

WHO Background Paper Obstacles to Women Accessing Forensic Medical Exams in Cases of Sexual Violence

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Final Version

Introduction

The international community awoke to the realization that “women’s rights are human rights” when women’s rights activists from all over the world took center stage at the World Conference on Human Rights held in Vienna in 1993. They seized the initiative at the conference by focusing on violence against women and the failure of states to provide redress for the violence suffered. At a tribunal held at the NGO parallel conference, women from numerous countries stepped forward to describe their experiences as victims of sexual and gender based violence. They also described the failure of the state to condemn the violence, to protect women from further violence and to provide redress through the criminal justice system. The pervasiveness of violence against women is breathtaking in developing and developed countries alike.¹ The litany of harms inflicted is long: female genital mutilation, forced marriages, trafficking into forced labor, domestic violence, so-called honor killings, acid burning, dowry deaths, and finally, in every culture, rape and other crimes of sexual violence.

The U.N. Convention on the Elimination of all forms of Discrimination against Women adopted in 1979, called on States to “take in all fields appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”² The Convention further calls on States to “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”³ But it was not until the women’s human rights community organized around the issue of violence against women that the international community began to understand that violence against women seriously impairs women’s enjoyment of human rights and fundamental freedoms. Immediately prior to the Vienna Conference, the Committee on the Elimination of Discrimination Against Women (CEDAW) adopted a general recommendation which concluded, “Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations or to investigate and punish acts of violence, and for providing compensation.”⁴ After the Vienna Conference, the U.N. General Assembly adopted a “Declaration on the Elimination of Violence Against Women.”⁵ The Declaration notes States’ responsibility to

¹ <http://www.undp.org/unifem/campaign/violence/mediafac.htm>

² U.N. Convention on the Elimination of all forms of Discrimination against Women, Article 3.

³ *Ibid.*, Article 2(f).

⁴ General Recommendation No. 19, U.N. Document CEDAW/C/1992/L.1/Add.15 (eleventh session, 1992).

⁵ U.N. Document GA/48/104 (Dec. 20, 1993).

“[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”

The CEDAW General Recommendation and the General Assembly Declaration were significant because they made explicit the responsibility of states to address violence by non-state actors as well as state actors. The focus of the international community and the human rights movement had been focused almost exclusively on violations and abuses perpetrated by state actors. Violence against women by private actors such as family members was not recognized as a human rights abuse until the international community acknowledged that acts of omission, i.e., the failure of states to provide redress for victims, as well as commission, can trigger state responsibility.

Despite the success of the women’s human rights movement in highlighting the issue of violence against women, many countries have yet to implement the necessary criminal justice system reform to ensure that, at the very least, women can pursue redress through the criminal justice system. This work must happen in the larger context of dismantling *de jure* and *de facto* discrimination against women. It is women’s second class status that makes them vulnerable to violence and bars them from receiving effective redress through the criminal justice system. Women’s rights activists all over the world are doing extensive work training police, prosecutors and judges to address pervasive bias and ignorance. A group of professionals largely untouched by this advocacy are doctors or other health professionals responsible for collecting, analyzing and testifying about forensic evidence in cases of sexual and gender based violence. In this paper, we call on the World Health Organization (WHO) to establish minimum standards for the collection of evidence in cases of sexual and domestic violence.⁶ We also call on WHO to draft a policy paper to support the effective implementation of the minimum standards. This paper should explore obstacles to the successful implementation of these standards such as discriminatory rules of evidence and procedure; the failure of states to criminalize specific conduct such as marital rape; and, the belief that only virgins can be raped.

Summary of HRW’s work in Brazil, Peru, Pakistan, Russia, South Africa, Turkey and the United States

In 1991, the Women’s Rights Division of Human Rights Watch issued its first report, *Criminal Injustice: Violence Against Women in Brazil*. It was the first in a series of reports documenting state response to violence against women. The purpose was to identify obstacles women face in seeking redress through the criminal justice system. Additionally, Human Rights Watch sought to identify similarities in how states fail to respond to the needs of women who are victims of sexual and gender based violence. The

⁶ HRW recognizes that the WHO consultation is focusing on sexual violence, however, based on our research, we believe that marital rape and other forms of sexual violence are significant issues in abusive relationships and would ask that any WHO documents on this issue explicitly recognize sexual violence within marriage and marriage-like relationships. Inevitably this raises the issue of documenting other injuries that occur in abusive intimate relationships.

reports on Brazil, Peru, Pakistan, Russia and South Africa each focused specifically on the states response to violence against women, including the medico-legal system. A report on Turkey explored the use of virginity testing and the state's justification of virginity testing as a means of "preventing" rape. A report on the United States (forthcoming) examines, among other issues, access to forensic medical exams by women subjected to sexual abuse and rape in California prisons by prison staff.

The Role of Forensic Evidence in Cases of Sexual Violence

The laws governing prosecution of crimes of sexual violence vary widely from state to state. However, emerging international standards have focused on proof of three elements. The prosecutor must prove some penetration, however slight, of the vagina or anus by a penis or another object or the penetration of the mouth by a penis. The prosecutor must prove that such penetration occurred without the consent of the victim, against her will, or that she lacked the capacity to consent. The lack of capacity can be temporary, for example if a woman is drugged then raped, or permanent, for example if a woman is in a coma. Finally, the prosecutor must prove the identity of the perpetrator.

Forensic evidence addresses these three elements in the prosecution of cases of sexual violence. It can offer evidence as to whether the complained of act occurred, i.e., was the woman vaginally, anally or orally penetrated and by what? It can support allegations that the perpetrator used force. And finally, it can address the identity of the perpetrator. Although DNA testing based on semen, blood, skin and organ tissues, saliva or hair follicles remains unavailable in most countries, more basic tests on this evidence can corroborate the identity of the perpetrator or exclude a suspect.

