NATIONAL PUBLIC HEARING ON RIGHT TO HEALTH CARE
ORGANISED BY NHRC & JSA ON 16-17 DECEMBER 2004, NEW DELHI

NHRC Recommendations for a

National Action Plan to Operationalise the Right to Health Care

Within the broader framework of the Right to Health

Objectives of the National action plan

- **Explicit recognition of the Right to Health Care,** to be enjoyed by all citizens of India, by various concerned parties: Union and State Governments, NHRC, SHRCs and civil society and other health sector civil society platforms.
- **Delineation of essential health services and supplies** whose timely delivery would be assured as a right at various levels of the Public Health System.
- **Delineation of citizen's health rights related to the Private medical sector** including a Charter of Patients Rights.
- **Legal enshrinement of the Right to Health Care** by enacting a Public health services Act, Public health services Rules and a Clinical Establishment Regulation Act to regulate the Private medical sector.
- **Operationalisation of the Right to Health Care** by formulation of a broad timetable of activities by Union and State Governments, consisting of the essential steps required to ensure availability and accessibility of **'appropriate'** health services to all citizens, which would be necessary to operationalise the Right to Health care. This may include a basic set of Health Sector reform measures essential for universal and equitable access to **appropriate** health care, and guidelines regarding the budgetary provisions to be made available for effective operationalisation.
- **Initiation of mechanisms for joint monitoring** at District, State and National levels involving Health departments and civil society representatives, with specified regularity of monitoring meetings and powers to monitoring committees. In parallel with this, an institutionalised space needs to be created for regular civil society inputs towards a more consultative planning process. These should be combined with **vigilance mechanisms** to take prompt action regarding illegal charging of patients, unauthorized private practice, corruption relating to drugs and supplies etc. **To monitor unethical and illegal medical practices.**
- **Functional redressal mechanisms** to be put in place at District, State and National levels to address all complaints of denial of health care.

Recommendations under the action plan

Recommendations to Government of India / Union Health Ministry

- **Enactment of a National Public Health Services Act, recognizing and delineating the Health rights of citizens**, duties of the Public health system, public health obligations of private health care providers and specifying broad legal and organisational mechanisms to operationalise these rights. This act would make mandatory many of the recommendations laid down, and would make more justiciable the denial of health care arising from systemic failures, as have been witnessed during the recent public hearings.

  This act would also include **special sections to recognise and legally protect the health rights of various sections of the population, which have special health needs:** Women, children, persons affected by HIV-AIDS, persons with mental health problems, persons with disability, persons in conflict situations, persons facing displacement, workers in various hazardous occupations including unorganised and migrant workers etc.
- **Delineation of model lists of essential health services at various levels:** village / community, sub-centre, PHC, CHC, Sub-divisional and District hospital to be made available as a right to all citizens.
- **Substantial increase in Central Budgetary provisions for Public health,** to be increased to 2-3% of the GDP by 2009 as per the Common Minimum Programme.
- **Convening one or more meetings of the Central Council on Health** to evolve a consensus among various state governments towards operationalising the Right to Health Care across the country.
- Enacting a **National Clinical Establishments Regulation Act** to ensure **citizen's health rights concerning the Private medical sector** including right to emergency services, ensuring minimum standards, adherence to Standard treatment protocols and ceilings on prices of essential health services. Issuing a Health Services Price Control Order parallel to the Drug Price Control Order. Formulation of a Charter of Patients Rights.
- **Setting up a Health Services Regulatory Authority** - analogous to the Telecom regulatory authority- which broadly defines and sanctions what constitutes rational and ethical practice, and sets and monitors quality standards and prices of services. This is distinct and superior compared to the Indian Medical Council in that it is not representative of professional doctors alone – but includes

Elements of Advocacy

- Public campaigns on right to healthcare
- Raising the budget / allocations
- Dialogue with parliamentarians
- Dialogue with civil society groups
- Public Hearings
- Policy briefs and info packs
- Media use
- Legislative/ Constitutional changes
- Public interest litigation

Examples of monitoring and advocacy from India

- Budget monitoring and advocacy (CEHAT)
- Right to healthcare campaign (JSA)
- Research support for right to healthcare (CEHAT)
- Public hearings on denial of healthcare and violation of health rights (NHRC, JSA)
- Monitoring sex selection and advocating for changes in and implementation of PNDT Act (CEHAT, MASUM…)
- Regulation of the medical profession (CEHAT)
- Reproductive rights and right to abortion (CEHAT)

representatives of legal health care providers, public health expertise, legal expertise, representatives of consumer, health and human rights groups and elected public representatives. Also this could independently monitor and intervene in an effective manner.

- Issuing **National Operational Guidelines on Essential Drugs** specifying the right of all citizens to be able to access good quality essential drugs at all levels in the public health system; promotion of generic drugs in preference to brand names; inclusion of all essential drugs under Drug Price Control Order; elimination of irrational formulations and combinations. Government of India should take steps to publish a National Drug Formulary based on the morbidity pattern of the Indian people and also on the essential drug list.
- **Measures to integrate National health programmes with the Primary Health Care system** with decentralized planning, decision-making and implementation. Focus to be shifted from bio-medical and individual based measures to social, ecological and community based measures. Such measures would include compulsory health impact assessment for all development projects; decentralized and effective surveillance and compulsory notification of prevalent diseases by all health care providers, including private practitioners.
- **Reversal of all coercive population control measures,** that are violative of basic human rights, have been shown to be less effective in stabilising population, and draw away significant resources and energies of the health system from public health priorities. In keeping with the spirit of the NPP 2000, steps need to be taken to eliminate and prevent all forms of coercive population control measures and the two-child norm, which targets the most vulnerable sections of society.
- Active participation by Union Health Ministry in a National mechanism for health services monitoring, consisting of a ***Central Health Services Monitoring and Consultative Committee*** to periodically review the implementation of health rights related to actions by the Union Government. This would also include deliberations on the underlying structural and policy issues, responsible for health rights violations. Half of the members of this Committee would be drawn from National level health sector civil society platforms. NHRC would facilitate this committee. Similarly, operationalising ***Sectoral Health Services Monitoring Committees*** dealing with specific health rights issues (Women's health,

Children's health, Mental health, Right to essential drugs, Health rights related to HIV-AIDS etc.)

- The structure and functioning of the **Medical Council of India** should be immediately reviewed to make its functioning more democratic and transparent. Members from Civil Society Organisations concerned with health issues should also be included in the Medical Council **to conform medical education to serve the needs of all citizens, especially the poor and disadvantaged.**
- People's access to emergency medical care is an important facet of right to health. Based on the Report of the Expert Group constituted by NHRC (Dr. P.K.Dave Committee), short-term and long-term recommendations were sent to the Centre and to all States in May 2004. In particular, the Commission recommended:

  (i) Enunciation of a National Accident Policy;

  (ii) Establishment of a central coordinating, facilitating, monitoring and controlling committee for Emergency Medical Services (EMS) under the aegis of Ministry of Health and Family Welfare as advocated in the National Accident Policy.

  (iii) Establishment of Centralized Accident and Trauma Services in all districts of all States and various Union Territories along with strengthening infrastructure, pre-hospital care at all government and private hospitals.

- Spurious drugs and sub-standard medical devices have grave implications for the enjoyment of human rights by the people. Keeping this in view all authorities are urged to take concrete steps to eliminate them.

- Access to Mental health care has emerged as a serious concern. The NHRC reiterates its earlier recommendations based on a Study "Quality Assurance in Mental Health" which were sent to concerned authorities in the Centre and in States and underlines the need to take further action in this regard.

Recommendations to State Governments / State Health Ministries

- **Enactment of State Public Health Services Acts/Rules,** detailing and operationalising the National Public Health Services Act, recognizing and delineating the Health rights

of citizens, duties of the Public health system and private health care providers and specifying broad legal and organisational mechanisms to operationalise these rights. This would include **delineation of lists of essential health services at all levels:** village / community, sub-centre, PHC, CHC, Sub-divisional and District hospital to be made available as a right to all citizens. This would take as a base minimum the National Lists of essential services mentioned above, but would be modified in keeping with the specific health situation in each state.

These rules would also include **special sections to recognise and protect the health rights of various sections of the population, which have special health needs:** Women, children, persons affected by HIV-AIDS, persons with mental health problems, persons in conflict situations, persons facing displacement, workers in various hazardous occupations including unorganised and migrant workers etc.

- Enacting **State Clinical Establishments Rules** regarding **health rights concerning the Private medical sector**, detailing the provisions made in the National Act.
- **Enactment of State Public Health Protection Acts** that define the norms for nutritional security, drinking water quality, sanitary facilities and other key determinants of health. Such acts would complement the existing acts regarding environmental protection, working conditions etc. to ensure that citizens enjoy the full range of conditions necessary for health, along with the right to accessible, good quality health services.
- **Substantial increase in State budgetary provisions for Public health** to parallel the budgetary increase at Central level, this would entail at least doubling of state health budgets in real terms by 2009.
- **Operationalising a State level health services monitoring mechanism,** consisting of a ***State Health Services Monitoring and Consultative Committee*** to periodically review the implementation of health rights, and underlying policy and structural issues in the State. Half of the members of this Committee would be drawn from State level health sector civil society platforms. Corresponding **Monitoring and Consultative Committees** with civil society involvement would be formed in all districts, and to monitor urban health services in all Class A and Class B cities.
- **Instituting a Health Rights Redressal Mechanism** at State and District levels, to enquire and take action relating to all cases of denial of health care in a time bound manner.

- **A set of public health sector reform measures** to ensure health rights through strengthening public health systems, and by making private care more accountable and equitable. The minimum aspects of a health sector reform framework that would strengthen public health systems must be laid down as an essential precondition to securing health rights. **An illustrative list of such measures is as follows:**

  1. State Governments should take steps to **decentralize the health services** by giving control to the respective Panchayati Raj Institutions(PRIs) **from the Gram Sabha** up to the district level **in accordance with the XI Schedule of the 73rd and 74th Constitutional Amendment of 1993**. Enough funds from the plan and non plan **allocation** should be devolved to the PRIs at various levels. The local bodies should be given the responsibility to formulate and implement health projects **as per the local requirements** within the **local** overall framework of the health policy of the state. The elected representatives of the PRIs and the officers should be given adequate training in local level health planning. Integration between the health department and local bodies should be ensured in formulating and implementing the health projects at local levels.
  2. The adoption of a **State essential drug policy** that ensures full availability of essential drugs in the public health system. This would be through adoption of a graded essential drug list, transparent drug procurement and efficient drug distribution mechanisms and adequate budgetary outlay. The drug policy should also promote rational drug use in the private sector.
  3. The health department should prepare a State Drug Formulary based on the health status of the people of the state. The drug formulary should be supplied at free of cost to all government hospitals and at subsidized rate to the private hospitals. Regular updating of the formulary should be ensured. Treatment protocols for common disease states should be prepared and made available to the members of the medical profession.
  4. The adoption of an integrated community health worker programme with adequate provisioning and support, so as to reach out to the weakest rural and urban sections, providing basic primary care and strengthening community level mechanisms for preventive, promotive and curative care.
  5. The adoption of a detailed plan with milestones, demonstrating how essential secondary care services, including emergency care services, which constitute a basic right but are not available today, would be made universally available.

6. The public notification of medically underserved areas combined with special packages administered by the local elected bodies of PRI to close these gaps in a time bound manner.
7. The adoption of an integrated human resource development plan to ensure adequate availability of appropriate health humanpower at all levels.
8. The adoption of transparent non-discriminatory workforce management policies, especially on transfers and postings, so that medical personnel are available for working in rural areas and so that specialists are prioritised for serving in secondary care facilities according to public interest.
9. The adoption of improved vigilance mechanisms to respond to and limit corruption, negligence and different forms of harassment within both the public and private health system.
10. All health personnel upto the district PRI level must be administratively and financially accountable to the PRI at each level from the Gram Panchayat to the District level. Adequate financial resources must be made available at each level to ensure all basic requirements of health and medical care for all citizens.

- Ensuring the implementation of the Supreme court order regarding **food security, universalising ICDS programmes and mid day school meal programmes**, to address food insecurity and malnutrition, which are a major cause of ill-health.
- People's access to emergency medical care is an important facet of right to health. Based on the Report of the Expert Group constituted by NHRC (Dr. P.K.Dave Committee), short-term and long-term recommendations were sent to the Centre and to all States in May 2004. In particular, the Commission recommended:

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- Spurious drugs and sub-standard medical devices have grave implications for the enjoyment of human rights by the people. Keeping this in view all authorities are urged to take concrete steps to **monitor and** eliminate them.
- Access to Mental health care has emerged as a serious concern. The NHRC reiterates its earlier recommendations based on a Study "Quality Assurance in Mental Health" which were sent to concerned authorities in the Centre and in States and underlines the need to take further action in this regard.

Recommendations to NHRC

- NHRC would oversee the monitoring of health rights at the National level by initiating and facilitating the ***Central Health Services Monitoring Committee***, and at regional level by appointing ***Special Rapporteurs on Health Rights*** for all regions of the country.
- Review of all laws/statutes relating to public health from a human rights perspective and to make appropriate recommendations to the Government for bringing out suitable amendments.

Recommendations to SHRCs

- SHRCs in each state would facilitate the ***State Health Rights Monitoring Committees*** and oversee the functioning of the State level health rights redressal mechanisms.

Recommendations to Jan Swasthya Abhiyan and civil society organisations

- JSA and various **other** civil society organisations would work for the widest possible raising of awareness on health rights – 'Health Rights Literacy' among all sections of citizens of the country.

