca/crim/sutton.htm>>).

<sup>470</sup> Canada: Criminal Code, sections 276(1) and 276(2).

<sup>471</sup> Ibid., section 277.

<sup>472</sup> Ibid., section 278.1. Personal records encompass medical, psychiatric, employment, child welfare and social services records, personal journals and diaries.

<sup>473</sup> Ibid., section 278.3(3).

<sup>474</sup> Canada: Supreme Court, R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577, 22 August 1991. The case entails arguments pro and contra the rape shield laws.

<sup>475</sup> Canada: The Victim's Bill of Rights, Complaint's Process, <<http://www.gov.mb.ca/justice/victims/pdf/complaintprocess.pdf>>. The Bill of Rights is legally binding.

<sup>476</sup> The section on support services in the chapter on domestic violence is based on the Spanish gender violence law. In Spain, where rape occurs between two persons involved in a sentimental relationship, it falls within the scope of the gender violence law; victims thus benefit from the support services established by that law.

<sup>477</sup> Good examples of provision of services in culturally appropriate ways exist in Canada. Some victim service agencies offer programmes specifically for ethno-cultural or visible minority groups, including Aboriginal peoples. Among the victim service agencies contacted, 16% reported having programmes for South Asians (e.g. East Indian and Punjabi), 8% for East and South East Asians such as Chinese, 6% for persons from Latin, Central or South American origins and 18% for individuals from a variety of other origins. Report and tables available at <<http://www.justice.gc.ca/en/ps/voc/publications/juristats/85-002-xpe-v24-n11/p6.html>>.

<sup>478</sup> Good examples of provision of services in different languages exist in Canada. A study conducted by Statistics Canada in 2002 found that informal interpreters (57%), such as family and friends, were the method most frequently used to provide help to victims unable to speak English or French. This was followed by voluntary interpreters (48%), paid interpreters (42%) and staff members who could speak other languages (32%). Moreover, 20% of services indicated that they had staff or volunteers who were able to communicate in an Aboriginal language. Full report available at <<http://www.justice.gc.ca/en/ps/voc/publications/juristats/85-002-xpe-v24-n11/p6.html>>. British Columbia, for example, hosts more than 200 victim service programmes which all provide interpretation services for all the major languages spoken in the province (see the Ministry of Public Safety and Solicitor General of British Columbia at <[http://www.pssg.gov.bc.ca/victim\\_services/](http://www.pssg.gov.bc.ca/victim_services/)>).

<sup>479</sup> In a study conducted in Canada, 90% of services reported to be able to accommodate persons with challenges in mobility, with about six in ten stating they are able to accommodate services for persons with hearing (63%) or visual impairments (60%). Full report available at <<http://www.justice.gc.ca/en/ps/voc/publications/juristats/85-002-xpe-v24-n11/p6.html>>.

<sup>480</sup> South Africa: UNICEF South Africa, *Thuthuzela Care Centres*; Government Innovators Network (Harvard University, John F. Kennedy School of Government), *Efficient Management of Sexual Offences Cases, 2003 Winner, National Project, South Africa*, available at <<http://www.innovations.harvard.edu/awards.html?id=6035>>.

<sup>481</sup> Thuthuzela is a Xhosa word meaning to care or comfort. Vera Institute of Justice, Bureau of Justice Assistance, *Thuthuzela Care Centres: Has Treatment of Rape Survivors Improved since 2000?, A Study of Rape Survivors in the Western Cape* (November 2004), p. 1.

<sup>482</sup> South Africa: Government Innovators Network (Harvard University, John F. Kennedy School of Government), *Efficient Management of Sexual Offences Cases, 2003 Winner, National Project, South Africa*. The Department of Justice, the South African Police Services and the Departments of Health and Social Development established the centres jointly. Responsibility now lies with the Sexual Offences and Community Affairs Unit at the National Prosecuting Authority.

<sup>483</sup> South Africa: UNICEF South Africa, *Thuthuzela Care Centres*.