Methodology

For each of the reports, Human Rights Watch researchers interviewed victims of sexual and domestic violence, service providers from nongovernmental organizations, police officers, detectives, prosecutors, judges and health professionals working in the area of forensic medicine.

In each country we asked the following questions:

- What acts of sexual and gender based violence are crimes as defined in the penal code?
- Does the penal code include separate crimes of sexual violence against children?
- Are these crimes prosecuted as public or private crimes?
- What are the elements necessary to offer proof of the commission of the crime?
- Are any of the elements of the crime irrelevant or inappropriate, e.g., requiring proof of use of force?
- Are police officers required to take reports of the crime?
 - If yes, do other obstacles limit women's ability to make the report to the police?

- If no, how does a woman compel the police to take a report, e.g., must she employ a lawyer to make the complaint?
- Must the police make an official referral before a woman can be given a forensic evidence exam?
 - Who is authorized to collect the evidence?
 - Has the state adopted uniform and appropriate standards for the collection of forensic evidence in cases of sexual and gender based violence?
 - Has the state adopted uniform and appropriate standards or regulations governing the analysis and preservation of the evidence?
 - If yes, are these standards followed?
 - If no, why are these standards not followed?
 - Are the places designated for evidence collection readily accessible in a timely manner to women throughout the country?
 - Are women charged a fee for the forensic evidence exam?
 - What additional obstacles do women face when seeking forensic evidence examinations?
 - Has the state adopted uniform and appropriate standards for the collection of forensic evidence from suspects in cases of sexual and gender based violence?
 - If yes, are the rights of the defendant safeguarded?
- Is staff charged with collecting forensic evidence specifically trained to collect the evidence?
 - Does staff conduct an initial interview with the victim to determine the specific details of the assault?
 - Does staff get the patient's informed consent to conduct the interview and subsequent examination and tests?
 - Is staff trained to interview and examine the victims in a respectful and appropriate manner?
 - Is staff trained to interview and examine children who are the victims of sexual violence?
 - As a matter of practice, does staff collect all the relevant evidence?
 - As a matter of practice, does staff collect irrelevant evidence or put irrelevant information in their report, e.g., noting that the woman is "habituated to intercourse"?
 - Does staff provide medical treatment, information regarding pregnancy and sexually transmitted diseases as an integral part of the exam?
 - Is crisis counseling available at the same location from trained staff?
 - Are victims provided with information and referrals regarding follow up on pregnancy, sexually transmitted diseases and psychological counseling?
 - Does staff analyze the information from the examination and give relevant information to the police or investigators from the office of the prosecutor?

- Does staff protect the integrity of the evidence by ensuring that it is preserved in an appropriate manner and secured in such a way that it cannot be tampered with or otherwise compromised?
- Does staff cooperate with the police and prosecutor as the case moves through the criminal justice system?
- Does staff testify competently at any subsequent legal proceedings?
- Do police officers investigate the women's reports of sexual violence?
 - Are police investigators trained to interview the victims in a respectful and appropriate manner?
 - Do police investigators use information gleaned from the forensic evidence exam?
 - Do police investigators receive training with regard to the significance and use of forensic evidence in cases of sexual and gender based violence?
 - Do police investigators seek or use information that is inappropriate, i.e., the victim's prior sexual history?
 - Do police investigators pursue leads given by the complainant?
 - Do police officers arrest the alleged perpetrator if he is identified?
 - Do police officials forward the case to the prosecutor?
 - Do police officials cooperate in the preparation of the case for trial at all stages?
 - Do police officials testify competently at any subsequent legal proceedings?
- Do prosecutors bring charges in cases of sexual and gender based violence?
 - Are prosecutors trained to interview the victims in a respectful and appropriate manner?
 - Do prosecutors understand the significance of forensic evidence?
 - Do they exhibit any bias against women and/or victims of sexual violence?
 - Are there rules of evidence or procedure that discriminate against women or victims of sexual and gender based violence?
 - Do they prepare and call on forensic evidence experts to testify in individual cases?
 - Do they have any form of witness protection for the victim?
 - Are witnesses provided with counseling and other support throughout the process of the investigation and prosecution of the crime?
- Do judges treat cases of sexual and gender based violence with appropriate gravity?
 - Do judges understand the significance of forensic evidence?
 - Do judges have chamber rules that discriminate against women or victims of sexual violence?
 - Do judges sentence defendants found guilty of crimes of sexual and gender based violence to appropriate sentences?

It was in the process of conducting this research in the various countries that Human Rights Watch identified the failure to collect, analyze and preserve forensic evidence as a major obstacle for women who seek redress for sexual and gender based violence through the criminal justice system. Our research revealed that health professionals collecting forensic evidence face three broad categories of obstacles: lack of resources and equipment, lack of training, and systematic and entrenched gender bias. These issues cannot be entirely separated and often reinforce and compound each other. For example, if forensic staff is taught that only virgins can be raped, then the forensic examiners will find evidence of very few rapes. States will then cite the low numbers of rape to justify their decision not to prioritize funding of forensic evidence.

Human Rights Watch strongly believes that the decision by prosecutors to pursue a case sexual violence should not be based solely on whether there is corroborating forensic evidence. Many states as a matter of law require some form of corroboration such as forensic proof as an element of the crime. Even if women had unobstructed, free access to forensic medical exams, there are many reasons why there may not be corroborating physical evidence of the crime. As with other crimes, prosecutors should make their decisions based on assessment of other elements including the credibility of the witness, opportunity and motive.

However, Human Rights Watch recognizes that the official denial by many states regarding the extent of sexual and gender based violence has a profound impact on women's ability to seek redress through the criminal justice system. Given this denial and gender bias within many societies and their criminal justice system, it is imperative that women have unobstructed access to professional and sensitively conducted forensic evidence exams. One means of countering skepticism with regard to women's report of sexual and gender based violence, is to ensure this access.