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LAW AND ETHICS

THE LAW

- ***a set of rules which governs the way people behave***
- ***the law creates corresponding rights and obligations***

ETHICS

- ***moral principles which guide behaviour (e.g.: ethical guidelines for professionals - Hippocratic Oath)***

SOURCES OF LAW

Constitutional Law

Statutory Law

Common Law

Customary Law

Personal Law

SOURCES OF LAW

Constitutional Law

**how State is organised*

**fundamental rights of citizens*

**supreme law*

Statutory Law

**laws made by Parliament/Legislatures*

SOURCES OF LAW

Common Law

**arose from English judge-made law*

**imported into India by the British under the doctrine of equity, justice & good conscience*

Customary Law

**developed from the customs of a community*

**in existence from time immemorial (> 30 years)*

SOURCES OF LAW

Personal Law

**applicable to a person on the basis of their religion*

**originally applicable in all spheres, contract, criminal and family and succession*

**now primarily family and succession law*

SEPARATAION OF POWERS

Judicial Review

Organs of State:

- ***Legislature (Parliament)=makes law***
- ***Executive (Government, Police, Bureaucracy)= implements law***
- ***Judiciary= Reviews what laws are passed and actions of the executive***

JUDICIAL REVIEW

- *India has a Written Constitution*
- *Constitution is Supreme Law*
- *All laws have to be within it and subordinate to it (intra vires)*
- *High Courts and Supreme Court decide whether law is constitutional*
- *Even a constitutional amendment has to be intra vires (doctrine of basic features/structure)*

TYPES OF LAW

Criminal Law

**how State expects you to behave in society*

Civil Law

**how one must behave in private relationships*

THE LEGAL RESPONSE ...

- *the evolving pandemic of HIV/AIDS has given rise to legal responses*
- *more developed in USA, Australia - where the pandemic hit first*
- *in these countries a wide variety of legal responses arose*
- *in most developing countries the legal responses are not fully developed and are very much in the early stages*

THE LEGAL RESPONSE ...

The law has various roles
**deterrent*
**normative/pedagogic*
*The law is *premised on various doctrines*
**natural law*
**human rights*
Today we live in an era of the positivist state - a body of persons authorised to make enforceable laws

THE LEGAL RESPONSE ...

- *prescriptive (prescribes behaviour)*
- *proscriptive (punishes behaviour)*
- *human rights (protective of individual rights)*
- *instrumentalist (promote behaviour change)*
- *pedagogic (educative)*

THE LEGAL RESPONSE ...

- *Generally there have been two types of legal responses*
- *These responses are diametrically opposed*
- *They can be termed as the isolationist response and the integrationist response*

ISOLATIONIST v. INTEGRATIONIST

isolationist	integratioinst
• mandatory testing	•voluntary testing
• confidentiality breached	•confidentiality maintained
• discrimination if HIV-positive	•no discrimination if HIV-positive
• ...leading to isolation of HIV-positive person…	•...leading to integration of HIV-positive person...

ISOLATIONIST RESPONSE PROBLEMS...

1. REQUIRES COMPULSORY REPEAT TESTING OF HIV-NEGATIVE PERSONS (every six months)
2. ECONOMICALLY NOT FEASIBLE
3. IMPOSSIBLE TO IMPLEMENT FOR THE WHOLE OF THE POPULATION IN A COUNTRY LIKE INDIA

ISOLATIONIST RESPONSE...

IN PRACTICE, THE ISOLATIONIST STRATEGY

- further targets already marginalised populations like sex workers, drug users and men who have sex with men
- is violative of fundamental rights
- results in driving the HIV epidemic underground

THE ROLE OF THE LAW...

- **it is clearly necessary to opt for either the isolationist response or the integrationist response**

THE ROLE OF THE LAW...

- Right to health is recognised as a fundamental right under Article 21 of the read with Article 47 of the Constitution
- State is required to reimburse expenses for open heart surgery as per rules
- However budgetary constraints have to be considered while framing rules

(Vincent Panikurlangara; Surjit Singh; Ram Lubhaya; cases)

THE ROLE OF THE LAW...

- **The law, especially in the social sphere, must base itself on a rational and scientific understanding of the issue at hand and not on prejudice, myth or political opinion**

THE LEGAL RESPONSE...

- 1986: Goa Public Health (Amendment) Act -- espouses isolation
- 1989: *Lucy D'Souza's* case challenges the Act -- rejected by Bombay High Court. However, the Act is no longer implemented
- 1989: AIDS Prevention Bill, 1989 - not passed by Parliament
- 1997: Draft National AIDS Prevention & Control Policy -- espouses a rights-based approach (approved by Cabinet in 2002)

THE LEGAL RESPONSE

- 1997: *MX v ZY* -- Bombay HC upholds right of PWA to employment
- 1998: *Mr. X v Hospital Z* -- Supreme Court suspends the right of PWA to marry (reversed in December 2002)
- 1999: Maharashtra & Karnataka legislators table isolationist HIV Bills
- 2000: NHRC recommends rights-based legal measures
- 2000/1: Bombay & Kerala HC injunct false advertising of 'cures'

THE LEGAL RESPONSE

- 2001: India signatory to UN Declaration of Commitment on HIV/AIDS
- 2001/2: NGOs intervening with MSM and CSW are harassed, raided - workers jailed
- 2002: Calcutta HC awards damages of Rs. 22 lakhs -- negligence ion blood transfusion
  2002: Andhra Pradesh & Goa governments consider mandatory pre-marital testing
- 2002: MCI Regulations fail to reevaluate medical practice
- 2005: TRIPS -- impact on drug prices?

PUBLIC HEALTH

CLASSIC DEBATE

Rights of the individual v. Rights of the Community
Individuals Rights v. Public Health Interest

- ***Also raised in the HIV/AIDS Pandemic***
- ***False Debate (No dispute that Public Health, that is .Stopping further Spread of HIV is key)***
- ***Paradox in the HIV/AIDS scenario is that public health can only be enhanced by protecting the rights of individuals infected and affected***

PUBLIC HEALTH

There exists a dramatic gap between the identification and existence of human rights and the respect and enforcement of human rights...

Domestic law seeks to bridge this gap and empowers the individual to assert and vindicate his/her rights.

THE ROLE OF THE LAW IN HIV/AIDS

Domestic law should promote effective policies that impede HIV transmission while assuring the dignity of each individual living with HIV/AIDS

SOURCES OF INTERNATIONAL LAW (IL)

- Article 38, Statute of ICJ
- Customary Law
- Treaties (interpretation by Vienna Convention)
- General principles of law
- Equity
- Judicial decisions
- The writings of publicists
- Ethical principles and considerations of humanity
- Soft law

Right to health under IL

- World Health Organization
- United Nations Charter
  - Articles 55 and 56
- Universal Declaration of Human Rights, 1948 (General Assembly Resolution)
  - Right to standard of living adequate for the health of himself and his family, including ... healthcare (Article 25(1))
  - Right to share in scientific advancements and its benefits (Article 27(1))
- International Covenant on Civil and Political Rights, 1966
  - Right to life (Article 6)

Right to health under IL

- International Convention on Economic, Social and Cultural Rights
  - Right to highest attainable standard of health (Art. 12)
  - General Comment No. 14, 2001:
    - The obligations to respect, promote and fulfil
    - Obligation to respect: States to refrain from interfering with enjoyment of right to health
    - Obligation to protect: States to make measures that prevent third parties from interfering with the right to health, includes duties of States to adopt legislation or take measures to ensure equal access to health-care services provided by third parties
    - Obligation to fulfil: State to adopt measures towards full realization of the right to health
    - Core obligations

Right to health under IL

- Other international instruments such as CEDAW, CRC, Charter of Economic Rights and Duties of States
- Regional instruments
- Therefore, right to health is a part of Customary IL

Application of IL in national courts

- International Customary Law
  - Does not require to be domesticated
  - Applied by national courts unless domestic law to the contrary
- International Treaties
  - Monism: IL and municipal law part of the same system, no need of legislation
  - Dualism: IL and municipal law are two distinct legal systems, IL can be enforced only when incorporated or transformed into municipal law
  - Treaty is law under domestic jurisdiction unless there is contrary domestic statute
  - Treaty can be used to interpret rights and fundamental rights

IL in India

- Article 51(c), Constitution of India: The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another.
- Article 253, Constitution of India: Parliament has power to make any law for implementing any treaty, agreement or convention with any other country, or countries or any decision made at an international conference, association or other body.

IL in India

- *M. V. Elisabeth* v. *Harwan Investment & Trading Pvt Ltd., Goa*, AIR 1993 SC 1014:
  Conventions to which India is not a party are the result of unification and development of maritime laws of the world, and can, therefore, be regarded as international common law or transnational law rooted in and evolved out of the general principles of national laws, which in the absence of specific statutory provisions, can be adopted and adapted by courts to supplement and complement national statutes on the subject"

IL in India

- *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241:
  The international conventions and norms are to be read into [the fundamental rights] in the absence of enacted domestic law occupying the filed when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.

CONSENT

- **Medical consent is part of common law**
- **Principles of consent in common law are set out in detail in the law of contract and are applicable to consent in the medical field**
- ***"Consent is taken when two or more persons agree upon the same thing in the same sense."***

(Section 13 Indian Contract Act)

CONSENT

- *Consent is free when it is not caused by :-*
- *Coercion*
- *Undue Influence*
- *Fraud*
- *Misrepresentation*
- *Mistake*
- *(Section 14 of the Indian Contract Act)*

CONSENT

- *EXCEPTIONS TO CONSENT*
- *unconscious patient brought to hospital*

**doctrine of necessity will permit doctor to interfere with bodily integrity*

**necessity not convenience*

- *acting out of necessity legitimizes an otherwise unlawful act*

CONSENT

- *DOCTOR - PATIENT RELATIONSHIP*
- *relationship between unequals :*

*Doctors have *better knowledge*

**larger experience*

- *Therefore the duty of the physician :*

**is to provide honest information*

- *BASIS OF THE DOCTRINE OF INFROMED CONSENT*

INFORMED CONSENT

"patient must agree to the risk to which s/he may be exposed"

What sort of risks are to be disclosed ?

How much information does the patient require to have?

Who should decide ?

Varying approaches in the US, Canada and England;

INFORMED CONSENT

VARYING APPROACHES:

- *Expert approach= Doctor's right= UK*
- *Patient approach= Patient's right= USA*
- *Middle approach= Mix of both= Canada*
- *India = No approach= Common law Dependant on the predilection of judges*
- *Can we leave it judges or should we have a statute?*

INFORMED CONSENT

ENGLISH APPROACH: Current medical Practice

The test of whether to inform of the risks (part of the general duty of care) and what to inform was to be determined by the Bolam test= current medical practice

Current medical practice may be ignored if a substantial risk was likely and the right to information was so obvious

(Sidaway v. Board of Governors, England)

INFORMED CONSENT

US Approach=Prudent Patient test

- *Doctor must disclose all material risks based on the prudent patient*

(A risk is material when a reasonable person would attach significance to)

- *A doctor however has the therapeutic privilege to withhold information if the disclosure would result in serious adverse psychological consequences to the patient*

(Canterbury v. Spence, US)

INFORMED CONSENT

CANADIAN Approach=Modified objective test: Mixture of Objective and Subjective

- *The patient has a right to know all material risks inherent in the procedure or treatment.*
- *A risk is material if in the circumstances of a case, a **reasonable person** would have attached significance to it - **objective factors**.*
- *Risks are also material which are particular considerations affecting the **particular patient** constitute the **subjective factors***

INFORMED CONSENT

- *Consent for Blood transfusion*
- *Patient has a right to control her own body and reject specific treatment, even if such a decision may entail a risk such as death.*
- *Risks relating to transfusion should be explained to the patient*
- *Possible consequences of refusal should be brought out*
- *Specific Consent should be taken*

INFORMED CONSENT

Consent for an HIV is a diagnostic test

- *HIV infection is not curable*
- *other diagnostic tests do not have life-threatening implications*
- *HIV test has life threatening implications*
- *knowledge of HIV-positive status itself may led a person to untold trauma like taking one's life*

INFORMED CONSENT

HIV SCENARIO:

- *HIV test cannot be treated as any other diagnostic test*
- *consent to another diagnostic test cannot be taken as implied consent to an HIV test*
- *Specific consent for an HIV test necessary*
- *An HIV test must be preceded by informed consent*

TESTING

When to test for HIV?

- *Indicative of treatment*
- *Preventive measures for Mother to Child Transmission*
- *Significant risk of exposure*

TESTING

HIV SCENARIO

- ***informed consent in the context of HIV/AIDS implies conducting pre and post-test counselling***
- ***failure to perform pre and post-test counselling implies no consent***

What is Confidentiality ?

- Confidentiality arises when there is :
- a confidential relationship, the nature of which may be dependent on factors of trust, knowledge and skill
- confidential information

PRIVACY-SECRECY-CONFIDENTIALITY

- *Privacy*
  the right of a person vis-à-vis the world at large
- *Secrecy*
  the right of a person vis-à-vis the state
- *Confidentiality*
  the right of a person vis-à-vis another person/s

PRIVACY-SECRECY-CONFIDENTIALITY

- ***confidentiality arises when information which has the necessary quality of confidence about it has been imparted in circumstances importing an obligation of confidence.***
- ***the duty to maintain confidentiality emerges from common law principles.***

Ethics and Practices

Indian Code of Medical Ethics:

" Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of patients observed during medical attendance should never be revealed unless their revelation is required by the laws of the State.

CONFIDENTIALITY

Sometimes, however, a physician must determine whether his duty to society requires him to employ knowledge obtained through confidence to his as a physician, to protect a healthy person against a communicable disease to which he is about to be exposed. In such instance the physician should act as he would desire another to act toward one of his own family in like circumstance."

CONFIDENTIALITY

IS DISCLOSURE PERMISSIBLE ?