- <sup>484</sup> South Africa: Vera Institute of Justice, Bureau of Justice Assistance, *Thuthuzela Care Centres: Has Treatment of Rape Survivors Improved since 2000? A Study of Rape Survivors in the Western Cape* (November 2004), pp. 2-5; UNICEF South Africa, *Thuthuzela Care Centres*.
- <sup>485</sup> See CASAC at <<http://www.casac.ca/english/home.htm>>.
- <sup>486</sup> See e.g. Sexual Assault Centres in Edmonton, at <<http://www.sace.ab.ca>>.
- <sup>487</sup> See e.g. C. Fong, 'Post-exposure prophylaxis for HIV infection after sexual assault: When is it indicated?', 18 *Emergency Medicine Journal* (2001) p. 243.
- <sup>488</sup> Canada: Pamphlet published by the University of Alberta Sexual Assault Centre: *Reporting a Sexual Assault to the Police, Edmonton Area*, available at <<http://www.uofaweb.ualberta.ca/SAC/pdfs/Reporting.PDF>>.
- <sup>489</sup> Canada: *The Devastation of Sexual Assault*, February 2006, information paper prepared by the Canadian Resource Centre for Victims of Crime.
- <sup>490</sup> South Africa: Department of Health, *The primary healthcare package for South Africa – A set of norms and standards*, available in English at <<http://www.doh.gov.za/docs/policy-f.html>>. The services to be delivered include counselling and referral of victims, STD (sexually transmitted diseases) prophylaxis and HIV testing, emergency contraception, care of injuries, medico-legal advice and documentation of evidence.
- <sup>491</sup> South Africa: Department of Health, *The primary healthcare package for South Africa – A set of norms and standards*.
- <sup>492</sup> See e.g. World Health Organization (WHO), *Summary Country Profile for HIV/AIDS Treatment Scale-Up for South Africa*, available at <[http://www.who.int/3by5/support/june2005\\_zaf.pdf](http://www.who.int/3by5/support/june2005_zaf.pdf)>. The total adult HIV prevalence rate is 21.5 %.
- <sup>493</sup> South Africa: Department of Health, *Policy Guideline for Management of Transmission of Human Immunodeficiency Virus (HIV) and Sexually Transmitted Infections in Sexual Assault*, available at <<http://www.doh.gov.za/aids/docs/rape-protocol.html>>.
- <sup>494</sup> South Africa: *ibid.*; Department of Health, National HIV and AIDS and TB Unit, *Preventing HIV after Rape - Steps You Can Take to Protect Your Health* (pamphlet), available at <<http://www.doh.gov.za/aids/index.html>>. Post exposure prophylaxis must be taken for 28 days to have effect. Check-up visits are scheduled at one week, six weeks, three months and six months after the first visit. New HIV tests are performed at each visit.
- <sup>495</sup> Canada: see e.g. Criminal Injuries Compensation Board in Ontario, information available at <<http://www.ciecb.gov.on.ca/en/index.htm>>; and British Columbia's Criminal Injuries Compensation Act [RSBC 1996] CHAPTER 85, art. 1(1), available at <[http://www.qp.gov.bc.ca/statreg/stat/C/96085\\_01.htm#section2](http://www.qp.gov.bc.ca/statreg/stat/C/96085_01.htm#section2)>.
- <sup>496</sup> Spain: Lola Cidoncha, Coordinator of the Centre of attention for Sexual Aggression Victims of Cádiz, Madrid, telephone conversation 29 January 2007. Specialised attention is always offered if the woman who was raped falls within the scope of the gender violence law, i.e. she has or has had a sentimental relationship with the aggressor. See Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 20.
- <sup>497</sup> Canada: *A Victim's Guide to the Canadian Criminal Justice System: Questions and Answers*, prepared by the Canadian Resource Centre for Victims of Crime, p. 25. The programmes in Canada are called Victim/Witness Assistance Programs (VWAP) and are attached either to the Crown or the court.
- <sup>498</sup> For example, the Canadian Resource Centre for Victims of Crime (CRCVC) is a national, non-profit victim advocacy group that lobbies for victims rights; it has helped hundreds of victims of crime. See CRCVC at <<http://www.crcvc.ca/en/>> (a detailed list of support services associations is available on the same web site, see 'Links').
- <sup>499</sup> In Canada, some advocacy groups for victims of crimes focus for example on women, children, aboriginals (information available on the CRCVC web site).
- <sup>500</sup> See e.g. the Victims Funds administered by the Policy Center for Victim Issues (PCVI) at the Department of Justice Canada, at <<http://www.justice.gc.ca/en/ps/voc/index.html>>.
- <sup>501</sup> Among the victim service agencies contacted, 16% reported having programmes for South Asians (e.g. East Indian and Punjabi), 8% for East and South East Asians such as Chinese, 6% for persons from Latin, Central or South American origins and 18% for individuals from a variety of other origins. Report and tables available at <<http://www.justice.gc.ca/en/ps/voc/publications/juristats/85-002-xpe-v24-n11/p6.html>>.
- <sup>502</sup> Informal interpreters (57%), such as family and friends, was the method most frequently used to provide help to victims unable to speak English or French (Figure 4). This was followed by voluntary interpreters (48%), paid interpreters (42%) and staff members who could speak other languages (32%). Moreover, 20% of services indicated that they had staff or volunteers who were able to communicate in an aboriginal language. See Policy Centre for Victims Issues, *Victim's Services in Canada 2002/03*, available at <<http://www.justice.gc.ca/en/ps/voc/publications/juristats/85-002-xpe-v24-n11/p6.html>>.
- <sup>503</sup> 90% of services reported to be able to accommodate persons with challenges in mobility, with about six in ten stating they are able to accommodate services for persons with hearing (63%) or visual impairments (60%). See

Policy Centre for Victims Issues, *Victim's Services in Canada 2002/03*, available at

<<http://www.justice.gc.ca/en/ps/voc/publications/juristats/85-002-xpe-v24-n11/p6.html>>.

<sup>504</sup> See e.g. Fredericton Sexual Assault Crisis Centre, *Aware and Supportive Communities - Support for Survivors of Sexual Assault*, <<http://www.aware-nb-averti.org/index.htm>>. The underlying idea of the project is that enhanced awareness and suitable interventions make small and isolated communities better equipped to respond proactively to attitudes and behaviours that condone sexual aggression.

<sup>505</sup> Canada: *Context of Programs and Services for Victims of Crime in Canada*, part 2: Provincial/Territorial Context, available at <<http://www.justice.gc.ca/en/ps/voc/publications/01/01.html>>. Compensation and assistance schemes seem to be available in most provinces, but take different forms throughout the country.

<sup>506</sup> Spain: Ley Orgánica 35/1995, de 11 de diciembre, de Ayudas y Asistencia a las Víctimas de Delitos Violentos y Constra la Libertad Sexual, available in Spanish at

<<http://www.cfnavarra.es/asistenciavictimas/IJURIDICA/L35-95.HTM>>. The law created the National Commission of Contribution and Assistance to Victims of Violent Crimes and Crimes against Sexual Freedom (arts. 11-12).