Analysis

1. Coordination between Police, Justice and Health Sector in cases of sexual assault:

Human Rights Watch found that there is very little coordination between law enforcement agencies, the criminal justice system and the health sector in most countries in which we conducted research. Although sexual and gender based violence raises significant issues regarding the responsiveness of the justice system and the public health system, violence against women remains largely unaddressed by states. The role of sexual and gender based violence against women in the spread of sexually transmitted diseases, in the number of unwanted pregnancies, in women risking unsafe abortions, in loss of productivity and even in subsequent behavior such as drug abuse or other forms of self-medication has been recognized by the public health sector in many states. However, that recognition has largely failed to inform the response of the law enforcement or justice sectors.

Furthermore, studies conducted by researchers working in the public health sector that confirm the claims made by activists about the extent of sexual and gender based

violence against women have failed to shake the bias against women demonstrated by many police and justice officials who persist in their belief that women lie about or exaggerate the extent of the violence. And despite the costs to society of violence against women, many in government continue to perceive both sexual and domestic violence as “private” issues not suitable for resolution in the public sphere.

Even within the health sector, Human Rights Watch identified the failure of the public health sector with its understanding of the sexual and gender based violence to coordinate effectively with the medico-legal sector. As a result, women are often traumatized by how the forensic exam is conducted. For example, women may be forced to tell and re-tell what happened to them to numerous strangers; they may be treated as “suspect” by the investigators; and, they may be threatened with violations of their privacy. Some women report that forensic examiners failed to explain what the exam would entail and were rough in how they conducted the exam. In fact, some women reported that the forensic exam felt like another form of sexual violence.

Furthermore, many forensic examiners seemed unable or unwilling to collect, preserve and analyze the evidence in an appropriate manner, for example, focusing solely on whether the victim is a virgin, failing to collect or document other evidence such as bruising or scrapings under the nails, conducting a psychological assessment which could corroborate a victims report of threat or coercion.

2. Ideological, institutional and resource barriers – in law enforcement

A. Police as gatekeepers

It is virtually impossible for a woman who has been the victim of sexual or gender based violence to achieve redress through the criminal justice system unless she can first get the police to take her report of the crime. It is the act of filing an official police report that triggers any subsequent investigation, arrest and prosecution. However, Human Rights Watch documented numerous reports of the refusal of police to register complaints made by women.⁷ Furthermore, the police are the first point of contact that victims have with the criminal justice system. Officers who refuse to take reports of sexual violence contribute to a climate in which women decide it is not worth it to even try to report these crimes to the police.

⁷ Human Rights Watch, *Criminal Injustice: Violence Against Women in Brazil*, New York: 1991, p. 56; Human Rights Watch, *Double Jeopardy: Police Abuse of Women in Pakistan*, New York: 1992, p. 2; Human Rights Watch, *Crime or Custom? Violence Against Women In Pakistan*, New York: 1999, p. 53; Human Rights Watch, *Violence Against Women in South Africa: State Response to Domestic Violence and Rape*, New York: 1995, p. 95; Human Rights Watch, *South Africa: Violence Against Women and the Medico-Legal System*, New York: 1997, p. 22; Human Rights Watch, *Russia: Too Little Too Late: State Response to Violence Against Women*, New York: 1997, p. 21; Human Rights Watch, *Peru: Law of Protection from Family Violence*, New York: 2000, p. 8; Human Rights Watch, *Peru: Private Crimes, Practical Impunity*, unpublished manuscript on file with Human Rights Watch, p. 143; Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, New York: 1996, p. 88.

In Brazil, after the creation of women's delegacias (women's police stations)⁸, the reporting of rape and other crimes of sexual violence increased dramatically.⁹ Activists who trained police learned that it was not enough to train just the officers who would take or investigate the report, but also the officers who literally sit behind the desk at the front of the police stations. These police officers function as gatekeepers and, if untrained, may send women away or otherwise discourage them from making a report rather than sending them to the appropriate person to make the complaint.¹⁰

B. Mistreatment and Bias

Unfortunately, many women suffer more than simple rejection from the police. The police sometimes subject women who report crimes of sexual and gender based violence to harassment, intimidation or abuse. This is particularly true in countries in which women are considered suspect simply because they report being raped. Human Rights Watch interviewed women who reported rapes to the police and then were subjected to intimidation and threats by the police in Pakistan.¹¹ In an earlier report on police abuse in Pakistan, Human Rights Watch cited a report by the Human Rights Commission of Pakistan that more than 70 percent of women in police custody reported being subjected to physical or sexual abuse. Human Rights Watch further noted that when Pakistan implemented the Hudood Ordinances, which discriminate on the basis of gender, the number of women in custody in Pakistan rose sharply. One of the ramifications of the Hudood ordinances is that a woman who alleges rape and then fails to "prove" the rape happened, can then be charged with fornication or adultery and be sentenced to prison.¹²

In every country in which we conducted research we talked to women who were repeatedly told by the police that they should not pursue pressing charges against the perpetrators. Police officers warned women that they would have to investigate their sexual histories¹³; they were told that their identity would be exposed to the public¹⁴; and they were told that they would bring about dishonor on themselves and their families. In countries in which women may be killed in the name of honor, this latter point could have a significant chilling impact on women's willingness to report sexual violence or to pursue charges against the perpetrator.¹⁵

⁸ Human Rights Watch does not recommend the creation of women's police stations as a permanent solution, but rather the training of police to respond appropriately to women reporting sexual and gender based violence.

⁹ *Criminal Injustice*, 1991, p. 56.

¹⁰ Human Rights Watch interview with Shanti Dairiam, New York, NY, March 9, 1998.

¹¹ *Crime or Custom*, p. 57.

¹² *Double Jeopardy*, p. 2.

¹³ *Russia : Too Little Too Late*, p. 22; *Criminal Injustice*, p. 55.

¹⁴ *Russia : Too Little Too Late*, p. 22, *Criminal Injustice*, p. 58.

¹⁵ Male relatives may kill women and girls who are perceived to have brought dishonor upon their families in order to "restore" honor to the family. In some societies, being the victim of sexual violence is perceived to bring dishonor upon the victim's family and the victim may pay with her life.