Issue

Interest of the PLWHA to keep his HIV + status confidential

v/s

Interest of the community, society, to have knowledge of the the individual's HIV + status

CONFIDENTIALITY

Courts have held disclosure not to be permissible :

Held :

" Victims ought not to be deterred by fear of discovery from going for treatment and free and informed public debate about AIDS could take place without disclosure."

X v/s Y; [1988] 2 All ER 414, QBD

CONFIDENTIALITY

Courts have held disclosure not to be permissible :

Held :

" *The persons receiving the confidential information were not at risk of exposure and therefore the disclosure was unreasonable, unjustified and wrongful."*

Jansen Van Vuuren & Anr. v. Kruger
1993(4)SA 342

LARGER PUBLIC INTEREST TO DISCLOSE

- *In certain circumstances, disclosure of information imparted in confidence may be allowed if public interest to disclose outweighs public interest to maintain confidentiality*

CONFIDENTIALITY

Courts have held disclosure to be permissible :

- Treatment/Interest of patient

Doctor to Doctor/ medical staff discussions

W v/s Edgell & Ors,(1990) 1 All ER 835 CA

- Statutory requirement/Notification tauthorities

Hunter v/s Mann, (1974) 2 All ER 414 QBD

CONFIDENTIALITY

- Medical research approved by a recognized ethical committee
- Public Safety/Administration of justice

W v/s Edgell & Ors (1990) 1 All ER 835 CA

PRIVACY-SECRECY-CONFIDENTIALITY

- Partner Notification

Tarasoff v/s Regents of the University of California, 17 Cal 3d 425

Held :

(i) At common law, the general rule is that one person owes no duty to control the conduct of another nor to warn those endangered by such conduct;

PRIVACY-SECRECY-CONFIDENTIALITY

(ii) Exceptions arise where

(a) a special relationship exists between the defendant and the injured part giving the latter a right to protection, or

(b) a special relationship exists between the defendant and the active wrongdoer imposing a duty on the defendant to control the wrongdoer's conduct

PRIVACY-SECRECY-CONFIDENTIALITY

(iii) Existence of a special relationship between a doctor and a patient

(iv) Duty to warn/protect the third party

(v) Duty to warn patient's family members of a contagious disease

(vi) Duty to care to all persons who are forseeably endangered

CONFIDENTIALITY

Mr. X v/s Hospital Z, (1998) 8 SCC 296

- Disclosure permissible to wife or prospective wife as the fundamental right of the right of the wife to lead a healthy life outweighs the fundamental right of the PLWHA's right to confidentiality and privacy
- the right which would advance the public morality or public interest to be advanced "*AIDS is the product of indiscipline sexual impulse*"

CONFIDENTIALITY

- Partner notification emerged as a public health tool in the US in the 1930's
- Rationale : allows identification, treatment and education of individuals who have been exposed to a communicable disease
- Failure : Inspite of standard use of partner notification for cases of syphilis and gonorrhea and the existence of effective treatment, the prevalence has increased- CDC study

CONFIDENTIALITY

- Studies conducted in the US, reveal that coercive HIV partner notification programmes have failed.
- Recognition of the importance of public health programs that encourage voluntary partner notification

DISCRIMINATION

- *Concept of discrimination is incorporated in Articles 14, 15 and 16 of the Constitution. These form part of the Fundamental Rights Chapter (Part III) of the Constitution.*
- *Fundamental rights are available only against the State (Article 12)*

DISCRIMINATION

- *Based on principles of natural justice and equality*
- *Incorporates the American doctrine of classification and the doctrine of non-arbitrariness developed in India*

DISCRIMINATION

- *The doctrine of classification is based on the premise that equals should not be treated unequally and unequals should not be treated equally.*
- *Classification must satisfy the tests of:*
  - *(a) intelligible differentia - objective criteria*
  - *(b) rational nexus - rational relationship*

DISCRIMINATION

- *a group can be divided into two classes if the classification is based on an intelligible differentia viz. an objective and rational criteria*
- *the basis of the classification (the objective criteria) itself must have a rational relationship to the object of a statute*

DISCRIMINATION

- *HIV status is certainly an intelligible differentia to classify individuals into the classifications of HIV-positive or HIV-negative*
- *whether or not classification on the basis of HIV will satisfy the test of rational nexus will depend on the facts of each individual case*

DISCRIMINATION

- *The doctrine of non-arbitrariness posits that the statutes and state action must be fair, just and reasonable (reasonableness doctrine)*
- *Reasonableness must be applicable to statute (substantive reasonableness) and to state action (procedural fairness)*
- *In India statute can be struck down as being substantively and procedurally unreasonable under Article 14 of the Constitution*

DISCRIMINATION

- *MX v. ZY AIR 1997 Bom 406*
  - *The Bombay High Court held that actions must follow the rigours of Articles 14 & 21 of the Constitution and followed the principles set down in School Board of Nassau County, Florida et al. V. Arline, (1987) 480 U.S. 273*
  - *In order for a person to be rendered incapable of performing the job, s/he must be unable to perform the job functions due to reported ailment, or pose a risk to others at the time ("otherwise qualified" & "significant risk")*

DISCRIMINATION: IN THE HEALTHCARE SETTING

IS REMOVING AN HIV+ HEALTHCARE WORKER FROM EMPLOYMENT DISCRIMINATION? (employment scenario)

DATA ON TRANSMISSION FROM HEALTHCARE WORKER TO PATIENT

- *CDC estimates risk of transmission from surgeon to patient through stick or cut is between 1 in 41, 667 and 1 in 416, 667*
- *CDC and AMA are currently reevaluating policies in light of epidemiological evidence showing that the risk to patients, even from invasive procedures, is negligible*

HIV-INFECTED HEALTH CARE PROFESSIONALS

- *For healthcare providers, risk is inherent in every activity, including every medical procedure*
- *Significant risk must also be measured in the context of the particular field of activity. The acceptable risks in that field of activity would establish risk threshold therefore comparative risk must also be assessed*

HIV-INFECTED HEALTH CARE PROFESSIONALS

Bradley v. University of Texas M.d. Anderson Cancer Ctr.

- *Bradley, a surgical tech. revealed that he was HIV+. Soon after, the hospital reassigned Bradley to another department. Bradley sued the hospital.*
- *The Court held that Bradley posed a significant risk to patients and that was sufficient reason for him not to continue in that department.*

HIV-INFECTED HEALTH CARE PROFESSIONALS

- *In India there have been no HIV/AIDS-related decisions offering alternate employment to healthcare workers but a similar concept has been applied by the Supreme Court*

Anand Bihari v. Rajasthan S.R.T.C

DISCRIMINATION: EMPLOYMENT

- *There is a common law duty for an employer to provide a safe working environment.*
- *There is a corresponding right of the employee to a safe working environment*

Provision of Post Exposure Prophylaxis (PEP) in Healthcare Settings

- *In public healthcare institutions, PEP should be made readily available for healthcare workers*
- *Healthcare workers should be trained about all facets of PEP*

Recommendations for Post Exposure Prophylaxis (PEP) in Healthcare Settings

-prompt management of exposure site
-evaluation of source & healthcare worker for the need for PEP
-baseline HIV test of exposed healthcare worker
-2 drug regimen - 2 NRTIs with possible use of PI
-initiated as soon as possible(before 36 hours)
-4 week regimen to be completed
-follow-up with counselling, testing & medical evaluation

COMPENSATION FOR HIV CONTRACTED AT THE WORKPLACE

- *healthcare workers infected on the job could file suit under common law for damages on the ground that the employer had failed to provide a safe working environment*
- *In India, healthcare workers are not covered by the Workmen's Compensation Act*
- *Courts in other jurisdictions have considered such cases for damages*
  - » *James v. Nolan*

Discrimination : Healthcare Delivery Setting

DOES REFUSAL TO PROVIDE MEDICAL TREATMENT TO A PERSON LIVING WITH HIV/AIDS AMOUNT TO DISCRIMINATION?

(healthcare delivery)

EXAMPLES OF HIV/AIDS-RELATED DISCRIMINATION IN DELIVERY OF HEALTHCARE SETTING

- *refusal to treat*
- *inappropriate treatment*
- *physical isolation in wards*
- *early discharge*
- *delays in treatment*
- *conditional treatment*
- *prejudicial comments & behaviour*

Duty to Treat

- *There is a common law duty for doctors to care where there exists a professional relationship between the doctor & patient according to the standard of care*
- *Where the person requiring medical treatment is a stranger to the doctor and there is no established professional relationship, the doctor will not be liable for refusing to treat the person*

Duty to Treat

- *Under Article 21 of the Constitution of India the right to life and liberty includes the right to health*
- *By law, State healthcare institutions/providers are obliged to provide medical treatment to all persons in emergency and non-emergency situations without discrimination*

REFUSAL TO TREAT

- *Private healthcare institutions/providers are not obliged to treat persons except in an emergency situations and until the patient can get other medical help*

(Parmanand Katara v. Union of India AIR 1989 SC 2039)

PUBLIC & PRIVATE HEALTHCARE

- *According to National Sample Study, National Council for Applied Economic Research 60 - 80% of healthcare is sought in the private sector for which households contribute 4 - 6% of their income*
- *Given the sheer numbers of HIV+ persons in India, this will place an increasing burden on the private healthcare system to provide treatment for HIV+ persons*

REFUSAL TO TREAT

- *In the US, under the American Disabilities Act (ADA), HIV is now recognized as a disability*
- *Disability under the ADA is defined as "an … impairment that substantially limits one or more of [an individual's] major life activities"*
- *A person who is HIV+ is disabled and cannot be denied medical treatment*

(Bragdon v. Abbott)

MEDICAL TREATMENT

- *In other jurisdictions where anti-discrimination legislation exists it has been held that treatment may be reasonably refused on several grounds:*
  - *if a professional lacks the the skill appropriate to render competent care, s/he may legally refuse to treat the person and lawfully refer the patient elsewhere*
  - *significant risk posed to the healthcare provider during the course of treatment*

MEDICAL TREATMENT

Medical treatment is denied for the following reasons:

» *fear of occupational exposure*
» *lack of resources to provide adequate treatment and protect oneself*

OCCUPATIONAL EXPOSURE

Risk of acquiring HIV infection from patients is a function of several factors:

nature of the exposure
likelihood that the person is infected,
if so then:
viral load, stage of HIV infection
efficiency of the virus infecting the exposed person

OCCUPATIONAL EXPOSURE

- *Epidemiological data suggests that the risk of transmission through occupational exposure is exceedingly low in low prevalence settings*
- *San Francisco General Hospital study of surgical personnel showed cumulative risk of 0.125 per year (high prevalence setting - 10%)*
  (1 infection among staff every 8 years)

OCCUPATIONAL EXPOSURE

- *Latest CDC data on occupational exposure shows that paramedical staff are actually more prone to occupational exposure that physicians and surgeons*
  - » *out of 52 reported cases of occupational exposure sero-converting to HIV : 19 laboratory workers, 21 nurses,6 physicians, 2 surgical technicians*
  - » *out of 52 cases: 45 percutaneous injuries (puncture/cut) of which 41 involved hollow-bore needles*
  - » *out of 52 cases: 47 - HIV infected blood*

Preliminary Recommendations

- *Development of anti-discrimination legislation which covers the the private healthcare sector*
- *Development of welfare legislation which covers the healthcare sector*
- *PEP be made readily available to all healthcare workers at least those working in high prevalence settings*

An overview of Health and Human Rights

In health there is freedom.
Health is the first of all liberties.

Henri-Frederic Amiel, c.1850

Human Rights

Human rights are proposed entitlements that should belong to every human being. Human rights are ideally supposed to:

- Be mandated by international standards;
- Be legally protected;
- Focus on the dignity of the human being;
- Protect individuals and groups;
- Oblige states and state actors;
- Not be waived or taken away;
- Be interdependent and interrelated;
- Be universal.

In reality, rights are not always realised in this form!

Needs and Rights

Needs

- May or may not be met, not obligatory
- Identified by the provider
- Are fulfilled out of a sense of benevolence of the provider
- May be reduced according to the dynamics of the situation

Rights

- Enforceable, once given cannot be reduced
- The holder of rights has a role in the negotiation
- Are fulfilled because the holders have an entitlement
- Once given may not be reduced, but are open to expansion

Needs and Rights

Needs

- Lack of fulfilment becomes critical only when a large section is affected
- If the provider does not meet needs, there are no direct consequences
- Needs do not directly confront the system, may remain unmet if not translated into rights
- Based on passive recipients, does not lend itself to political mobilisation

Rights

- Violation of rights of even one individual is a wrong
- There are consequences for duty holders if rights are violated
- Confronts the status quo, once a right is recognised, it is more likely to be fulfilled
- For a right to be recognised requires political mobilisation, hence rights have the potential for political action

The Needs based approach and the Rights based approach …

"When I fed the poor, they called me a saint. When I asked why they were poor, they called me a communist."

- Archbishop Camara

Levels of obligations
regarding Human rights

Three types or levels of obligations on States parties: the obligations to ***respect, protect*** and ***fulfil.***

The obligation to ***respect*** requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.

The obligation to ***protect*** requires States to take measures that prevent third parties from interfering with article 12 guarantees.

Finally, the obligation to ***fulfil*** requires States to adopt appropriate legislative, administrative, budgetary, judicial,promotional and other measures towards the full realization of the right to health.

United Nations

United Nations
Declaration of Human Rights

Article 25. (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

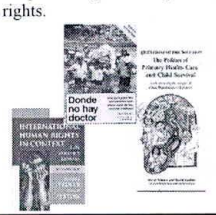
'International Bill of Rights'

United Nations Declaration of Human Rights

Covenant on Civil and Political Rights

Covenant on Economic, Social & Cultural Rights

The UN Declaration of Human Rights is supported by two binding Covenants. These Covenants define the specific rights & responsibilities of signatory Nations to uphold human rights.