<sup>507</sup> Canada: see e.g. British Columbia, Crime Victim Assistance Act [SBC 2001] Chapter 38, art. 4(1), available at <[http://www.pssg.gov.bc.ca/victim\\_services/cva/index.htm](http://www.pssg.gov.bc.ca/victim_services/cva/index.htm)>; Spain: Ley Orgánica 35/1995, de 11 de diciembre, de Ayudas y Asistencia a las Víctimas de Delitos Violentos y Constra la Libertad Sexual, art. 6.

<sup>508</sup> Canada: see e.g. British Columbia, Crime Victim Assistance Act [SBC 2001] Chapter 38, art. 4(1); Spain: Ley Orgánica 35/1995, de 11 de diciembre, de Ayudas y Asistencia a las Víctimas de Delitos Violentos y Constra la Libertad Sexual, art. 6.

<sup>509</sup> Spain: Ley Orgánica 35/1995, de 11 de diciembre, de Ayudas y Asistencia a las Víctimas de Delitos Violentos y Constra la Libertad Sexual, art. 2.

<sup>510</sup> Canada: Canadian Resource Centre for Victims of Crime, <<http://www.crcvc.ca/en/>>.

<sup>511</sup> Honduras: Decreto 250-2005. Ley contra la Violencia Doméstica (2005), art. 5, available in Spanish at <<http://www.inam.gob.hn/>>.

<sup>512</sup> Ibid.

<sup>513</sup> Ibid.

<sup>514</sup> Ibid.

<sup>515</sup> Ibid.

<sup>516</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 1(3).

<sup>517</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 1(1), available in English at <<http://www.redfeminista.org/laley.asp>>.

<sup>518</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), arts. 9-10.

<sup>519</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 5, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.

<sup>520</sup> South Africa: Domestic Violence Act 116 of 1998, sections 1 (vii) (e) and (f). Full text available in English at <<http://www.info.gov.za/gazette/acts/1998/a116-98.pdf>>.

<sup>521</sup> Ibid, section 9(3)

<sup>522</sup> Ibid, section 1 (vii) (b).

<sup>523</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 5(4), available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>;

Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 1; South Africa: Domestic Violence Act 116 of 1998, section 1 (vii); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 1(1).

<sup>524</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 5, available in Spanish at <<http://www.inam.gob.hn/>>.

<sup>525</sup> Ibid.

<sup>526</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 6, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.

<sup>527</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 9(1) and 11, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>; Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6 (1)(a). If the perpetrator is caught during the violent act, he or she can be put in arrest for the time that is provided for in criminal cases. An application for a protective measure has to be, according to Honduran law, heard before a judge as soon as possible, at the latest 72 hours after the filing of the report. See Ley de Enjuiciamiento Criminal, art. 544 ter, available at <[http://noticias.juridicas.com/base\\_datos/Penal/lecr.html](http://noticias.juridicas.com/base_datos/Penal/lecr.html)>; South Africa: Act 116 of 1998, section 7(1)(c); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 64.

- <sup>528</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 9(2) and (4), 12 and 14, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>; Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6(1)(b) and (d); South Africa: Act 116 of 1998, section 7(1)(a)-(b) and (d)-(h); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 64. Among the orders that can be made according to Spanish law, restraining orders and orders of prohibited communication were the most common, representing 31% and 24% respectively. See Observatorio contra la Violencia Doméstica y de Género, Datos de Violencia Doméstica y de Género del primer trimestre de 2005, available in Spanish at <<http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/pjexaminarestadistica.html&dkey=2020&TableName=PJESTADISTICAS>>.
- <sup>529</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6(1)(e)-(f); South Africa: Act 116 of 1998, section 7(2)(a), and 9 and (d)-(h); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 67.
- <sup>530</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6(3)(b); South Africa: Act 116 of 1998, section 7(6)(a)-(b); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 65-66.
- <sup>531</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 9(3) and 13, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>; Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6(3)(a); South Africa: Act 116 of 1998, section 7(3)-(4); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 27. In Honduran law, precautionary measures aim at guaranteeing the fulfilment of the offender's familiar responsibilities. These measures include orders of alimony payments, a change of the legal guardianship of children to the victim, and a possibility to grant the victim the right to use the common household.
- <sup>532</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 9(3) and 13, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>; Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6(1)(i)-(j).
- <sup>533</sup> The latter is the case in South Africa. See Domestic Violence Act 116 of 1998, section 7(2).
- <sup>534</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6; South Africa: Act 116 of 1998, section 7(1)-(2); Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 64(6).
- <sup>535</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 9, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.
- <sup>536</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 4 and 17-18, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>. Similar to the Bosnian-Herzegovinian legislation, the Honduran law encompass a wide circle of entitled initiative takers. See Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica 2005, arts. 16 and 17.
- <sup>537</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 7 and 20, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.
- <sup>538</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 17.
- <sup>539</sup> South Africa: Domestic Violence Act 116 of 1998, section 4(3).
- <sup>540</sup> South Africa: Domestic Violence Act 116 of 1998, section 4(3).
- <sup>541</sup> Ibid, section 4(4).
- <sup>542</sup> Spain: Delegación Especial del Gobierno Contra la Violencia Sobre la Mujer, Formulario Solicitud Orden de Protección, Modelo de Solicitud de Orden de Protección, available at <<http://www.mtas.es/igualdad/violencia/Solicitud.pdf>>.
- <sup>543</sup> Ibid. In South Africa, the state provides for financial assistance to a complainant or respondent who does not have the means to pay the fees for the service of any document in terms of the act. See Domestic Violence Act 116 of 1998, section 13.
- <sup>544</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 63.
- <sup>545</sup> South Africa: Domestic Violence Act 116 of 1998, section 11.
- <sup>546</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), arts. 6 (1) and 14; Spain, Ley de Enjuiciamiento Criminal, art. 496, available at <[http://noticias.juridicas.com/base\\_datos/Penal/lecr.html](http://noticias.juridicas.com/base_datos/Penal/lecr.html)>.