Some police officers simply refuse to believe that a woman can be raped absent the explicit threat of force. “Nobody is able to spread the legs of a woman if they are cross, unless she is threatened with a weapon or fears for her life.”¹⁶ In Pakistan, a senior police official explained, “in 95 percent of the cases, the women themselves are at fault.”¹⁷ A 1996 study of police performance in rape investigations conducted by DEMAS, a leading Lima-based women’s rights organization found that the investigating officer had doubted the victim’s story in 59 percent of the rape cases. In 13 percent of rape cases, the investigating officer was convinced that the victim was completely fabricating the story of being raped.¹⁸

C. Failure to investigate

Human Rights Watch documented persistent patterns of non-existent or sloppy investigations by the police. In some instances, it seemed that the police were deliberately sabotaging the investigation.¹⁹ A 1996 study of police response to sexual violence in Peru, found that in 45 percent of the cases, the police did not even go to the crime scene.²⁰ In other cases, the police would fail to follow leads or thoroughly investigate the crime scene or refer women to get forensic evidence examinations in a timely manner. In some cases, corruption seemed to be the motivating factor behind police inaction. Corrupt police could either demand that the witness or her family pay a bribe before taking action or accept a bribe from the accused in exchange for agreeing not to pursue the investigation.²¹

In other cases, it appears that racism and other biases influenced the decision of police whether or not to investigate. Activists in South Africa explained that when a white woman files a report of rape, her claim is taken seriously and thoroughly investigated. But when a black woman reports the rape her case may be ignored. Police also refuse to take reports of sexual violence from prostitutes or reports in which another police officer is named as the perpetrator.²²

Finally, when police did identify and arrest a suspect in a case of sexual violence, they did not collect evidence from the body and clothing of the suspect. Such an examination would have to be undertaken only in a manner consistent with the rights of the accused. However, given probable cause, such an examination may be warranted and could be legally conducted. A forensic examination of the suspect should mirror the examination given to the victim. The suspect’s body should be examined for body fluids and any evidence of injuries that he may have suffered if the victim physically resisted the attack. The nature and extent of such injuries should be carefully documented as they may corroborate the victim’s account of the attack. If appropriate, the suspect’s clothing

¹⁶ *Criminal Injustice*, p. 56.

¹⁷ *Double Jeopardy*, p. 2.

¹⁸ *Private Crimes*, p. 143.

¹⁹ *Crime or Custom*, p. 59

²⁰ *Private Crimes*, p. 155.

²¹ *Crime of Custom*, p. 60, *South Africa (1995)* p. 91, *Private Crimes*, p. 158.

²² *South Africa (1995)*, p. 93; *Double Jeopardy*, p. 2.

should also be examined and kept as the clothing may yield information both as to any struggle and where the attack took place.²³

Police should ensure that when a complainant makes a report of sexual violence, that she is immediately told of the importance of receiving both medical treatment and a forensic examination. Police should assist her in identifying where she should go to get the exam and even help her get there in a timely manner. After the examination is conducted, the police should have a preliminary consultation with the examiner to get any information or leads that could be immediately pursued. At this point the evidence kit should either be sent directly to a laboratory for further analysis or given to the police to deliver, whichever is specified in current practices. In either case, it is important that the chain of custody be carefully preserved.

After more extensive tests are conducted on the evidence in the kit, the police investigator should again meet to discuss the evidence and pursue additional leads. These leads could vary from blood type to evidence that the victim inflicted scratches on the perpetrator to evidence of the site where the attack occurred. If the police fail to ensure that the evidence is analyzed, to protect the chain of custody or to learn what the evidence has to offer the investigator, the case may languish.

D. Pressure for offender/victim reconciliation

Because crimes of sexual and gender based violence have been routinely perceived as “private” crimes, police officers may push for a mediated resolution to the complaint. Until April 1997, a man who raped a woman in Peru and then agreed to marry her would not be charged with the crime. In many cases the women were not consulted on this arrangement. Women who report marital rape are particularly vulnerable to being forced to accept a mediated solution by the police. Also, in many countries, marital rape is not a recognized crime. These mediated solutions virtually never provide for holding the perpetrator accountable for future violence or setting up any mechanism to protect the woman from further harm.

E. Rudimentary follow up of forensic evidence

In most countries, the police are responsible for ensuring that women are sent for a forensic medical exam for the collection of evidence and assessment of injuries. In some cases, the police must provide the woman with a form so that she can get an appointment. In other cases, the police are to provide transport for the woman to the examination place. The police rarely inform women of the importance of this step. They sometimes refuse to take reports from women until they have received the medico-legal report confirming the rape.²⁴ Thus if women fail to get a forensic exam in a timely manner or if the examiner does not find evidence – either because there is no evidence or the examiner failed to find the evidence, the police will not investigate a complaint. Thus

²³ Violence Against Women Online Resources, Module 3, Police Investigation, Part 4: Suspects. See <http://www.vaw.umn/finaldocuments/consac3.htm>

²⁴ *Private Crimes*, p. 140.

even if there was an eyewitness, of the perpetrator told another person that he committed the rape, the police will treat the lack of forensic exam as a bar to further investigation of the reported crime. In some cases, the police delay the referral making it less likely that there will be evidence of the assault and the use the lack of evidence as the justification for not investigating the complaint. In countries where the police are to provide transport to the medical facility, they sometime outright refuse to provide the transportation or demand that the woman pay for the transportation or otherwise demand a bribe.

3. Ideological, institutional and resource barriers -- in health sector

Forensic evidence in cases of sexual violence can help establish that the act did occur, provide evidence of the identity of the perpetrator and corroborate the victim's story of when, where and how the attack occurred. The presence of semen strongly supports a woman's claim of rape although it does not address the issue of consent. Bruising, vaginal or anal tearing, striations from being choked and other evidence of force may be used to support a claim of use of force. Although there will not be physical evidence of the use of threats, there may be psychological evidence to support the claim.