CP Rights and ESC Rights

- Civil and political rights have been traditionally asserted by the US and Western capitalist states ('First generation rights')
- Economic and Social rights were upheld to a much greater degree by the erstwhile socialist states ('Second generation rights')
- These two types of rights need not be dichotomised, but we should be aware that ESC rights are 'Rights of the poor and marginalised' and attack more directly at exploitative ***structures***

(ESC rights were) "a response to the abuses and misuses of capitalist development and its underlying, essentially uncritical, conception of individual liberty that tolerated, even legitimated, the exploitation of working classes and colonial peoples.

Historically, it is a *counterpoint to the first generation of civil and political rights*, with human **rights conceived more in positive ("rights to") than negative ("freedom from") terms**, requiring the intervention, not the abstention, of the state for the purpose of assuring equitable participation in the production and distribution of the values involved."

"You can kill a man by making him a pavement dweller, just as surely as you can kill him with a gun."

Strengths of the Rights approach

- A slogan like 'Right to Health Care' can be ***comprehended, at a basic level, by anyone;*** the rights language has a ***strong universal appeal***
- ***Empowers individuals, communities and organisations,*** enabling them to demand particular health services
- ***Focuses on functional outcomes,*** and measures all policy declarations in terms of ***what people actually receive***
- ***Health services become understood as important public goods***, distinct from commercial services to be purchased in the market

Strengths of the Rights approach

- ***Rights lend themselves to expansion*** and universalisation; certain rights become a precedent for establishment of others
- The rights approach naturally ***strengthens the claims of the most disadvantaged*** and vulnerable sections
- ***Rights once granted cannot be easily reversed*** though policies and funding priorities may change
- ***The rights approach talks in terms of obligations and violations,*** thus placing the responsibility to deliver on the system.

Difficulties in taking a Rights approach in the Health sector

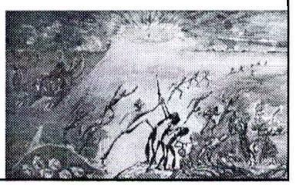
- No specific strong 'pressure group' for Public health
- Consumer extremely vulnerable at the time of service delivery
- Personalised nature of doctor-patient relationship
- Many quality related and technical issues involved
- Health is a usually 'Off' occassionally 'ON' priority
- A major group centrally involved – **health care providers** may have strong sectional interests, resistance to change and attitude of technical arrogance

Some limitations of the Rights approach

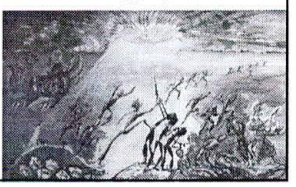
- May **range people against the local providers** like the ANM but may leave the policy makers and global actors unscathed
- Demand for rights may be partly met by introducing tokenistic reforms, an **attempt may be made to co-opt this demand** as 'good governance' without making broader structural changes
- Rights are progressively realised; hence details of policies and implementation need to be monitored and supported, which may require pro-people experts to work 'with the system'. Danger of **divide between the 'experts' and the people**
- **Larger context of globalisation-liberalisation sets limits to public expenditure** and the possibilities of realising the right to health care

How can we develop an understanding of Human Rights in a "structural" context?

While ESC Rights are universal, their violation is very much focussed on the poor and marginalised. Addressing these rights would require an analysis of structures – who is oppressing whom in the present structure, and what kind of alternative social structure are we demanding?



The movement for these rights has to be a collective activity based on community and social mobilisation.
The Rights framework offers one way to anchor, broaden and guide such mobilisation. But the Rights approach cannot substitute for social mobilisation, nor can it avoid discussing the real barriers to achieving rights in the form of existing social and economic structures.
Struggles for social justice have been waged since times immemorial. The Human rights framework is one more weapon which can be used by the oppressed in their struggles for a new society.



Health is a reflection of a society's commitment to equity and justice. Health and human rights must prevail over economic and political concerns.

- People's Charter for Health

Exercise

- In your opinion, how does the striving for rights by people throughout history relate with the modern framework of human rights?
- What is the relevance of this today?

WHAT ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- **Fair, safe working conditions;**
- **Right to seek and choose work;**
- **Right to form, join and act in trade unions;**
- **"Social Security", including government assistance during old age and in times of unemployment, and money or other help for people at other times when they need assistance in order to live their lives with dignity;**
- **Assistance and protection for families;**
- **Equal marriage rights for men and women;**
- **Adequate standard of living for everyone, involving adequate clothing, housing and food;**
- **High standard of health and health care for all;**
- **Satisfactory primary education for all and increased opportunities for further education;**
- **Right to participate in the cultural life of the community; and**
- **Right to benefit from scientific progress;**

UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

- **Mandate – Monitor the extent to which State Parties comply with the International Covenant on Economic, Social and Cultural Rights; and**
- **Formulate and provide general guidance to States on how to understand and comply with their obligations under the Covenant;**
- **Procedures – State Party must submit progress report to CESCR within two years of ratification of Covenant;**
- **State Party must submit progress reports every five years;**
- **CESCR assesses the performance of each State Party by examining the State Party reports as well as information from NGOs and other UN agencies;**

HOW CAN NATIONAL IINSTITUTIONS (NI) PARTICIPATE IN THE WORK OF THE CESCR
In Their Own Country

- **Provide information and expert advice on economic and social conditions.**
- **Provide information and advice to legislatures and legislators;**
- **Prepare an "alternative" or "parallel" report to submit to the CESCR supplementary to the State Party report;**
- **Annual report card on the performance of their country;**
- **Urge to governments that annual budgetary planning respect the State's obligations under the Covenant;**
- **Lobby assistance from courts, tribunals and NGOs to prevent and remedy violations;**
- **Develop friendly and cooperative relationships with members of public service;**
- **Develop ties with the media to publicise and disseminate information and educate the public;**
- **Develop communication networks with other National Institutions and NGOs to share knowledge and work on the same problem from various directions;**

HOW CAN NATIONAL INSTITUTIONS PARTICIPATE IN THE WORK OF THE CESCR
Working in Conjunction with the CESCR

- **Provide information to formulate List of Issues identifying areas of concern with respect to a State's fulfilment of its Covenant obligations and serving to structure and guide the formal review session;**

- **Provide information for the Country profile to help CESCR prepare for its review of Country record, in the form of newspaper clippings, newsletters, or reports from the NGO or other National Institutions;**

- **Participate in the Pre-Sessional Working Group (PSWG) by sending information about a State Party's implementation of the Covenant, submitting questions for the List of Issues, and making oral presentations at the PSWG meeting;**

- **Shorter National Institutions/ NHRC briefs that do not amount to full reports provide valuable insight to the CESCR by pointing to gaps or misleading data in a State's periodic report;**

- **National Institutions may submit a written statement, no more than 2,000 words, to the CESCR about its State's periodic report;**

- **National Institutions may submit a detailed "alternative", or "parallel" or "shadow", report mirroring the State's report;**

- **National Institutions may make oral presentations during CESCR Sessions;**

- **National Institutions may stay in the Conference room during CESCR review proceedings and advise the Committee on follow-up questions during breaks;**

- **National Institutions may publicise outcomes of the proceedings through the media;**

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Engendering health

T.K. SUNDARI RAVINDRAN

THE term 'gender' is often used as synonymous with 'sex', male and female. Though the two are indeed synonymous according to English language dictionaries, the term 'gender' has over the past three decades evolved into a concept different from 'sex'. Ann Oakley and others used the term gender in the 1970s to describe those characteristics of men and women which are socially determined, as against 'sex' which describes biologically determined characteristics. This distinction between sex and gender provides a useful analytical tool for focusing attention on differences between women and men which are socially constructed.

Many of the differences in men's and women's roles and responsibilities, norms and values guiding appropriate behaviour and access to and control over resources, have less to do with the fact that they were born male or female or that women alone can be impregnated and bear children, and more with how society expects women and men to behave. These in turn are derived from patriarchal ideology – a system of ideas based on a belief in inherent male superiority. This ideology typically includes the belief that male control over property is 'the natural order of things'.

What do we mean by 'engendering' health or a gender perspective on health? The very term suggests that it is not the same as focusing on women's health, or even more narrowly on health conditions exclusively experienced by women as a consequence of their biology.

Traditional frameworks for analysing women's health have often concentrated on the childbearing years, and especially with health problems related to pregnancy and childbearing. Besides their special health needs that are different from those of men due to biological differences, women are also exposed to all the health problems that affect men throughout their lifecycle. Thus malaria, tuberculosis, occupational and environmental health hazards – all these impact women's health needs too. In fact, since infections such as malaria and hepatitis become life-threatening conditions for women during pregnancy, they are issues of special concern.

A gendered perspective on health includes, besides examining differences in health needs, looking at differences between women and men in risk factors and determinants, severity and duration, differences in perceptions of illness, in access to and utilisation of health services, and in health outcomes. 'When considering the differences between women and men (in health status), there is a tendency to emphasize biological or sex differences as explanatory factors of well-being and illness. A gender approach in health, while not excluding biological factors, considers the critical roles that social and cultural factors and power relations between women and men play in promoting and protecting or impeding health.'[1]

Why do we advocate engendering health? Few would disagree with the view that health is a product of the physical and social environment in which we live and act, which is in turn affected by the global and local environment: social, cultural, economic and political. It is also widely acknowledged on the basis of studies conducted in diverse settings that inequalities in health across population groups arise largely as a consequence of differences in social and economic status and differential access to power and resources. The heaviest burden of ill-health is borne by those who are most deprived, not just economically, but also in terms of capability, such as literacy levels and access to information.

Substantial evidence exists to indicate that in almost all societies women and men have differing roles and responsibilities within the family and in society, experience different social realities, and enjoy unequal access to and control over resources. It therefore follows that gender is an important social determinant of health. Gender differences are observed in every stratum of society, and within every social group, across different castes, races, ethnic or religious groups.

Men and women perform different tasks and occupy different social, and often different physical, spaces. The sexual division of labour within the household, and labour market segregation by sex into predominantly male and female jobs, expose men and women to varying health risks. For example, the responsibility for cooking exposes poor women and girls to smoke from cooking fuels. Studies show that a pollutant released indoors is 1000 times more likely to reach people's lungs since it is released at close proximity than a pollutant released outdoors. Thus, the division of labour by sex, a social construct, makes women more vulnerable to chronic respiratory disorders including chronic obstructive pulmonary disease, with fatal consequences.[2] Men would in turn be more exposed to risks related to activities and tasks that are by convention male, such as mining.

Differences in the way society values men and women, and accepted norms of male and female behaviour influence risk of developing specific health problems as well as health outcomes. Studies have indicated that preference for sons and the undervaluation of daughters skew the investment in feeding and health care. This has potentially serious negative health consequences for girls, including avoidable mortality. On the other hand, social expectations about male behaviour may expose boys to a greater risk of accidents, and to the adverse health consequences of smoking and alcohol use.

Patriarchal norms which deny women the right to make decisions regarding their sexuality and reproduction expose them to avoidable risks of morbidity and mortality, be it through sexually transmitted infection resulting from coercive sex, or death from septic abortion because access to safe abortion has been denied by state legislation. The practice of unsafe sex by large sections of men who are aware of the health risks cannot be explained except in terms of gender norms of acceptable and/or desirable male sexual behaviour.

Because men and women are conditioned to adhere to prevailing gender norms, their perceptions and definitions of health and ill-health are likely to vary, as is their health seeking behaviour. Women may not recognise the symptoms of a health problem, not treat it as serious or warranting medical help, and more commonly, not perceive themselves as entitled to invest in their well-being.

Finally, because women and men do not have equal access to and control over resources such as money, transport and time, and because the decision-making power within the family is unequal with men enjoying privileges that women are denied, women's access to health services is restricted. They may be allowed to decide on seeking medical care for their children, but may need the permission of their husbands or significant elders within the family to seek health care for themselves. Restrictions on women's physical mobility, common in many parts of India, often makes it imperative for women to be accompanied to a health facility by a male family member.

In many instances, biologically determined differences between women and men interact with socially constructed behaviour to the disadvantage of women. This is best illustrated in the case of sexually transmitted infections. Women are biologically more susceptible to contracting a sexually transmitted infection than men. This is because of the shape of the vagina and a greater mucosal surface exposed to a greater quantity of pathogens during sexual intercourse, since the quantity of seminal fluid is far greater than the vaginal fluid involved. Further, women with a sexually transmitted infection are more likely to be asymptomatic and therefore less likely to seek treatment. Untreated and undiagnosed sexually transmitted infections are the cause of chronic infections and numerous long term complications suffered by women, including infertility and cervical cancer.

There are other factors which compound women's vulnerability because of the way society expects women and men to behave. For a majority of women, high risk activity can simply mean being married. Social norms which accept extra-marital and pre-marital sexual relationships in men as 'normal', and women's inability to negotiate safe sex practices with their partners, are factors that make it difficult for women to protect themselves from sexually transmitted infections. A study of STD (sexually transmitted diseases) clinic patients in India (1992) indicated that a third of the women, all in monogamous married relationships, were infected by their husbands, while the majority of the male patients were infected by commercial sex workers and casual sexual partners. Not a single man was infected by his wife.[3] Men's unwillingness to use condoms further accentuates women's risk. For example, in a study of the prevalence of and risk factors for HIV infection in Tamil Nadu, India (1994-1995) covering a population of about 97,000, less than 2% of married men were found to be condom users.[4] The stigma attached to visiting an STD clinic together with other barriers such as lack of time, money and decision-making power discourages women from seeking treatment.

deconstruct and reconstruct the normative premises of science (which is cognitive, experimental and rational) and the law (which is practical and rational).[22]
Thus, by applying these definitions feminists are not only intervening in the classical political arenas of the state and the market, but also challenging the dominant normative forces which have the power to determine the limits and possibilities of transforming contemporary societies. With this understanding, the boundaries and goals of the feminist project will be clarified, and the theoretical and methodological instruments which should be applied in the domains of analysis and action can be made more precise. **Gender and sexuality: fusion vs distinction**

> "An important barrier in our efforts to understand gender relations is the difficulty in comprehending the links between sex and gender."