- <sup>547</sup> South Africa: Domestic Violence Act 116 of 1998, section 5(1); Federation of Bosnia and Herzegovina: Law on Protection from Domestic Violence (2005), art. 3, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.
- <sup>548</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 14.
- <sup>549</sup> Spain: Ley de Enjuiciamiento Criminal, art. 544 ter, available at <[http://noticias.juridicas.com/base\\_datos/ Penal/lecr.html](http://noticias.juridicas.com/base_datos/ Penal/lecr.html)>.
- <sup>550</sup> South Africa: Domestic Violence Act 116 of 1998, section 3; Spain: Ley de Enjuiciamiento Criminal, art. 496, available at <[http://noticias.juridicas.com/base\\_datos/ Penal/lecr.html](http://noticias.juridicas.com/base_datos/ Penal/lecr.html)>.
- <sup>551</sup> South Africa: Domestic Violence Act 116 of 1998, section 5(2).
- <sup>552</sup> Ibid, section 6 (1)-(2).
- <sup>553</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 68.
- <sup>554</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 12 and 14-16, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.
- <sup>555</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6.
- <sup>556</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), arts. 12 and 14-16, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.
- <sup>557</sup> South Africa: Domestic Violence Act 116 of 1998, section 6(7).
- <sup>558</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 19, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>; South Africa: Domestic Violence Act 116 of 1998, section 16; Spain: Ley de Enjuiciamiento Criminal, art. 216, available at <[http://noticias.juridicas.com/base\\_datos/ Penal/lecr.html](http://noticias.juridicas.com/base_datos/ Penal/lecr.html)>.
- <sup>559</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 19, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>; South Africa: Domestic Violence Act 116 of 1998, section 6(7).
- <sup>560</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 6.
- <sup>561</sup> Federation of Bosnia-Herzegovina: Law on Protection from Domestic Violence (2005), art. 21, available in English at <[http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV\\_Law.pdf](http://www.stopvaw.org/sites/3f6d15f4-c12d-4515-8544-26b7a3a5a41e/uploads/DV_Law.pdf)>.
- <sup>562</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 7(2).
- <sup>563</sup> Honduras: Decreto Número 144-83. Código Penal de Honduras (1983), art. 81, available in Spanish at <[http://www.cejamericas.org/doc/legislacion/codigos/pen\\_honduras.pdf](http://www.cejamericas.org/doc/legislacion/codigos/pen_honduras.pdf)>.
- <sup>564</sup> South Africa: Domestic Violence Act 116 of 1998, section 8.
- <sup>565</sup> Bosnia-Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), art. 27; Honduras: Decreto Número 144-83, Código Penal de Honduras (1983), art. 179(c), available in Spanish at <[http://www.cejamericas.org/doc/legislacion/codigos/pen\\_honduras.pdf](http://www.cejamericas.org/doc/legislacion/codigos/pen_honduras.pdf)>; Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), arts. 148(4), 171(4), 172(2) and 173(2), available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>; Sweden: Public offence is the general rule with few exceptions. See Criminal Code, chapter 3, section 12; chapter 4, section 11; and chapter 6, section 13, available in English at <<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>>.
- <sup>566</sup> Honduras: Decreto Número 144-83, Código Penal de Honduras (1983), art. 179.A, available in Spanish at <[http://www.cejamericas.org/doc/legislacion/codigos/pen\\_honduras.pdf](http://www.cejamericas.org/doc/legislacion/codigos/pen_honduras.pdf)>.
- <sup>567</sup> Ibid, art. 179.B.
- <sup>568</sup> Ibid, art. 18.
- <sup>569</sup> Sweden: Criminal Code, chapter 4, section 4 (a), and chapter 29, section 2(3) and (4), available in English at <<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>>. The crime of gross violation of a woman's integrity is a separate crime under the general crime of gross violation of integrity. The latter is gender neutral and applies to the same circumstances, but where the crime was not committed against a woman who is or was the aggressor's spouse or cohabitant, but against another person who has or has had a close relationship with the perpetrator. Consequently, repeated violations of a person's integrity are assessed in the same way in, for example, homosexual relationships and parent-child relationships.
- <sup>570</sup> Sweden: Criminal Code, chapter 4, section 4(a), available in English at <<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>>. Crimes covered by the new provision include crimes against life and health, crimes against liberty and peace and crimes against sexual liberty (chapters 3, 4 and 6 of the Swedish Criminal Code).
- <sup>571</sup> Sweden: Regeringens Proposition 1997/98:55, Kvinnofrid, pp. 74-88, available in Swedish at <<http://www.regeringen.se/content/1/c4/22/66/5406e038.pdf>>.