A thorough forensic evidence exam should begin with an interview of the woman during which she gives a detailed history of the assault, including where the rape occurred, whether it was vaginal, anal and/or oral; what was used to penetrate her, whether and where the perpetrator ejaculated; whether the perpetrator used a condom, the use of any weapons or force, the use of any drugs, and whether and how she resisted. This information will enable the examiner to better collect evidence. For example, if a woman was anally raped, but is not interviewed by the examiner, she or he may only look for semen or other evidence based on the assumption it was a vaginal rape. It is critical that the examiners conduct a thorough interview and not make the victim feel under attack during the interview. The interview should take place in a private setting. It may be appropriate for the victim to have a support person with her during the interview. The examiner should explain why it is important to get the request information. As there are many euphemisms used to refer to acts of sexual violence, it is important that the examiner clarify any ambiguous language to ensure that all evidence will be collected.

If the victim of the sexual violence is a child, she or he may not have the language to describe what occurred. Therapists who work with child victims of sexual violence sometimes use anatomically correct human figures and ask the child to show what happened. Prosecutors tend to be reluctant to go forward with cases of child sexual abuse absent forensic evidence because of the trauma to children of testifying and questions regarding their capacity to testify in a court situation.

Additionally, the examiner should thoroughly examine the victim's body for visible injuries and document each injury. The examiner should collect clothing worn during the assault and examine both the woman's body and her clothing for evidence to identify the perpetrator such as saliva, sperm, blood, fibers, hairs, dried semen and skin

under fingernails and to corroborate any use of force. The examiner should also look for evidence of the location of the assault, e.g., sand, fibers, twigs, and mud.²⁵

Finally, the examiner should address the medical, psychological, safety and legal needs of the victim and should include counseling about possible pregnancy and testing and treatment for sexually transmitted diseases.²⁶ Only the findings linked directly to the assault and medical information necessary and relevant to the interpretation of the findings should be included in the forensic evidence report.²⁷ This prevents the defense from introducing irrelevant information related to the victims past sexual history into the legal proceedings.

As mentioned earlier, in some states, forensic examiners are unable to conduct appropriate examination because of a lack of resources. In the worst cases, there was insufficient lighting in the examination room. Examiners did not have the equipment to collect the evidence, e.g., no swabs for collecting semen from the vagina, rectum or mouth. Examiners did not have any kit in which to store the collected evidence in such a way that would protect it from being tampered with or otherwise compromised. Even more disturbing was the lack of sterile equipment and gloves for conducting the examination. In Pakistan, women were either subjected to examinations by a forensic examiner wearing used gloves that had been rinsed with water since the previous use or were told they must pay for new glove.²⁸

In some cases, in part because of the issue of resources, women do not have access to timely forensic exams because the state only supports the training and employment of a small number of forensic examiners. In Peru, the physicians who work for the Institute for Legal Medicine (IML) are all located in either Lima or provincial capitals making it impossible for many women to get the required exam.²⁹

A. Mistreatment and bias

Human Rights Watch interviewed forensic medical doctors who believed that women lie about being raped. A chief police surgeon in Pakistan told Human Rights Watch that women report rapes in the hundreds, “but they lie.”³⁰ More typical is the routine insensitivity toward women evidenced by the failure of examiners to explain what the exam will entail and why different procedures are being done. In some cases, the examiners fail to respect the women’s privacy, for example asking them to strip naked, but failing to give them a gown, or cover them with a sheet. In other cases, examiners would allow others to watch the examination without getting the women’s consent.³¹

²⁵ Linda E. Ledray, “Sexual assault evidentiary exam and treatment protocol,” *Journal of Emergency Nursing*, vol. 21, pp. 355-359.

²⁶ American College of Emergency Physicians, “Policy Statements: Management of the Patient with the Complaint of Sexual Assault,” *Annals of Emergency Medicine*, vol. 25, no. 5, pp. 728-729.

²⁷ *Ibid.*, pp. 54-56.

²⁸ *Crimes or Custom*, p. 79.

²⁹ *Private Crimes*, p. 168, 174.

³⁰ *Ibid.*, p. 88.

³¹ *Private Crimes*, p. 198.

B. Focus on virginity

Many of the forensic examiners focused on the condition of the hymen, often to the exclusion of all other evidence. This focus on the hymen per se has no legal or medical basis. It is one of two tests conducted by doctors to establish whether the woman is a virgin or “habituated to intercourse.”³² The second test is the finger test in which the examiner measures the elasticity of the woman’s vagina. Neither the state of a woman’s hymen nor the results of the finger test are definitive in answering the question of whether an individual was raped. The focus on virginity also means that many forensic doctors treat the exam as solely a gynecological exam and fail to document other evidence of force or violence.³³ In Pakistan, the same tests are conducted on women alleging rape as on women charged with adultery or fornication.³⁴ A senior medico legal officer in Pakistan defended the focus on virginity by arguing incorrectly, that the law of rape in Pakistan varies depending on whether the victim is a virgin or not.

In Peru, women’s rights activists repeatedly told Human Rights Watch that the focus of forensic examiners, as well as prosecutors and judges, was on the state of the victim’s hymen. One of the notations routinely written in charts was “old deflowering.”³⁵

In 1994, Human Rights Watch conducted research on state sanctioned virginity test in Turkey. In defense of the widespread use of virginity tests, state officials argued that they help prevent rape.³⁶ This justification is based on the idea that only women who are virgins can be raped or that the rape of a virgin is a more serious crime. To the extent that young women remaining virgins is perceived to reflect on the honor of the woman’s family and community, the rape of a virgin is often described as a crime against her family or community, rather than a crime against her. This construction of rape explains why an acceptable remedy in some culture is for the rapists to marry the woman he raped.