1

Given the significance of Cairo and Beijing for the feminist women's health movement, it is important to discern what the implications are for the future. An important part of this process is to explore the conceptual and political challenges that emerge in the face of the unwillingness to legitimise the concept of sexual rights.
Petchesky identifies a trend in international women's rights campaigns towards emphasising horrors such as genital mutilation and trafficking in women and children, which propagate an image of women as victims in the arena of sexuality. This discourse, she says, is so powerful that it was not surprising in Beijing that: "the spectre of sexualised bodies desiring pleasure remained lurking behind the debates".[9] Although Petchesky is right, the explanation for this silence should also be sought in feminist and other theoretical analyses of gender and sexuality.[23-25]
The academic and political environment in which feminist definitions of sexual and reproductive rights were elaborated has been strongly influenced by post-structuralist and constructivist theories.[25,27,28] The analytical arsenal of social construction (and deconstruction) theories of language, of discourse and of difference have fertilised the debates and research on gender and sexuality.[23,29-32]

> "...the totality of arrangements through which a society transforms biological sexuality into a human activity, and in which human needs are both satisfied and transformed. The power of gender operates more forcefully during the childbearing years, when the means of controlling sexuality, reproduction and access to work are most focused and function in a clearer and sharper fashion" 27

Teresita de Barbieri enhances this definition as follows:

> "...the social construction that defines and gives meaning to sexual and human reproduction."[33]

Rubin, however, later retraced her own theoretical steps and re-conceptualised sexuality as an autonomous sphere in which personal, social, cultural and political relationships are

built and transformed.[25] Rather than linking sexuality and gender, her more recent work maintains that:

> "...gender and sexuality are the basis of two different arenas of social practice."

This new approach implies that the construction of gender identities, gender norms, and the asymmetry in the relations between men and women do not necessarily determine the manifestation of sexual desire, erotic practices and the experience of sexual pleasure.
Along similar lines, through studies of male homosexuality in Brazilian culture, Richard Parker has developed a theoretical triangle in which gender, sexuality and the erotic are linked. In his analysis, "sexuality system" is partially defined by religious doctrine, the biomedical perspective and other such mechanisms of control, while the "erotic" is designated as the sphere of imaginative and passionate bodies at play, which we call sexuality.[23]
Similarly, Carol Vance16 suggests that distinguishing these systems is an important step, to get beyond essentialist assumptions of gender, sexuality and reproduction. She reminds us that biomedicine has converged with religious assumptions which defined reproduction (heterosexual, penetrative) as sexuality, replacing:
older ideas of unnatural sexuality as sin, by newer ideas of unnatural sexuality as physical aberrations or violations of a physically constituted law of natureí.
These hegemonic conceptions are strongly grounded in the notions that men are "naturally men", women are "naturally women" and sexuality is definitely gender-bound.
Dowsett[34] takes an even more radical position in this conceptual trend of distinguishing gender and sexuality systems. As a result of his study of men who sometimes have sex with other men, he elaborates a concept of "sexual construction of sociality", which turns upside down the Foucaultian formulation that sexuality is socially constructed.[35,36] In addition, he suggests that, in the context of "bodyplay", gender difference as a means of explaining passive and active roles may have little meaning. The implicit idea is that any erotic encounter between two (or more) people will always contain the potential for each of them to be active and creative agents in the search for pleasure.[37]
The ideas of Rubin, Vance, Parker and Dowsett help and inspire us, in the post-Beijing era, to get some distance from the premise that conceptual approaches to sexuality are necessarily derived from theories of gender.[25] This is no easy task because of how closely gender and sexuality are connected with reproduction, work and power.
Costa made a brilliant contribution in 1996 in a paper that focused on the example of western culture. It shows that prior to the Enlightenment, metaphysics did not emphasise the sexual differences between men and women; this only came later.[38] The paradigm of the body up to that time was the male body. Woman's body was represented as an inverted and imperfect male body, in which penis and testicles were turned inward. The hegemonic 'two-sex model' of today resulted from an ideological need on the part of Enlightenment liberalism to resolve the contradiction between equality (grounded in the premise that all individuals are in possession of the same faculty of Reason) and difference (between the male and female bodies in which Reason was lodged):

world. Dowsett, in turn, emphasises the positive dimensions of bodies at play in sexuality, conceptualising sexual pleasure as a 'big bang'. He strongly suggests that the power and extent of the means of controlling sexuality are not as extensive as Foucault postulated. The two views should not be taken as opposing, but as two different perceptions of the issues: North and South, male homosexuality and feminism.

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GENDER, REPRODUCTIVE AND SEXUAL RIGHTS

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What is Gender?

- Existing differences between men and women is biological and social in nature:
  - 'Sex' refers to the biological differences between men and women
  - 'Gender' refers to the socially constructed roles and relations between men and women in a given culture or location.
  - These roles and relations are influenced by several societal institutions, social factors and processes.
  - Gender attitudes and behaviours have wide variations both between and within cultures.

Gender Relations

- Gender relations refer to relations of power between men and women, and women.
- Gender relations interact with other structures of social hierarchy such as class, caste and ethnicity.
- Gender relations are relations of dominance and subordination with elements of co-operation, force and violence.

HUMAN RIGHTS TREATIES AND CONVENTIONS

- Universal Declaration of Human Rights, 1948 was the first to articulate the right to health and family planning.
- The International Covenant on Civil and Political Rights, 1966 stated that men and women of marriageable age have the right to marry and to found a family.

HUMAN RIGHTS TREATIES AND CONVENTIONS -2

- The International Covenant on Economic, Social and Cultural Rights, 1966 required state parties to recognise right to health and take steps to achieve the realisation of the right.
- The Convention of Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 addressed rights to health and family planning.
- The Convention on the Rights of the Child, 1989 reiterates the rights to maternal health and identifies it as linked to health of children.

UN CONFERENCES AND ACCORDS

- The UN Conference on Environment and Development, Rio de Janeiro, 1992.
- World Conference on Human Rights, Vienna, 1993.
- International Conference on Population and Development, Cairo, 1994.
- World Summit for Social Development, Copenhagen, 1995.
- Fourth World Conference on Women, Beijing, 1995.
- Second Conference on Human Settlements, Istanbul, 1996.

Rio Conference 1992

- Rio Declaration stressed the centrality of women to the twin issues of environment and development.
- Called for women's participation in
  - environmental management
  - Economic and political decision-making
  - Equality to women, in particular in access to natural resources.

Vienna Conference, 1993

- The Conference Declaration endorsed "Women's Rights are Human Rights"
- Reaffirmed the universality of Women's Human Rights
- Arguments of Cultural Relativism and the primacy of civil and political rights over social, economic and cultural rights have been quelled thru this declaration.

Cairo Conference, 1994

- Cairo PoA emphasised improving the status of women, gender equity and equality; education, especially for girls; infant, child and maternal mortality reduction; and universal access to reproductive health services.
- Women's empowerment is considered to be central to the exercise of reproductive rights.

Beijing Conference

- Reaffirmed the Declarations made by earlier Conferences.
- The Beijing Platform for Action stated that governments irrespective of their political, economic and cultural systems are responsible for the promotion and protection of women's human rights.

Reproductive Rights are Human Rights

- Reproductive Rights include:
  - Right to health
  - Right to Family Planning
  - Right to Reproductive Self-determination
  - Principle of non-discrimination that ensures that reproductive health care services are provided to all women.
  - Sexual Rights are more contentious that reproductive rights

Women's Health and Rights

- Right to Life
- Liberty and security of the person
- Equality before the law
- Safe conditions of work
- Found a Family
- Highest attainable standard of physical and mental health
- Informed consent, choice and decision-making in health care
- Reproductive and sexual health
- Benefits of scientific progress

Rights Violations

- Direct action on the part of States
  - Coercion in FWP
    - Two-child Norm
  - States Failure to Meet core Obligations - reducing MMR
  - Discrimination in terms of access to services to specific groups

Ethical Context of Reproductive and Sexual Rights

- Bodily Integrity
- Personhood
- Equality
- Diversity

Thank You

Sex Selection and Sex Determination-Abuse of Genetic Diagnostic Technology

Producing a child in an infertile mother's womb; when to have a child and when not to have a child; determining whether the child to be born is a boy or girl; determining the position of the child in the mother's womb; whether the child has any genetic disorders or not; , are all made known to us by virtue of astounding progress in genetic diagnostic technology and sex selection have been discovered in last three decades or so under the phenomenal development of genetic diagnostic technology such as sex selection, foetoscopy, ultrasonography, chorionic villus biopsy, foetal blood sampling, especially for the prenatal detection of various disorders, combined with the revolution in new assisted reproductive technologies such as artificial insemination, micro-manipulation, in-vitro and in-utero fertilization, sperm and egg banks, surrogacy and so on..

Abortion was legalized in India in 1971 after a 1965 UN mission to India recommended this step to strengthen the population policy, and the Shantilal Shah Committee Report of 1966 also advocated it to reduce the numbers of illegal and unsafe abortions that were prevalent. Although the stated reasons for passing the Medical Termination of Pregnancy (M.T.P.) Act were humanitarian (to 'help' victims of sexual assault), health-related (to provide an alternative to those whose contraceptive measures failed) and eugenic (to reduce the numbers of 'abnormal' children born), there was a strong population control motivation underlying the passage of the Act.

In 1975, amniocentesis techniques for detecting foetal abnormalities began to be developed in India, at the All India Institute of Medical Sciences, New Delhi. It was soon known that these tests could detect the sex of the foetus also, and doctors at the Institute noted that most of the 11,000 couples who volunteered for the test wanted to know the sex of the child and were not interested in the possibility of genetic abnormalities. Most women who already had two or more daughters and who learnt that their expected child was female, went on to have an abortion

Unfortunately, even male geneticists seem to have no qualms about abetting sex selection. Wertz and Fletcher (1995) surveyed the attitudes of 71 medical geneticists in four developing countries (Brazil, Greece, India and Turkey) and 611 geneticists in the 15 developed countries. They found that 52 % of the geneticists in India (the highest percentage amongst the developing countries) would perform pre natal diagnosis to select a male foetus for a couple with four daughters and no sons. Though India was not the only country with a strong preference for sons , it was the only country using pre natal diagnosis for this purpose. The doctors who said they would perform pre natal diagnosis for sex selection argues that by aborting female fetuses they would be preventing the suffering and early deaths of unwanted girls.

The 2001 Census highlighted the drastic decline in child sex ratios in several states in North and West India and continued declines in major Southern states. It was in the North-Western and Western states that private fetal sex determination clinics were first established and where the practice of selective abortion of female fetuses became popular in the late 1970s and early 80s. The Southern states, e.g. Karnataka, Tamil Nadu and Andhra pradesh, have shown declines in child sex ratio but these are less

than in the Northern states, as sex determination clinics emerged in the South only a decade after they became popular in the North. The emergence and spread of prenatal sex determination clinics are the early warning signals on the distortion of sex ratios at birth in the coming decade following selective abortion of female fetuses. The recently available urban-rural figures for 2001 on child sex ration provide further confirmation that these declines are caused by the relative availability of sex determination facilities. Medical professionals and sex determination clinics are mostly present in the urban areas. The decline in urban areas is more than twice that seen in rural areas (935:903 and 948:934, respectively) over the inter-Censal period 1991-2001. In fact of all the 35 states and union territories of India, it is only in the small states of kerala and Manipur that urban child sex ratios have not declines.

In 2003 the Pre Natal Diagnostic Act was amended to Pre- Conception and Pre Natal Diagnostic Act- after a PIL filed by CEHAT, MASUM and Sabu Goerge for the implementation of the PNDT Act. Now sex selection and sex determination is cirme under the law and is punishable with three years of imprisonment and and a fine of rs 10,000, besides the fact that his/hers registration to practice as a doctor will also be cancelled. Even the advertising about such methods amounts to a crime punishable under the act.

What can be the long term implications if amniocentesis continues? Will it not aggravate the already disturbed sex ratio? There should be 105 women for 100 men but there are 927 women for 1000 men now.

Sycophants of population control advocate this test because they think that the government can achieve , Net Reproduction Rate (NRR) of one, that is, replacement of a mother by only one daughter, with the help of sex determination tests . According to them, if they are less number of women , there will be less growth of runway population. The government and private medical practitioners justify sex determination test as a measure of population control. Women have always been at the receiving end of all family planning policies. Harmful effects of pregnancy tests, contraceptive pills , anti-pregnancy injections and camps for mass sterlisation of women with ist unhygienic atmosphere, are always overlooked by the enthusiasts of the family planning policy. Advocates of the population control will continue encashing on the sociocultural values that treat the birth of daughter as a great calamity to perpetuate modern methods of massacre of female fetuses on a massive scale.

Another Economic theory is that if supply of women reduces, their demand as well as status will be enhanced.the scarcity of women will only increase their value . According to this logic. Women would not be easily replaceable commodities. But how the economist forget the sociocultural milieu in which women have to live .The society that treats women as mere sex objects will not treat women, in more humane way if they are scare of supply.On the contrary there will eb increased incidences of rape , abduction a nd forced polyandry. In certain communities in Madhya Pradesh, Haryana and Punjab the sex ratio is extremely adverse for women., A set of brothers share wife and sometimes even by patrilineal parallel cousins. To think it is better to kill a female foetus than give birth to an unwanted female child is very fatalistic. By this logic it is better to kill poor people or third world masses, rather than let them suffer poverty and deprivation.