- <sup>572</sup> Sweden: Criminal Code, chapter 4, section 4 (a), available in English at <<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>>.
- <sup>573</sup> Sweden: Regeringens Proposition 1997/98:55, Kvinnofrid, pp. 75-76, available in Swedish at <<http://www.regeringen.se/content/1/c4/22/66/5406e038.pdf>>.
- <sup>574</sup> Sweden: Regeringens Proposition 1998/99:145, Ändring av fridskränkingsbrotten, p. 13, available in Swedish at <<http://www.regeringen.se/content/1/c4/11/27/5eab27a7.pdf>>.
- <sup>575</sup> Sweden: Criminal Code, chapter 4, section 4(a), available in English at <<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>>.
- <sup>576</sup> Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum, Mission to Sweden, A/HRC/4/34/Add.3 (6 February 2007), paras. 47-48.
- <sup>577</sup> Spain: Tribunal Supremo, Sala de lo Penal, 23/05/ 2006, Recurso nº1486/2005 (Id Cendoj: 28079120012006100589, STS 3421/2006). See official web site of jurisprudence at <<http://www.poderjudicial.es/jurisprudencia>>.
- <sup>578</sup> Honduras: Decreto Número 144-83, Código Penal de Honduras (1983), arts. 18 and 27(23), available in Spanish at <[http://www.cejamerica.org/doc/legislacion/codigos/pen\\_honduras.pdf](http://www.cejamerica.org/doc/legislacion/codigos/pen_honduras.pdf)>; Sweden: Criminal Code, chapter 29, section 2(3) and (4), available in English at <<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>>.
- <sup>579</sup> Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), arts. 148(4), 171(4), 172(2) and 173(2), available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>.
- <sup>580</sup> Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), arts. 148 (4), 171 (4), 172 (2) and 173 (2), available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>, last visited: 26/11/2006
- <sup>581</sup> Ibid, art. 148(1) and (4).
- <sup>582</sup> Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), art. 22(4), available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>.
- <sup>583</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 33-41.
- <sup>584</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 7, available in Spanish at <<http://www.inam.gob.hn/>>.
- <sup>585</sup> Ibid.
- <sup>586</sup> Ibid, art. 6(2).
- <sup>587</sup> Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), art. 153.
- <sup>588</sup> Ibid, art. 620.
- <sup>589</sup> This is the case in Spain where both the law and the rules of the Penitentiary Administration mandate the creation of treatment programmes for persons convicted for acts of gender violence. See Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 42; Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 36, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.
- <sup>590</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 42; Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), art. 83, available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>.
- <sup>591</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), art. 7, available in Spanish at <<http://www.inam.gob.hn/>>, and Decreto Número 144-83, Código Penal de Honduras (1983), arts. 107-115, available in Spanish at <[http://www.cejamerica.org/doc/legislacion/codigos/pen\\_honduras.pdf](http://www.cejamerica.org/doc/legislacion/codigos/pen_honduras.pdf)>; Spain: Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (1995), arts. 109-126, available in Spanish at <<http://constitucion.rediris.es/legis/1995/lo10-1995.html>>.
- <sup>592</sup> Ibid. Even though Canada is not one of the studied countries in this context, we find a good practice worth mentioning in regard to compensation. A complainant in a domestic violence case has the right to claim compensation, not only for injuries suffered, but also for the expenses resulting from her moving out from the common residence to avoid further harm. See Bill C-41 (sentencing) amending the provisions of the Criminal Code on sentencing provisions. Cited in the fifth periodic report of Canada, CEDAW/C/CAN/5, para.104, available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N02/364/78/IMG/N0236478.pdf?OpenElement>>.
- <sup>593</sup> Honduras: Decreto 250-2005, Ley contra la Violencia Doméstica (2005), capítulo VIII.
- <sup>594</sup> Ibid, art. 23.
- <sup>595</sup> Spain: Criminal Procedural Code, art. 440, available in Spanish at <<http://2ni2.com/juridico/penal/leyenjuiciamientocriminal.htm>>.

<sup>596</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 31.

<sup>597</sup> Spain: Protocolo de Actuación de las Fuerzas y Cuerpos de Seguridad y de Coordinación con los Órganos Judiciales para la Protección de las Víctimas de Violencia Doméstica y Género (2004), available in Spanish at <<http://www.ub.es/geav/Imatges/Protocolo%20de%20protecci%F3n%20a%20Victimas.pdf>>.

<sup>598</sup> Spain: Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 35, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>599</sup> Spain: II Plan Integral contra la Violencia Doméstica 2001-2004, p. 3, available in Spanish at <[http://w3.cnice.mec.es/recursos/secundaria/transversales/instituto\\_mujer/plan\\_integral\\_vdomestica\\_2001.pdf](http://w3.cnice.mec.es/recursos/secundaria/transversales/instituto_mujer/plan_integral_vdomestica_2001.pdf)>.

<sup>600</sup> Spain: Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 22, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>601</sup> Honduras: UNFPA, *Through the Eyes of the Victim: Police Training and Domestic Violence in Honduras*, 11 October 2005, available at <<http://www.unfpa.org/news/news.cfm?ID=689>>.

<sup>602</sup><sup>602</sup> South Africa: ‘Complainant’ is defined in the Domestic Violence Act as “any person who is or was in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant”. Domestic Violence Act 116 of 1998, section 1(iii).

<sup>603</sup> Ibid, section 2(a).

<sup>604</sup> Ibid, section 2(b).

<sup>605</sup> Ibid, section 2(c).

<sup>606</sup> South African Police Services Act 68 of 1995, section 18(4).

<sup>607</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 70-71.

<sup>608</sup> Ibid, art. 71.

<sup>609</sup> Ibid, art. 70.

<sup>610</sup> Spain: Consejo de Ministros, *Medidas Urgentes en la Lucha contra la Violencia de Género*, 15 December 2006, p. 7, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Medidas.pdf>>.