Virginity examinations continue to be widely used in some countries. In South Africa, virginity testing is perceived as a means of stopping the spread of HIV. In Turkey, despite the Turkish Medical Association announcement that virginity tests were a form of gender based violence, forensic doctors in Turkey continue to conduct the exams for both legal and social reasons.³⁷ The vast majority of doctors surveyed acknowledged that the examinations are traumatic for the patient and that at least 50 percent of the patients undergo the examination against their will.³⁸

C. Incomplete and incorrect forensic medical exams

³² Ibid., p. 83

³³ *Criminal Injustice*, p. 58.

³⁴ *Crime or Custom*, p. 82.

³⁵ *Private Crimes*, p. 189,

³⁶ Human Rights Watch, *A Matter of Power: State Control of Women’s Virginity in Turkey*, New York: 1994.

³⁷ Frank et al., “Virginity Examinations in Turkey: Role of Forensic Physicians in Controlling Female Sexuality,” *JAMA*, vol. 282, pp. 485-490, 1999.

³⁸ Ibid.

Forensic examiners fail to conduct a preliminary interview with the victim to ascertain the nature of the alleged crimes that would allow the examiner to conduct the appropriate tests and make decisions about what type of evidence might be available. Forensic examiners often lack training in appropriate and effective techniques for the collection of evidence in cases of sexual assault or domestic violence. In rape cases, examiners routinely employ medically groundless tests, such as virginity exams, while failing to collect evidence of non-consensual intercourse or evidence that could help to establish the identity of the perpetrator. In many cases, they are insensitive to victims' trauma; fail to explain the nature or purpose of the exams they are conducting; fail to get the victim's informed consent to conduct tests and collect evidence; allow outside observers to attend examinations without getting the victim's permission; and, fail to provide treatment for injuries victims have sustained.

Human Rights Watch was also disturbed to find, not only how poorly trained most forensic medical examiners were, but how they acted based on misinformation. For example, in Pakistan, the examiners thought that it was unimportant whether a woman who was raped had evidence collected within the first three days, assuring our researcher that semen can live in a woman's body for up to a month.

D. Absence of follow up – particular health and counseling

“Treatment is not our concern,” explained a district surgeon of the Office of Surgeon Medicolegal in Lahore.³⁹ Human Rights Watch repeatedly found systems in which the medical response to sexual violence was bifurcated, i.e., a woman would go first to get a forensic evidence exam and then to a medical clinic for treatment. This process raises issues of medical ethics, namely, should the state support a system in which trained health professionals fail to provide medical treatment to a patient. This is particularly critical in cases in which a woman may not have obvious injuries and may be unaware of the importance of being checked for internal injuries and receiving information about pregnancy or the risks of contracting sexually transmitted diseases as a result of a rape. On a more practical level, this split in the system effectively discourages women from seeking the evidentiary exam.⁴⁰ In cases of serious injury, the forensic examiner will refer the woman for additional treatment, but in many cases, the forensic examiner will be the only health professional she will consult in the wake of the assault. The failure to provide basic counseling and treatment can result in serious and unnecessary health consequences for the victim. In countries that require women to pay a fee for the forensic exam, as well as paying the police to provide the mandated transportation to the facility, limited resources may force her to choose between having that exam and seeking medical attention.

E. Refusal to testify or inadequate testimony

³⁹ *Crime or Custom*, p. 89.

⁴⁰ *Private Crimes*, p. 187. A woman who was gang raped in Peru could not afford the test to analyze semen that costs approximately US\$6. Her case was never prosecuted.

Although Human Rights Watch did not document patterns of forensic examiners refusing to testify in court, the significant flaws in the system of collecting evidence, analyzing the evidence and protecting the chain of custody means that most examiners fail to provide adequate testimony in court. In many cases, forensic doctors lacked training regarding the terminology, significance, and appropriate courtroom use of forensic medical evidence. This reduces the usefulness of the records they make. Not only is information that is probative often missing from the report, but also information that is irrelevant but potentially prejudicial to the victim is included in the report. Furthermore, forensic doctors do not understand the importance of ensuring the chain of custody of the evidence to prevent any possibility of it being tampered with.

4. Ideological, institutional and resource barriers – in the justice system

A. Training on use of forensic evidence

Many prosecutors lack training in how to present forensic evidence in legal proceedings. One of the most glaring errors is when prosecutors ask forensic examiners to present legal conclusions, “was the victim raped” as opposed to findings of fact that would support or refute the legal conclusions.” Like forensic doctors, many prosecutors share misinformation with regard to the importance of the women’s virginity and the condition of her hymen in determining whether she was raped. The testimony of the forensic evidence examiner creates an opportunity for the prosecution to recreate the crime so that the judge and jury understand the seriousness of crimes of sexual violence, yet most prosecutors fail to use this opportunity.

B. Bias and mistreatment

Bias against women influences the objectivity of proceedings in the criminal justice system. Entrenched prejudices and the belief that women can’t be raped or that women lie about rape and domestic abuse for their own ends severely hamper women’s ability to receive a fair hearing in court procedures. A prosecutor in Lahore, Pakistan, told Human Rights Watch, “I don’t believe in rape cases. Women’s consent is always there. If rape exists, it happens in only 1 percent of cases. For example, women may be raped during [an ambush], but that is extremely rare. Our society does not allow rape.”⁴¹ Another prosecutor in Karachi referred to victims of sexual assault as “women who were no better than prostitutes.”⁴² In South Africa, courts apply the “cautionary rule” in rape cases. The cautionary rule requires the court to exercise additional care when assessing the credibility of a rape victim.⁴³ The application of this rule in rape cases is based on the belief that women suffer “hysteria that can cause a neurotic victim to imagine things that did not happen,” and “spite, sexual frustration and other unpredictable emotional causes.”⁴⁴

⁴¹ *Crime or Custom*, p. 49.

⁴² *Ibid.*

⁴³ *South Africa* (1995), p. 101.