Another argument is that in cases where women have one or more daughters, they should be allowed to have amniocentesis done so that they can plan a balanced family by having a son. The proponents of this argument asay that instead of going on producing female children in the hope of getting a male child , it is better for the family's and country's welfare if the female foetus(es) is aborted and achieve a small and balanced family with daughters and sons. The concept of a balanced family also ahs a sexist bias. Would couples with one or more sons undergo amniocentesis to get rid of a male foetus and have a daughter for balancing their family? What is the cost of having a balanced family? How many abortions can a woman bear without jeopardizing her health?

A complicated sex pre-selection technique, PGD (also called Ericsson's technique) involves the identification and discarding of the female embryo. The first step is "pick-up", which involves the collection of unfertilized eggs from the ovaries. They are fertilized in a petri dish with active sperms. The embryos are then carefully nurtured in an incubator.

After 72 hours, each eight-cell embryo is biopsied by a micromanipulator, which includes glass pipettes and a powerful microscope. While one of the pipettes holds the embryo in place, the second delicately extricates a single cell from the little clump. The extricated cell is taken to a tiny FISH (fluorescent in situ hybridization) laboratory and transferred to a slide under a stereo Zoom microscope, specially designed for single-cell analysis. The genetic blueprint of the cell is studied in order to de termine the sex of the embryo. Chemical stains are used to single out the X and Y chromosomes from the intricate genetic master plan. It is then "bathed" to wash away unwanted cellular debris, which could interfere with the analysis. The freshly scrubbed X chromosome (female) shows up as a pink dot while the Y chromosome (male) appears as a bright green speck. The male embryos are then implanted in the woman's uterus.

The popularity of sex selection can be more dangerous than that of sex determination tests because the former does not involve ethical issues related to abortion. So, even anti-abortionists can use this method. Dr Ronald Erikson who has a chain of clinics conducting sex selection tests in 46 countries of Europe, America, Asia and Latin America announced in his hand outs, almost a decade back that of the 263 couples who approached him, 248 selected boys and 15 selected girls. This shows that male preference is not limited to the third world country like India , but that it is a universal phenomenon. Sex selection could lead to a violent social disaster, through the social consequences of sex selection as well as sex determination tests, the reality shatters the myth of neutrality in linking science and technology with socioeconomic and cultural realities.

Class, race and sex Biases of the Ruling elites have crossed boundaries of human dignity. After almost five decades of revolution and socialist reconstruction, sex determination tests for female extermination have gained ground after government adoption of the two child norms and now also one family policy. Chinese couples as well as Indian, willy-nilly accept a system of the one child family today, but it would be matter of great satisfaction if the child is male, thus showing the adaptive system fo patriarchy and male supremacy. It can establish ban strengthen its roots in all kinds of social

structures- pre-capitalist, capitalist and even socialist- be making savage use of science. This ethos of patriarchy has to be challenged consistently.

A nation cannot progress without the progress of science and technology. So technological advancements should not be criticized ,as what matters most is its manifestation and beneficial application. The most important stake holder here is the medical professional conducting the test. They are the users and the abusers of the technology if they stick to the medical ethics, there will be no problem If doctors stop sex selection and sex determination, the dwindling sex ratio would be stabilized. Are the doctors listening ????

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EDITORIAL

Sexuality, Rights and Social Justice

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THE term "sexual rights" consists of the little discussed and poorly understood combination of the concepts of "sexuality" and "rights". Perhaps the unease about sexual rights would be lessened if it were clear that the concept does not mean "the right to have sex", just as "reproductive rights" is not about the right to reproduce. What is it about then and why is this a legitimate subject for an international journal on reproductive and sexual health?

Based on a technical consultation on sexual health at the World Health Organization in 2002 the following working definition of sexual rights was devised:

"Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus documents. These include the right of all persons, free of coercion, discrimination and violence, to:

- the highest attainable standard of health in relation to sexuality, including access to sexual and reproductive health care services;
- seek, receive and impart information in relation to sexuality;
- sexuality education;
- respect for bodily integrity;
- choice of partner;
- decide to be sexually active or not;
- consensual sexual relations;
- consensual marriage;
- decide whether or not, and when to have children; and
- pursue a satisfying, safe and pleasurable sexual life.

The responsible exercise of human rights requires that all persons respect the rights of others." [1]

In 1995, and in a much simpler form, the Platform for Action of the World Conference on Women in Beijing included the following statement in relation to women, which can be taken as an internationally agreed (though not enforceable) definition of sexual rights:

"The human rights of women include their right to have control over and decide freely and responsibly matters related to their sexuality." (Paragraph 96)

A small group of academics and human rights advocates worldwide are deeply concerned with what "sexuality" consists of. The papers in this journal issue, however, are concerned more with "matters related to sexuality" and their message is loud and clear. Women are far, far from a world in which such rights are near to being attained, even predicated in as simple and straightforward a fashion as in the Beijing statement. Indeed, many men are equally far from having sexual rights, particularly men who are not exclusively heterosexual in practice.

The concepts arising from the words "control", "freely" and "responsibly", juxtaposed with the threat to sexual rights posed by violence, misogyny (including in reproductive health care) and life-threatening sexually transmitted infections, are the subject of this journal issue.

Matters related to sexuality

This journal issue offers a rich and varied snapshot of matters related to sexuality, including problems with body image due to delayed puberty in adolescents born with HIV infection; the anti-sexuality content of so much sexuality education material and of government policies

and statements by ultra-conservative secular and religious leaders; the appalling extent of sexual violence experienced by sex workers; and the horror of sexual torture during armed conflict and war.

Some of these papers make for deeply depressing reading. Yet they are also about the multi-faceted fight for sexual rights in response to anti–sexuality policies and stances and violations of sexual autonomy. If there is any hope of reducing the violence perpetrated by members of the human race on each other in general, then there is hope also for attaining sexual rights.

What does it mean to support sexual rights

Human beings are sexual by nature. If nothing else, one thing seems certain – people will never stop having sex or wanting to have sex. At the same time, government policy in every country in the world legislates on and seeks to control sex between its citizens in one form or another, as does every religion. Whether their laws and policies support sexual rights or restrict and punish certain sexual practices and relationships is of crucial concern. This is where rights and concepts of social justice come in.

It is without doubt easier to give examples of anti-sexuality stances, because they proliferate so widely, than to define a progressive stance on sexuality which supports individual and public health and the right of individuals, with special care for children and young people, to respect for their bodies and their feelings. Such a stance, as I understand it, is one in which the sexual nature of human beings is accepted. With this acceptance comes a commitment by governments to protect individuals from sexual harm and to help them to protect themselves, and to promote safe sexual relationships.

The devil, however, is in the details. Thanks to well-organised international campaigns by feminist activists, almost all governments have laws and policies against various forms of rape and sexual violence, including increasingly against rape in marriage. Yet the extent and type of implementation of these laws remains seriously flawed and limited. Sexual torture of both women and men in war and armed conflict has been included in international law in recent years, but goes virtually unpunished in spite of its mass nature.

It is a well-known saying that prostitution is the oldest profession, yet selling and buying sex continues to be punished in criminal law in most countries and socially frowned upon to such an extent that life-threatening violence against sex workers is endemic. Nor is sex work itself widely understood to arise from the social and economic marginalisation of poor, unemployed, migrant, refugee and displaced women. Because sex work is criminalised, health services for those who engage in selling and buying sex are of poor quality, few and far between, and limited in scope and outreach. The existence of HIV and AIDS have made an important difference in this regard, but the current abandonment by donors and international agencies of support for HIV prevention strategies may mean that any such progress is short-lived.

Moreover, the question of who is permitted to be sexual with whom, and at what age, remains deeply controversial. It is not accepted that although a great many people practise lifelong sexual fidelity to one person, this is not universal behaviour; sexual infidelity characterises many marriages as well as many non-marital relationships. A few countries have decriminalised homosexuality and even fewer permit same-sex marriages, and there are campaigns for the acceptance of transgendered persons and transsexuals in all world regions, though in some countries more than others. The social legitimisation of minority sexual identities and of any sexual orientation that is not heterosexual, however, has a long way to go and a steep and rocky road ahead.

Some forms of sexual behaviour exist at the margins of society, such as consensual sadomasochism and bestiality, and are so stigmatised that they can barely be mentioned aloud, let alone studied. Even sex with oneself remains a highly stigmatised behaviour, though it harms absolutely no one and is the safest form of sex.

Finally, there is the question of sexuality among adolescents and young people. Parents, civil servants, teachers and those in charge of education, most of whom seem to have total amnesia about their own burning sexuality at a young age, are only with great reluctance facing up to the need for sexuality information and education for youth that is not deeply prohibitive and full of fear-mongering and dire warnings

of danger. Nor is the fact that most adults need such information for themselves widely recognised or acted upon.

And as yet I have not even managed to mention the subject of sexual pleasure nor the controversy and passionate beliefs that are aroused in discussions on who has a right to sexual pleasure.

Social justice in relation to sexuality and rights

Concepts of social justice in relation to sexuality and sexual rights have barely begun to be developed or acted upon, let alone entered into social consciousness. Ensuring social justice on the part of governments in relation to sexuality means ensuring that public and economic policies, and public services and education, prevent discrimination and abuse in relation to sexuality, and promote sexual health and rights. Social justice is denied in forced and other non-consensual marriages, in discrimination against homosexual men and women because of their sexual orientation, in the acceptance of so-called honour killings as crimes of passion, and in arguments that cruel and life-threatening punishments such

MAYA GODED / MAGNUM PHOTOS

Sex worker and her husband, a former client. Mexico City, 2000

as stoning of women on grounds of adultery are religiously-sanctioned. Issues of social justice arise in discrimination against pregnant adolescents, such as expelling them from school, or denying single mothers social benefits for themselves and their children as a judgement on them for having sexual relations. Widowed and divorced women often suffer from the social stigma of having survived their husbands in some cultures, and may be condemned and ostracised if they have sexual relations at all. Social justice in the community would take action against such discrimination.

Several articles in this journal issue make recommendations on how to respond to sexual discrimination and promote sexual rights. These include calls for:

- sexual torture to be prosecuted by international tribunals on war crimes and the new International Criminal Court;
- the decriminalisation of sex work and prosecution of violence against sex workers or coercion of anyone to provide sex against their will;
- freedom of speech in academic research on matters of sexuality, including on highly stigmatised sexual practices;
- information, sexual health and contraceptive and abortion services to be made available to young people;
- greater attention to the adverse effects on sexuality, not just health, of medical procedures such as unnecessary and poorly carried out episiotomy; and
- recognition of the effects on mental health of matters related to sexuality and the sexual body.

Barely touched upon in this issue, however, is public health law and policy in relation to sexuality. An example of the complexity of these issues is found in a recent review of bioethics and public policy by Udo Schuklenk, on how to address transmission of HIV infection in sexual relations. Schuklenk discusses whether infection acquired during voluntary, consensual sexual intercourse should be classified as a case of harm to others or harm to self. Two main positions emerge. One is that it is entirely a problem of individuals infecting themselves and others. The other is that the issue cannot be reduced to one of individuals, but should rather be seen as a public health matter because societal interests are at stake if individuals cannot keep from infecting themselves and others. Thus, he discusses the example of a law proposal in South Africa to classify voluntary sexual intercourse between two people as rape when one of the two is HIV infected, knows about it and does nothing to disclose this to his/her sexual partner.[2] At the heart of the problem, he says, are the following questions:

"If you have voluntarily unsafe sex with a person whose HIV status is unknown to you, and you acquire an infection during your sexual relationship with that person, have you been harmed by that person or have you harmed yourself? I have for many years maintained that an infection occurring as a consequence of sexual intercourse, under the circumstances described, should be interpreted as a form of harm to self. After all, you could have inquired about your sex partner's HIV status or you could have played it safe and insisted on safe sex regardless... This argument could certainly be applied to many cases under which infections occur, that is between sexual partners who know very little or quite possibly nothing about each other... [where] it can reasonably be argued that if you volunteer to have unsafe sex with such a person, it is your responsibility to protect yourself. It is less clear, however, that this argument could succeed when applied to people in long-term relationships, be they married or otherwise." [2]

On the basis of such different points of view, however, decisions have been made in a number of countries about whether the law should criminalise those who infect others with HIV, whether marriage to an HIV-positive person is permitted, and whether the promotion of condoms to those who are not married is a legitimate form of public expenditure.

Social policy on matters related to sexuality, as with information on sexuality for young people, can be punitive or supportive from both a social justice and public health point of view. An article on current US government policy on women listed (among many others) the following restrictive and anti-sexuality policies. The head of a right-wing women's group actively opposed to the Violence Against Women Act was chosen to serve on the National Advisory Committee on Violence against Women. Bush's party

backed the Personal Responsibility, Work and Family Promotion Act of 2003, which provided among other things US$200 million annually to promote marriage and US$50 million to promote abstinence. His administration decided to remove information about condoms and teenage pregnancy prevention from the US Centers for Disease Control and Prevention's website. Bush appointed as assistant secretary for family support in the US Health and Human Services Department a man who said that low-income children whose parents are not married should be last in line for certain benefits.[3] More recently, the Bush administration has required money for HIV prevention spent abroad to focus at least as much on encouraging people not to have sex – while restricting protection to only some of those who do.

Yet while abstaining from sex with another person and having only one lifetime partner are the surest ways to avoid getting an STI, it is when people have sex outside these parameters that they need protection, and that is where public expenditure needs to be targeted – both before people get an infection and when they need treatment afterwards.

In the past few years, in response to what is, in the eyes of some, a fin de siècle loosening of sexuality morality, the global atmosphere in relation to what constitutes legitimate vs. illicit sexual relations has moved so far to the right that the US, whose Constitution separates church and state, has adopted and is legislating fundamentalist Christian policies. Senior figures in the Catholic Church hierarchy have had the temerity to claim that condoms do not protect against HIV infection, without apparent concern or responsibility for the consequences for those of their parishioners who are unknowledgeable enough about the facts to believe them. And several Islamist governments are re-instituting or seeking to implement forms of punishment and the death penalty in relation to sex outside marriage that should have gone out with the Dark Ages.