<sup>611</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 43.

<sup>612</sup> Ibid, art. 44(1).

<sup>613</sup> Ibid, art. 57.

<sup>614</sup> Ibid, art. 44(5). On 29 June 2005, 434 specialised court sections on gender violence began functioning (17 of them dedicated exclusively to this matter). The majority of judges are women. Terra, *Hoy comienzan a trabajar 434 juzgados de violencia contra la mujer*, 29 June 2005, available in Spanish at <<http://actualidad.terra.es/articulo/html/av2376607.htm>>.

<sup>615</sup> Spain: Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 22, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>616</sup> Ibid.

<sup>617</sup> Spain: El Mundo, *Así funcionan los Juzgados de Violencia sobre la Mujer* (18 October 2005), available in Spanish at <<http://www.elmundo.es/elmundo/2005/10/18/sociedad/1129625090.html>>.

<sup>618</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 17-28.

<sup>619</sup> Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 32.

<sup>620</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 19(1). Children have an explicit right to specific social attention, see art. 19(5). The services shall be evaluated by equality authorities, which are also responsible for recommending future improvements, see art. 19(7). In 2006, ten million euros was allocated by the central government to implement the right to social services throughout the country. Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 25, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>621</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 28.

<sup>622</sup> Spain: Instituto de la Mujer, *Memoria de las actuaciones contra violencia de género realizadas por la Administración Central y Comunidades Autónomas en 2004*, pp. 145 et seq., and p. 262. In 2004, 100 shelters

existed throughout the country, the number of beds varies from shelter to shelter. 2,155 women and children sought refuge at the shelters in 2004. The time spent in the shelter varied significantly from case to case.

<sup>623</sup> Ibid.

<sup>624</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 17-18.

<sup>625</sup> Spain: Instituto de la Mujer, Servicios de información, <[http://www.mtas.es/mujer/servicios/telefonos\\_900/telef900.htm](http://www.mtas.es/mujer/servicios/telefonos_900/telef900.htm)>; Honduras, Instituto Nacional de la Mujer, Línea 114, <<http://www.inam.gob.hn/>>.

<sup>626</sup> Ibid, and UNFPA, *Through the Eyes of the Victim: Police Training and Domestic Violence in Honduras*, 11 October 2005, available at <<http://www.unfpa.org/news/news.cfm?ID=689>>. In its first year of operation, the Honduran hotline received approximately 1,000 calls. Most callers requested information, while an additional 100 calls led to the dispatch of police officers, and 40 led to the apprehension of abuse suspects.

<sup>627</sup> Spain: Ministerio de Justicia, Asistencia a las Víctimas, <[http://www.mjusticia.es/cs/Satellite?c=Page&cid=1057821035264&lang=es\\_es&menu\\_activo=av&pagename=Portal\\_del\\_ciudadano%2FPage%2FAsistenciaVictimas&subseccion=MostrarAtCiudadano&titulopage=Asistencia%20a%20la%20victima&categ=AV&iden=1068195030518&subcateg=DS&cate=AV&pinicio=1&pfin=20&pagina=1](http://www.mjusticia.es/cs/Satellite?c=Page&cid=1057821035264&lang=es_es&menu_activo=av&pagename=Portal_del_ciudadano%2FPage%2FAsistenciaVictimas&subseccion=MostrarAtCiudadano&titulopage=Asistencia%20a%20la%20victima&categ=AV&iden=1068195030518&subcateg=DS&cate=AV&pinicio=1&pfin=20&pagina=1)>.

<sup>628</sup> Ibid.

<sup>629</sup> Spain: During the first half of 2006, more than 10,000 victims of gender violence sought assistance at the offices. Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral contra la Violencia de Género, Avance (15 Diciembre 2006), p. 23, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>630</sup> Ibid.

<sup>631</sup> Spain. Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 20.

<sup>632</sup> Spain. Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral contra la Violencia de Género, Avance (15 Diciembre 2006), p. 26, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>633</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 27.

<sup>634</sup> Ibid.

<sup>635</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 21-26.

<sup>636</sup> Ibid, art. 21. In addition, the gender violence law gives the right to suspend the working relationship with the job's reservation and the right to terminate the contract.

<sup>637</sup> Ibid.

<sup>638</sup> Ibid, arts. 24-26.

<sup>639</sup> Ibid, art. 23.

<sup>640</sup> Ibid, art. 19.

<sup>641</sup> Spain: for an overview of the Spanish health system see Aemigrar, Salud, <<http://www.aemigrar.com/spain/salud.php#1>>.

<sup>642</sup> Spain: Real Decreto 1030/2006, de 15 de septiembre, por el que se establece la cartera de servicios comunes del Sistema Nacional de Salud y el procedimiento para su actualización, art. 6.6, and Anexo IV, art. 2.8, available at <[http://noticias.juridicas.com/base\\_datos/Admin/rd1030-2006.html#a1](http://noticias.juridicas.com/base_datos/Admin/rd1030-2006.html#a1)>.

<sup>643</sup> Spain: Ministerio de Salud y Consumo, Prevención Violencia Doméstica Ámbito Sanitario de la Atención Primaria de la Salud, available in Spanish at <<http://www.msc.es/ciudadanos/violencia/prevencion/home.htm>>; Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 16; Ministerio de Sanidad y Consumo, *Comision del Consejo Interterritorial Contra la Violencia de Género y Grupos de Trabajo*, <[http://www.msc.es/organizacion/sns/planCalidadSNS/e02\\_t03b.htm](http://www.msc.es/organizacion/sns/planCalidadSNS/e02_t03b.htm)>.