⁴⁴ *Ibid.*

In other cases, judges and prosecutors made a distinction between stranger rape and rape by an acquaintance. For example, in South Africa, a judge ruled that since the rapist's victim was a well-known acquaintance, his sentence should be reduced.⁴⁵

C. Discriminatory legislation

Discriminatory attitudes towards women in society are often reflected the laws of the country. Each state should review its criminal code and rules of procedure and evidence to identify and repeal laws that discriminate against women. The first question is whether the penal code includes crimes of sexual and gender based violence. Is rape a crime? Is there a distinction between rape of a virgin and other women? Is there a distinction between rape by a stranger and rape by an acquaintance? Is marital rape a crime? The second question is whether the law reflects the gravity of the crime. Is rape a misdemeanor or a felony? What is the statute of limitations for rape? Can the person convicted of the crime of rape avoid punishment by marrying the victim? The third question is whether the rules of evidence and procedure or the chamber rules of judges discriminate against women. In Pakistan, under existing laws, a woman's testimony does not carry equal weight with that of a man. Many countries allow the defense to raise the issue the women's prior sexual history to attack her character and argue that the rape of a sexually active woman is less serious than the rape of a virgin. Some states require proof of "earnest resistance" or proof of the use of force before they will proceed with a prosecution.

D. Nature of necessary links between health, police and justice sectors

All three sectors must be educated in what constitutes an appropriate, rights-based response to sexual and gender based violence against women. Each system must engage in self-scrutiny to identify and eliminate obstacles women face when seeking redress and treatment. This scrutiny must include looking at attitudinal as well as structural bias against women. Furthermore, the work of the public health sector on violence against women could be used to help counter perceptions within the law enforcement and criminal justice sectors that the violence is not serious, that it is rare, that women are inherently less credible than men, and that women lie about their experiences of sexual and gender based violence.

Issue of resources:

Human Rights Watch recognizes that any articulation of minimum standards must address the significant disparity between resources available in different countries. We believe that the obligation of the state to provide effective redress for victims of violence does not permit states to deny funding for the training of health professionals in the collection of forensic evidence or to deny health professionals access to the tools need to collect the evidence.

⁴⁵ Ibid.

We documented severe shortages of equipment, the inaccessibility of forensic medical examination clinics; the failure in particular to meet the needs of rural women; and personnel shortages, especially of women examiners. All these impacted women's ability to seek redress – many women, but especially rural women were unable to get to a clinic with a forensic examiner, in urban areas where women could get to the clinic, she might not be able to undergo the exam because they did not have the necessary equipment and in some cases because there was not female examiner and male examiners are forbidden to conduct the exam. These are not exclusively issues of resources, but rather of prioritization and political will. Human Rights Watch has specifically recommended the drafting of minimum standards, which are within the power of all states to meet with guidelines for how to use other tests, such as DNA testing, when the resources become available.

Recommendations:

To the medico-legal sector

- Rape victims should have access to medico-legal exams performed by women examiners twenty-four hours a day, seven days a week, including on holidays. States should ensure that there are sufficient numbers of trained staff and clinics throughout the country to ensure the timely access to exams for all the people living within its borders. Medical treatment and counseling should be available at the same location by trained health professionals. This may mean ensuring health professionals who work in rural areas receive training on the collection, analysis and preservation of forensic evidence. These health professionals may be doctors, but experience shows that nurses, physician assistants or midwives could also be trained to do the evidence collection effectively.
- Women who have been sexually assaulted and report to a public health facility should, wherever possible and with their written consent, be examined for medico-legal purposes at that facility, if necessary after calling a specialist from elsewhere to carry out the examination. The woman should be informed of her right to file a report with the police. With her consent, police should be called to the facility for the crime to be reported. Police involvement should not, however, be a prerequisite for conducting the medico-legal examination, which should always be carried out as soon as possible.
- In countries where services are rendered by medico-legal examiners at specialized medico-legal centers, the services should be expanded beyond collection of medical evidence to the provision of basic medical treatment. Furthermore, they should make referrals for additional medical treatment where necessary and to nongovernmental organizations providing legal aid and counseling to victims of sexual and gender based violence.

- Explicit regulations should be adopted to allow emergency clinic health professionals to be certified to conduct, in rape cases, official medical exams that would constitute admissible evidence at trial.
- The nature of the medico-legal examination performed on victims of rape and sexual assault and the format of the medico-legal report in such cases should be immediately analyzed for its appropriateness and changed if necessary. The focus of the exam should be on detecting signs of nonconsensual sexual intercourse rather than attempting to check the purported virginity status and vaginal elasticity of the examinee.
- The victim's entire body should be thoroughly examined for signs of struggle and for foreign materials of forensic significance, such as clothing fibers, twigs, sand, and gravel. The medico-legal report should make no reference to the victim's presumed level of sexual activity based on the "finger test" or any ostensible assessment of her vaginal elasticity. Such notations on the medico-legal report have no legitimate probative value in a rape case and are highly prejudicial and inflammatory, as well as being medically baseless.
- In countries in which medico-legal examinations are performed on women accused of adultery or fornication, the examination should also focus on detecting signs of nonconsensual sexual intercourse, since, in many cases, women who have been raped are falsely accused of these crimes. The practice of checking the virginity status of women accused of adultery or fornication should be discontinued in light of the scientifically flawed methods employed for this purpose. Modern medical standards hold that the use of the condition of the hymen to indicate recent sexual intercourse or virginity status is medically groundless.
- The medico-legal examinations performed on suspected rapists should not be limited to a potency test. The suspect's body should be given a thorough exam, including collecting evidence of a struggle, such as scratch marks and bruises, of body fluids and evidence of the place of the attack.
- Training programs should be developed and systematically implemented for all health professional designated to conduct medico-legal exams cases of sexual violence and in cases of adultery/fornication, both as a requirement before appointment and as annual in-service training. These programs should focus on relevant medico-legal methodology and principles, the psychological impact of sexual assault on victims, and the legal significance of medical evidence in these cases. Health professionals should be trained in methods to present their findings effectively and professionally in court. These training programs should be mandated at schools for health professionals and offered as part of continuing education programs.
- Manuals should be developed for health professionals responsible for examining rape victims that outline the relevant laws for their work, review specialized medico-legal techniques (for example, ways of determining the time of injury), and provide

detailed descriptions of injuries specific to sexual assault in both adult and child victims.