On the other hand, a growing number of meetings are being held on sexual and bodily rights as human rights, e.g. in the Middle East and North Africa, and South and Southeast Asia, in which many aspects of public health and social policy in those regions are being challenged. The analysis of civil codes, penal codes and personal status codes, as well as other forms of discrimination and social injustice, all point towards a clear imperative for progressive legal and social reform. The devastating and damaging effects of locking people "in the closet" are being acknowledged. Sex workers and sexual minorities are organising to demand their rights, and a growing number of efforts to address many matters related to sexuality are being reported around the world.

Promoting sexual autonomy and safe, consensual sexual relationships

Throughout the past decade, this journal has emphasised the importance of laws and policies and of public health education and services that promote safer sexual relationships and prevent the harm that can arise from unprotected and non-consensual sexual relations. Indeed, in this issue we continue this process through a number of papers that address contraceptive use in relation to STIs, fertility and education, contraception for unmarried youth, and the problem of uterine prolapse in young, married women.

Promotion of safe, consensual sexual relationships on the part of governments, supported by ministries of health and education and a wide range of NGOs providing both information and services, is still in its infancy. Progressive efforts in public health education to ensure that sexual relations are safe deserves much greater priority in a world where the HIV epidemic is now almost 25 years old. Such efforts will not be initiated, however, until more governments and other leaders in the community are convinced that bodily integrity and sexual autonomy are human rights and that support for safe, consensual sexual relations, inside as well as outside marriage, are a legitimate subject of public education and expenditure.

Thinking on these matters has received a great boost from international youth movements and youth culture, which are breaking down barriers (viz. the concept of "gender-blending") faster than most adults are willing to admit. As Holzner and Oetomo report in this journal issue, youth are "engaging in different forms of sexual relationships and finding their own sources of information, independent of government, religion and international organisations."

Nevertheless, the evidence on whether youth and youth culture and behaviour are moving closer to a sexual rights and social justice stance than that of their elders is not yet in. The globalisation of information through visual and print media and via the internet has connected young people and broken down cultural differences among them as perhaps never before. On the other hand, it seems that young people in several developing countries (based on anecdotal evidence from researchers in both Africa and Asia) are easily obtaining so-called "blue movies" and learning a lot of what they know about sex from them. What these movies actually contain has not yet been investigated by researchers on sexuality education. The almost ubiquitous spread of (soft) pornography in advertising and in coverage of fashion in women's and men's clothing, film and TV, music videos, youth magazines and other forms of popular culture, particularly in the west, is also going global. Many people believe it has gone too far because it is sexualising almost everything, often in grossly gender-stereotyped ways. This represents an enormous challenge – not least because of the reactionary backlash it is causing.*

Perspectives on the future for the 10th anniversary of ICPD

It is fitting that we carry an article in this journal issue on "ICPD at 10" which is about how far the world has come since it agreed the Programme of Action in Cairo in 1994. Looking back, there has been incredible movement and progress, more than anyone would have dreamed possible at the time. Looking forward to the second decade of implementing the ICPD Programme of Action, RHM will devote the next two issues of the journal to the theme of "Power, money and autonomy in national policies and programmes" for November 2004 and "Implementing ICPD: what's happening in countries" for May 2005. In both cases, we are looking for analysis of influences on policy and programmes and what they have achieved since 1994 and what they aim to achieve by 2014.

Attention to sexuality and sexual rights was perhaps the most controversial part of the Programme of Action in 1994, yet ten years down the line, these issues are coming firmly onto the agenda. If by insisting on their legitimacy in the coming decades, we are finally able to confront the beliefs and behaviour that allow epidemics of sexually transmitted illness to flourish and sexual violence and torture to happen, we will have come a very long way indeed.

Acknowledgements

Particular thanks to Asha George for pointing me in the direction of authors, papers and topics which have been covered in this journal issue. Thanks also to TK Sundari Ravindran and Jane Cottingham for comments and suggestions on an earlier draft of this editorial, and to Crea and Tarshi for the opportunity to hear and read the papers on gender, rights and sexuality in South and Southeast Asia at their meeting in Bellagio, Italy, September 2003, one of which appears in this journal issue.

*For an analysis of these trends, see Sorensen.[4]

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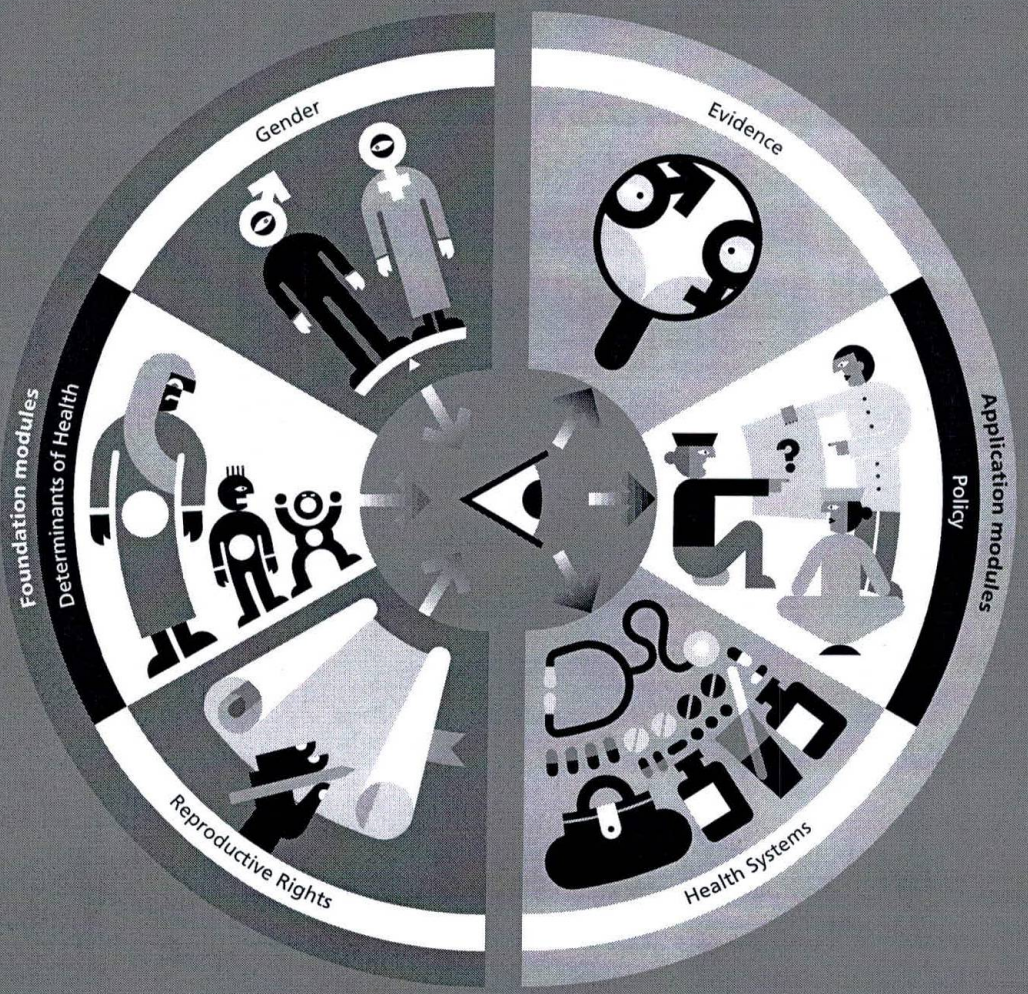
A Training Manual for Health Managers

World Health Organization

Transforming Health Systems: Gender and Rights in Reproductive Health



“Women are subject to particular health risks due to inadequate responsiveness and lack of services to meet health needs related to sexuality and reproduction. These problems should be addressed.”

Beijing Platform for Action, 1995, paragraph 97.

“In the coming years, . . . programmes should expand and upgrade formal and informal training in sexual and reproductive health care and family planning.”

ICPD programme of Action, 1994, paragraph 7.23d

Introduction

Gender Equality
Is the absence of discrimination on the basis of a person's sex in opportunities and the allocation of resources or benefits or in access to services.

Gender Analysis
Examines the differences in the roles that women and men play and the power balance in their relations. It examines how these differences determine differential exposure to risk, access to the benefits of technology, information, resources and health care, and the realisation of rights.

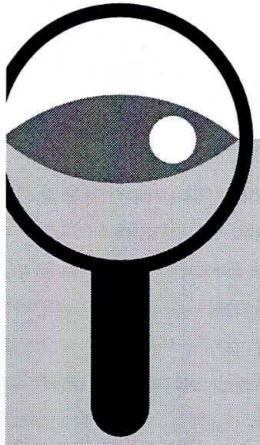
Human Rights
Refer to an internationally agreed upon set of principles and norms contained in treaties, declarations and recommendations at the international and regional level. Governments have an obligation to respect, protect and fulfil human rights. In practical terms, international human rights law is about defining what governments can do to us, cannot do to us and should do for us.

The 1994 International Conference on Population ar Development in Cairo and the 1995 Fourth World Conferen on Women in Beijing declared that women's empowerment ar reproductive rights are essential for the realisation of sexu and reproductive health. The curriculum *Transforming Heal Systems, Gender and Rights in Reproductive Health* was created direct response to this call.

Reproductive health exemplifies the complex interactic between biologic differences between the sexes, and gend power differentials. Many of women's reproductive heal problems are not simply the result of their having a womb bearing children. They are a consequence of discrimination ar lack of power to decide about how and with whom they w have sexual relations, and whether and when to bear childre For women, sexual and reproductive health are not ju dependent on their own behaviour but, more fundamentall they are dependent on the behaviour of their sexual partne other family members and service providers.

Therefore, in order to achieve improvements reproductive health, programmes and policies must promo gender equality and the realisation of sexual and reproducti rights for women.

This course focuses on improving participan understanding of gender and rights so that they can plan mo effective programmes and services. It offers both conceptu and technical skills and tools for pactitioners to integrate th promotion of rights and gender equality into their policie planning and programmes.



The Beginnings

In April 1996 a group of women from different parts of the world committed to women's rights and reproductive and sexual health came together to review existing training courses on reproductive health. They identified the need for a course which

- **includes a gender and human rights perspective**
- **has a health systems orientation**
- **is accessible to health mangers in developing and developed countries.**

The resulting training initiative in gender and reproductive health is a collaborative project of the

- **Harvard School of Public Health's François Xavier Bagnoud Center for Health and Human Rights, USA**
- **Women's Health Project at the University of the Witwatersrand, South Africa**
- **World Health Organization, Geneva, Switzerland.**

The Initiative is run by a coordinating committee of individuals from the three institutions and three consultants who are experienced international trainers in gender and reproductive health issues. The Initiative is coordinated by the Department of Reproductive Health and Research of the World Health Organization.

"The most positive aspect of the whole initiative process was being engaged in a collaborative international effort to develop a new course which has enormous potential to bring about positive change."
Member of collaborating institution

The Process

"I consider the course the best so far out of all the courses I have attended. It really changes you personally and enhances your work."
South Africa

Transforming Health Systems: Gender and Rights in Reproducti Health is a curriculum for health managers that is the resu of a four year testing and adaptation process involvi strong collaboration with institutions in different parts the world.

- The draft core curriculum was pre-tested as a pilot course in Johannesburg, South Africa in August-September 1997 for 32 programme managers, policy-makers and trainers from southern Africa

- Four training centres in Argentina, Australia, China and Kenya were selected from among 30 applicants to test the course.

- To ensure that the curriculum offered by each of the selected centres was adapted appropriately a Regional Adaptation Workshop was held in November 1998. At this meeting representatives from the training centre and members of the coordinating committee discussed and developed ways to integrate regional issues into the core curriculum.

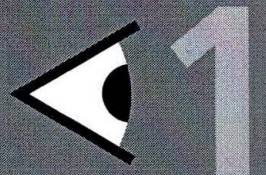
- During 1999, this course was offered by the four collaborating institutions
  - Centre for African Family Studies (CAFS), Nairobi, Kenya;
  - Centre for the Study of State and Society (CEDES) Buenos Aires, Argentina;
  - Key Centre for Women's Health in Society, University of Melbourne, Victoria, Australia;
  - Yunnan Reproductive Health Research Association (YRHRA), Kunming Medical College, Kunming, China.

- Pooling their experience of running the course, representatives from the different collaborating centres and the coordinating committee evaluated the course in early 2000. New materials developed by the regional partners have been incorporated into the curriculum, thereby increasing its usefulness to trainers in different regions of the world.

- The revised core curriculum was again tested in South Africa in September 2000 after which the curriculum was finalised.

- The curriculum will be published in 2001.

Goals of this Initiative



1 **To build institutional capacity in training centres around the world so that they can offer regionally-appropriate, high-quality training in gender and reproductive health covering aspects of research, service-delivery and policy development.**

2 **To increase the number of programme manager, planners, policy-makers and trainers with both a gender perspective on reproductive health, and the technical skills needed to contribute to increasing access, quality and comprehensiveness of gender-sensitive reproductive health policies and programmes.**

This curriculum provides training to health manage so they can

- Use and generate information
- Advocate and put in place policies
- Design, implement and manage programmes

for reproductive health services which are both gender sensitive and respectful of human rights

The Curriculum

training methods used

- draw on participants' existing knowledge
- allow for participants to learn from each other and for facilitators to learn from participants
- facilitate learning from experience
- through this process enhance knowledge, skills and insights

The curriculum consists of six modules:

- Gender
- Determinants of health
- Reproductive rights
- Evidence
- Policy
- Health Systems

The first three modules on gender, determinants of health ar reproductive rights provide the conceptual foundation of th course. These modules demonstrate the interconnectedness gender, rights and reproductive health issues within th broader socio-economic and political context.