<sup>644</sup> Ibid.

<sup>645</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, arts. 15-16.

<sup>646</sup> Spain: Consejo de Ministros, Plan Nacional de Sensibilización y Prevención de la Violencia de Género, 2007-2008, (15 Diciembre 2006), pp. 13 and 15, available in Spanish at

<<http://www.mtas.es/igualdad/violencia/Plan.pdf>>. Despite the efforts that have been done, Amnesty International claims the training of professionals on gender violence is insufficient. By the year 2004, less than 5% of the sanitary personnel had received any training on the matter. See Amnesty International, *¡Hay que actuar a tiempo! Detección de la violencia de genero y atención a las víctimas en el sistema sanitario español*, November 2006, p. 9, available in Spanish at

<[http://www.es.amnesty.org/nomasviolencia/docs/informes\\_ai/02regiones/04europa/espana/hay\\_que\\_actuar\\_a\\_tiempo.pdf](http://www.es.amnesty.org/nomasviolencia/docs/informes_ai/02regiones/04europa/espana/hay_que_actuar_a_tiempo.pdf)>. See also Amnesty International, *Más Derechos, los mismos obstáculos*, 28 June 2006, available in Spanish at <[http://www.es.amnesty.org/nomasviolencia/masinfo\\_jun06.php](http://www.es.amnesty.org/nomasviolencia/masinfo_jun06.php)>. In the latter report, Amnesty stresses the absence of a human rights approach in the development of training programmes.

<sup>647</sup> See e.g. Zene Zenama (Sarajevo), Lara (Bijeljina), Helsinki Citizens' Assembly (Banja Luka), Study about family violence in Bosnia-Herzegovina, the Excerpt (May 2006), pp. 16 et seq.

<sup>648</sup> Institute of Women, photo campaign against gender violence, available at <http://www.20minutos.es/galeria/559/0/0/mujeres/maltratadas/calendario/>.

<sup>649</sup> Periodista Digital, *Deportistas contra la violencia doméstica*, 20 November 2006, available in Spanish at <[http://blogs.periodistadigital.com/planetafutbol.php/2006/11/20/deportistas\\_en\\_contra\\_de\\_la\\_violencia\\_co](http://blogs.periodistadigital.com/planetafutbol.php/2006/11/20/deportistas_en_contra_de_la_violencia_co)>.

<sup>650</sup> Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 18, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>651</sup> Ibid.

<sup>652</sup> Annual Report against violence of the Institute of Women, 2004, pp. 20-21, available in Spanish at <<http://www.mtas.es/mujer/violencia/docs/memoria%202004.pdf>>. Intensified campaigns are expected during 2007, as the Council of Europe selected Spain (in recognition of its work on gender violence and the Gender Violence law) to be responsible for a European campaign against gender violence on the celebration of the Day of Elimination of Violence against Women, see e.g. Council of Europe, Stop violence against women, <[http://www.coe.int/t/pace/campaign/stopviolence/default\\_EN.asp](http://www.coe.int/t/pace/campaign/stopviolence/default_EN.asp)>.

<sup>653</sup> El Mundo, Un año de la Ley Integral, <[http://www.elmundo.es/fotografia/2006/01/ley\\_integral/13.html](http://www.elmundo.es/fotografia/2006/01/ley_integral/13.html)>.

<sup>654</sup> Observatorio de la Violencia de Género, *Las denuncias por violencia de género en España superaron por primera vez las 60.000 en 2006*, <<http://www.observatorioviolencia.org/noticias.php?id=666>>.

<sup>655</sup> Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 4; Bosnia and Herzegovina, Law on Gender Equality (2003), art. 6.

<sup>656</sup> Consejo de Ministros, Plan Nacional de Sensibilización y Prevención de la Violencia de Género, 2007-2008, (15 Diciembre 2006), p. 17, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Plan.pdf>>.

<sup>657</sup> The material was drafted jointly by the Ministry of Education and the National Institute of Women. See Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 19, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>658</sup> Ibid.

<sup>659</sup> Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 6; Bosnia and Herzegovina, Law on Gender Equality (2003), art. 6.

<sup>660</sup> Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 9.

<sup>661</sup> Bosnia and Herzegovina, Law on Gender Equality (2003), art. 28.

<sup>662</sup> Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 6; Bosnia and Herzegovina, Law on Gender Equality (2003), art. 10.

<sup>663</sup> Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), p. 18, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>664</sup> Bosnia Herzegovina, Gender Equality Law (2003), art. 16.

<sup>665</sup> In Spain, for example, more than 34% of the reported cases of penetration without aggression, and over 74% of the reported cases of penetration with aggression, were committed by the survivor's partner. Thus, the majority of cases are covered by the gender violence law targeting domestic violence. See Instituto de la Mujer, Estadísticas en violencia sexual según relación víctima/agresor, full document in Spanish at <<http://www.mtas.es/mujer/mujeres/cifras/tablas/W870.xls>>.

<sup>666</sup> Bosnia-Herzegovina, Gender Equality Law (2003), art. 4(b); Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, Exposición de Motivos, I; South Africa, Domestic Violence Act 116 of 1998, Preamble; Honduras, Decreto 250-2005, Ley contra la Violencia Doméstica (2005), Introducción.

<sup>667</sup> Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, Exposición de Motivos, I.

<sup>668</sup> Bosnia-Herzegovina, Gender Equality Law (2003), art. 17.