To law enforcement:

- A standard course of training on rape and other crimes of sexual and gender based violence should be required for new police recruits and serving officers. The government should commission individuals and organizations with expertise and experience in working with women victims of violence to develop a training program and to achieve its national implementation.
- Police should be trained in investigative methodology applicable to cases of sexual and domestic violence, including effective and respectful interviewing procedures for victims of these crimes and methods for protecting victims and witnesses from harassment by defendants (including physical violence, threats, and bribes to withdraw complaints).
- Police should receive professional training in basic medico-legal principles, methods for gathering medical and other forensic evidence, and in the legal and evidentiary significance of medical information in rape cases.
- The police rules requiring that a report be filed immediately upon receiving a complaint should be rigorously enforced, although filing a report should not be a prerequisite to obtaining a medico-legal exam for rape victims.
- Women who have been raped or sexually assaulted and report to a police station should be given the option to be taken immediately by the police to be examined by a specialist medico-legal practitioner. In rape cases women should also be able to go directly for a medico-legal examination without police escort or intervention. Hence, in cases of rape, there should be no requirement, in law or in practice, that an official complaint or report be registered prior to the victim's medico-legal examination. The requirement of obtaining a magistrate's order prior to the victim's medico-legal examination should also be eliminated in rape cases, provided that the health professional conducting the medico-legal exam obtains the woman's written consent before conducting the exam. In countries with laws on adultery or fornication, however, the requirement that a report be lodged and a magistrate determine the accused's consent before a medico-legal examination is performed should be maintained.
- States should create an independent mechanism in each province or region in a country to monitor and oversee police treatment of women victims of violence. This body should be empowered to hear complaints and to take steps to discipline police officers that reject complaints of sexual or domestic violence without cause, harass complainants or their families, close cases without cause, or accept bribes to block investigations.

- Police rules should establish clear and explicit guidelines for police intervention in cases of domestic abuse, including standardized arrest policies for perpetrators. Women victims of such violence are entitled to equal protection and enforcement of the law. Family violence cases should not be treated as "private problems" and as therefore unsuitable for intervention by the criminal justice system. It should be made clear that it is inappropriate conduct for the police to attempt to get the concerned parties to reconcile or reach a settlement.
- Police must be trained to eliminate gender biases in their responses to cases of violence against women. They should receive basic legal training to enable them comprehend the criminal nature of spousal and other family violence, and understand the parameters and elements of criminal assault. In particular the police should be trained to realize that domestic or family violence is not to be excused, tolerated, or condoned under any circumstances.

To the justice sector:

- It is now widely recognized that the general reputation of the victim has no bearing on whether she was raped in a particular instance. Many countries have enacted "rape shield laws" that explicitly bar the admission of reputation or opinion evidence relating to a woman's past sexual behavior in rape cases. Such rape shield laws also prohibit the admission of other evidence regarding a woman's past sexual behavior outside of a few limited exceptions.
- Laws should guarantee the right of women to have their testimony given equal weight to that of men in all cases.
- A specific set of laws should be enacted explicitly criminalizing all forms of domestic and familial violence against women, including assault, battery, burns, acid burns, sexual assault, forced abortions, and illegal confinement, at the hands of husbands, in-laws, and other relatives.
- A provision should be added to the code of criminal procedure to allow judges, at the request of the victim, to hold rape and domestic violence trials in camera. Such a provision is necessary in light of the social stigma attached to rape and the psychological trauma experienced by victims of rape and domestic violence, which may be heightened by a public proceeding.
- For the same reasons, and given the consequent reluctance of victims of these crimes to approach the courts, the codes of criminal procedure should be amended to empower courts to withhold the name, address, and other identifying information about the victim in rape and domestic violence cases from the media and general public.

- States should review all relevant laws including the statute of limitations to ensure that, without violating the rights of the accused, the police and prosecutors have the necessary time to thoroughly investigate and bring charges.

To WHO:

- WHO should draft minimum standards for the collection of evidence in cases of sexual and gender based violence. These standards should reflect the standards that all states can meet, regardless of resource issues.
- Additionally, WHO should draft graduated standards that would be adopted by governments as their resources allow them to use more sophisticated tests, such as DNA testing of evidence.
- WHO should draft a policy paper that analyzes the obstacles to the effective implementation of these standards. The paper should make recommendations for review and reform of all elements of the criminal justice and health sector necessary for the appropriate response to sexual and gender based violence, consistent with human rights principles.

Appendix

Checklist of forensic evidence collection from victims:

- Clothing
- Debris collection
- Fingernail cuttings
- Known head hair, pulled
- Oral Swab and smear
- Saliva sample
- Dried secretion specimen
- Pubic hair combing
- Genital swabbing
- Vaginal swab and smear
- Anal swab and smear
- Other physical evidence, i.e., description of cuts, scratches, bruises and other physical injuries
- Blood sample

Checklist of forensic evidence collection from suspects

- Clothing
- Debris collection
- Oral swabbing
- External penile swabbing

- Dried secretion specimens
- Fingernail cuttings
- Pubic hair combing
- Other physical evidence, e.g., description of cuts, scratches, bruises and other physical injuries
- Saliva sample
- Blood sample
- Known head hair, pulled
- Known pubic hair pulled

Evidence to look for at crime scene:

- Semen
- Vaginal fluids
- Tampons or sanitary pads
- Facial or toilet tissues
- Blood
- Lubricants or packages
- Saliva
- Ropes, twine, cordage, tape
- Hairs
- Fibers
- Body tissues
- Clothing
- Condoms or wrappers
- Bedding