<sup>669</sup> BBC News, *New Man Tackles Spanish Machismo*, 27 April 2004, available at <<http://news.bbc.co.uk/2/hi/europe/3661117.stm>>; European Industrial Relations Observatory on-line, *New gender-based violence law has workplace implications*, 11 February 2005, <<http://www.eiro.eurofound.ie/2005/01/features/es0501105f.html>>.

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<sup>670</sup> Spain, Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género.

<sup>671</sup> Ministerio de Trabajo y Asuntos Sociales, Balance de resultados de la Aplicación de la Ley orgánica 1/2004, de 28 de Diciembre, de Medidas de Protección Integral ontra la Violencia de Género, Avance (15 Diciembre 2006), pp. 6-7, available in Spanish at <<http://www.mtas.es/igualdad/violencia/Balance.pdf>>.

<sup>672</sup> Ibid, p. 7.

<sup>673</sup> Spain: M. D. Febrer, *Legal Analysis of the Framework Law on Integrated Protection Measures against Gender Violence in Spain from the Feminist Viewpoint*, Februray 2005, p. 3, available at <<http://www.mediterraneas.org/IMG/pdf/THE-ACT-ON-INTEGRATED-PROTECTION.pdf>>; Honduras: Decreto 132-97, Ley contra la Violencia Doméstica (1997), Preamble; South Africa: J. Fedler, 'Lawyering Domestic Violence Through the Prevention of Family Violence Act: An Evaluation After a Year in Operation', *South African Law Journal* (1995) p. 112; Bosnia-Herzegovina: Global Rights, *Legislative Advocacy Guide - Promoting Human Rights in Bosnia-Herzegovina*, 2005, pp. 55-59, available at <[http://www.hrlawgroup.org/resources/content/GenderEqualityCoalition\\_Bosnia.pdf](http://www.hrlawgroup.org/resources/content/GenderEqualityCoalition_Bosnia.pdf)>.

<sup>674</sup> For more information on the workings of the NGO coalition in the legislative process leading to the Gender Equality Law, see Global Rights, *Legislative Advocacy Guide - Promoting Human Rights in Bosnia-Herzegovina*, 2005, pp. 55-59, available at <[http://www.hrlawgroup.org/resources/content/GenderEqualityCoalition\\_Bosnia.pdf](http://www.hrlawgroup.org/resources/content/GenderEqualityCoalition_Bosnia.pdf)>.

<sup>675</sup> Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 3; Bosnia-Herzegovina: Gender Equality Law (2003), art. 23; Honduras: Decreto 132-97, Ley contra la Violencia Doméstica (1997), art. 20(B). However, South Africa addresses violence against women as a priority in its National Crime Prevention Strategy (1996), and in the Gender Policy Statement by the Department of Justice.

<sup>676</sup> Bosnia-Herzegovina: Gender Action Plan, available in English at <<http://www.arsbih.gov.ba/?PID=7&RID=296>>; Honduras: Decreto Ejecutivo 11, Plan Nacional contra la Violencia hacia la Mujer (2006); Spain: Consejo de Ministros, Plan Nacional de Sensibilización y Prevención de la Violencia de Género, 2007-2008, (15 Diciembre 2006), available in Spanish at <<http://www.mtas.es/igualdad/violencia/Plan.pdf>>; Consejo de Ministros, Medidas Urgentes en la Lucha contra la Violencia de Género (15 Diciembre 2006), available in Spanish at <<http://www.mtas.es/igualdad/violencia/Medidas.pdf>>.

<sup>677</sup> Bosnia- Herzegovina: Law on Gender Equality in Bosnia and Herzegovina (2003), arts. 22-26, establishes one central and two regional gender equality agencies; Honduras: Decreto 132-97, Ley contra la Violencia Doméstica (1997), art. 20; Decreto 232-98, Ley del Instituto Nacional de la Mujer (1998), both laws available in Spanish at <<http://www.inam.gob.hn/>>; Spain: Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, art. 30; Real Decreto 253/2006 de 3 de marzo, available at <<http://www.mtas.es/mujer/violencia/docs/observatorio%20violencia.pdf>>.

<sup>678</sup> Ibid.

<sup>679</sup> Honduras: Decreto 132-97, Ley contra la Violencia Doméstica (1997), art. 20B.

<sup>680</sup> Spain: Consejo de Ministros, Medidas Urgentes en la Lucha contra la Violencia de Género (15 Diciembre 2006), available in Spanish at <<http://www.mtas.es/igualdad/violencia/Medidas.pdf>>; Ministerio de Trabajo y Asuntos Sociales, Consejo de Ministros, *El Gobierno destina cerca 48 millones de euros a la lucha contra la violencia de género*, available in Spanish at <[http://www.mtas.es/periodico/igualdad/200612/IGU20061215\\_3.htm](http://www.mtas.es/periodico/igualdad/200612/IGU20061215_3.htm)>.

<sup>681</sup> See L. Vetten, *Addressing domestic violence in South Africa: Reflections on strategy and practice*, paper prepared for the UN Division for the Advancement of Women Expert Group Meeting "Violence against women: Good practices in combating and preventing violence against women", 17-20 May 2005, Vienna, p. 10, and CSVR Gender Programme, Policy Brief No. 02, October 2005, by L. Vetten, D. Budlender and V. Schneider, *The Price of Protection: Costing the Implementation of the Domestic Violence Act (no. 116 of 1998)*, available at <<http://www.csvr.org.za/papers/paplvdb.pdf>>.