In the last three modules, gender equity and human righ are applied to the collection, analysis and use of evidence, th formulation and promotion of policy, and the development well functioning health systems.

Reproductive health is the substantive focus of the cour and forms the basis of all the case material, examples, ar exercises. Each module includes six or seven sessions some which can be used to introduce new technical developmen or regional programmatic debates in reproductive health.

"I was concerned before starting that it may not have been appropriate because of the level of power that I have and that I may not be able to influence policies, but that soon disappeared! It was challengi and it clarified and built on my knowledge base."
Australia

The Training Manual

"The course clarified ıy thoughts and feelings nd empowered me to erbalise my feelings. I m gender sensitive ut not completely oman-focused. Both exes have different eeds and whilst there inequality, we must espect that both sexes ave rights."
outh Africa

Transforming Health Systems: Gender and Rights in Reproductive Health, is divided into two main sections. The first section contains a brief chapter on the people who the course is for, what it consists of and how it is run. The second section presents the teaching material for each of the six modules.

Each module includes:

- **The module brief**, giving the objectives, rational, and essential readings for the module, and a table outlining the sessions contained in that module;
- **Session guidelines** for each of the sessions, explaining the objectives, methodology and detailed guidelines on running the session;
- **Lecture notes and handouts** for the various sessions included in that module.

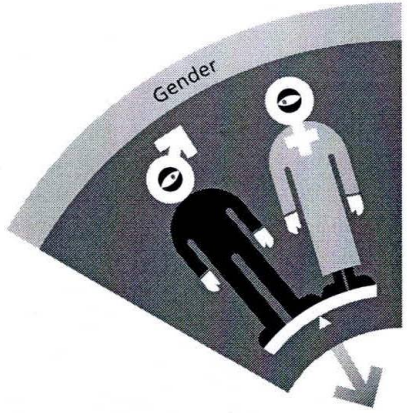
This section also contains a detailed description of the opening session, and of the concluding session which is structured so that participants are able to make linkages across all the modules and consolidate what they have learnt during the course.

Several annexes include additional material useful to trainers and facilitators of the course.

- Information resources, and where to access the readings mentioned in the modules
- Model timetable
- Assessment tools
- Resource list on participatory methods
- A compilation of "ice-breakers" and "energiser" exercises for groups.

The training manual is the outcome of a process of sustained interaction between a number of actors in different parts of the world. This has ensured that the content of this manual has undergone several iterations, modifications and refinements to produce an end product that offers a comprehensive and innovative look at gender and rights in reproductive health.

Course Structure

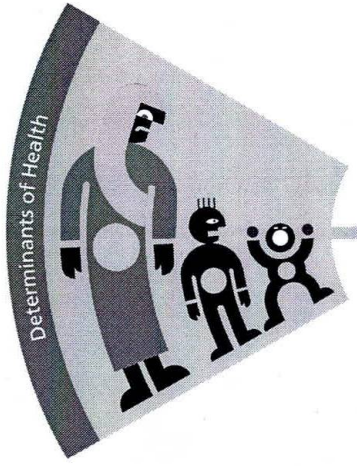


Gender

This module lays the basis for understanding how t combination of biological differences and gender inequalit has an impact on the health of women and men, on th health seeking behaviour and their access to health services.

On completion of this module participants will be able to

- understand how gender is constructed, maintained and reinforced, and the difference between sex and gender;
- understand how norms and values about gender roles ar related to gender based inequalities in workloads, in access education, control over economic resources and power;
- have the skills to apply gender analysis to specific heal conditions, to understand how gender impacts on health status.



Determinants of health

This module examines the broad socio-political and econon context within which health must be understood. It present framework for analysing the social construction of health a illness at household, community, national and international lev

On completion of this module participants will be able to

- apply a social determinants framework to the analysis of health;
- identify the factors affecting women' health as they relat to their social and economic status and as they relate to me
- understand the various levels at which health determina operate, and how these levels interrelate;
- gain an insight into how such analysis can shape and inform policies and interventions and to become aware the structural factors underlying the impact or success c policies and programmes.

eproductive Rights

his module aims to provide participants with the knowledge bout basic concepts of rights; participants learn to appreciate ays in which unequal gender power relations underlie the denial f women's reproductive and sexual rights in different settings.

t the end of the module, participants will be able to

- state the basic concepts of rights, including reproductive and sexual rights;
- understand the ways in which rights are defined in international human rights documents and how they are used by various actors;
- identify and describe the institutions which are promoting, monitoring, implementing and enforcing human rights norms relevant to reproductive health;
- apply a reproductive and sexual rights approach to research, interventions, service delivery and policy development;
- conceptualise and apply a reproductive rights model to concrete examples

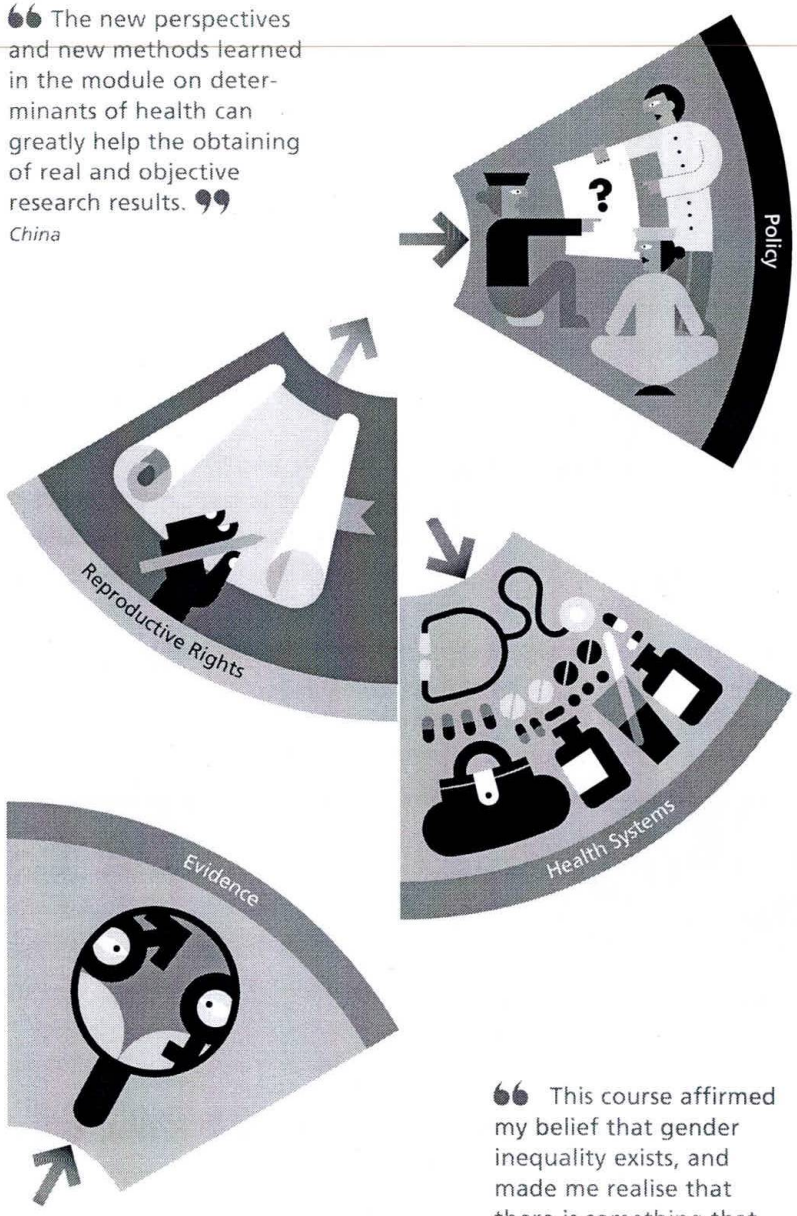
vidence

his module promotes the effective use of existing data and f data monitoring systems to improve gender equity and productive health policies and programmes.

t the end of the module, participants will have

- an overview of different types of evidence useful to health managers and policy makers;
- the capacity to recognise the main forms of bias, particularly gender bias in research design, implementation and analysis;
- the ability to locate, analyse and use different types of information to promote gender sensitive reproductive health services;
- the capacity to develop indicators for monitoring and assessing gender equity in this area.

> "The new perspectives and new methods learned in the module on determinants of health can greatly help the obtaining of real and objective research results."
> *China*



> "This course affirmed my belief that gender inequality exists, and made me realise that there is something that we can do about it."
> *Australia*

Policy

This module equips participants with the tools to understar and monitor the policy environment within the larger soci economic and political context. It also illustrates how gende sensitive information is essential for rational policy develo ment as well as service planning.

At the end of the module, participants will be able to

- conceptualise the policy-making process including the range of factors which influence policy decisions and policy implementation at various levels;
- identify the components of strategy design/planning fo policy changes;
- identify and address gender inequality in policies and programmes;
- use international agreements for motivating changes in policy or implementation;
- use specific tools to analyze policy making processes an design intervention strategies to impact on current policies or programmes;

Health Systems

This module demonstrates how the organization ar functioning of health systems impact differently on wom and men, often to the disadvantage of women, and how address this.

At the end of the module, participants will be able to

- understand the impact of the macroeconomic environment and health financing on the organisation c health care services;
- understand the interrelationship between the component of a well-functioning health system;
- use methodologies for gender-sensitive planning and managing health systems change;
- apply the tools learned throughout the course to a health systems issue affecting reproductive health

Current debates in Reproductive health

In addition to the six module, the course schedule has roo for special sessions and guest lectures on current debates reproductive health of relevance to the country/region whe the course is held.

"The course gave a wide perspective
f gender through use of interesting
nd participatory methodology that
eld interest throughout the course."
ustralia

"This course has empowered and
given me the practical advocacy skills to
try and change policies in the
Obstetrics and Gynaecology Department
of our Hospital."
Kenya

egional Collaborating Institutions

entre for African Family Studies (CAFS), with eadquarters in Nairobi (Kenya) and regional offices Lome (Togo). Founded in 1975, CAFS is an African gional institution dedicated to strengthening the ıpabilities of organizations working in sexual and productive health throughout sub-Saharan Africa. erving both Anglophone and Francophone Africa, AFS provides management and technical training in xual and reproductive health throughout sub- ıharan Africa, and has been an international leader the translation of gender and reproductive rights erspectives into the realities of service delivery.

entre for the Study of State and Society EDES), established in 1975 in Buenos Aires, rgentina, is a leading social science research ntre dedicated to basic, and applied research, ost-graduate training of social scientists, and chnical assistance. In 1993, the Health, Economy ıd Society Department initiated the Regional ogram on Social Research, Training and Technical ssistance on Reproductive Health and Sexuality for rgentina, Chile, Peru, and Columbia. This Program ıs since sponsored national and regional training orkshops throughout Latin America, a Resident llows Regional Program, and most recently, a aster Program on Social Science and Health in llaboration with the Facultad Latino-americana de encias Sociales (FLACSO-Argentina)

Key Centre for Women's Health in Society, University of Melbourne, Victoria, Australia was established in 1988. It is a multi-disciplinary research and teaching institution in the Faculty of Medicine, Dentistry and Health Sciences, and was an international forerunner in the development of post-graduate course in women's health. In 1993 the Centre became a WHO Regional Collaborating Centre for Women's Health. As part of their WHO mandate, they initiated a regional Network in Women's Health, expanding their training activities into Vietnam, Pakistan, and Fiji, and establishing collaborative research and institutional linkages with Indonesia, the Philippines, Thailand, Vietnam, and the South Pacific.

Yunnan Reproductive Health Research Association (YRHRA), Kunming, China, was founded in 1994. It was the first NGO established in China to promote multi-disciplinary reproductive health research and training, and to raise public awareness of reproductive health based on a woman-centred and community-based approach. YRHRA faculty represent more than 30 institutions in China, and have a close relationship with academic institutions and NGOs in neighbouring countries such as Thailand. YRHRA sponsors reproductive health courses and workshops within China, with participants from neighbouring Asian countries, for both NGOs and government family planning and maternal and child health institutions.

The International Coordinating Committee

Jane Cottingham, BA, MSc, is Technical Officer for Women's Perspectives and Gender Issues at the Department of Reproductive Health and Research of the World Health Organization in Geneva. She works with women's health groups, policy-makers and scientists to ensure that women's rights and gender perspectives are integrated into the reproductive health research agenda. In 1976 she co-founded ISIS Women's International Information and Communication Service. During her 11 years as Director of ISIS, she helped to create an international women's information network and co-authored and edited numerous publications on women's issues. Ms Cottingham received a Masters in Population Sciences from Harvard School of Public Health in 1991.

Sharon Fonn, MD, PhD, FFCH, is a medical doctor with a PhD in community health focussing on occupational epidemiology, and a public health specialist. She is the Director of Research at the Womenıs Health Project in Johannesberg and is an Associate Professor in the School of Public Health at the University of the Witwatersrand. Dr Fonn has worked extensively in and with the public health care system in South Africa. She has also initiated and been involved in research on the functioning of health services and womenıs access to health services and health related behaviour in Africa, and has worked for many years on cervical cancer. Dr Fonn has been involved with numerous international agencies working on gender and health research, taking account of gender relations in health policy and programmes, and developing training materials and running training courses on how to promote gender equity in health programming and service delivery.

Claudia Garcia Moreno, MD, MCM. For th last 10 years Dr. Garcia Moreno's work has focuse on women's health, including reproductive healt and on gender and health. She participated in th negotiations on reproductive health and rights the International Conference on Population ar Development in Cairo (1994), the Social Summ (1995) and the Fourth World Conference c Women in Beijing (1995). She was Chief Women's Health in the World Health Organizatic from 1994-1998 and now works in the Glob Programme on Evidence for Health Policy whe her primary responsibilities include mainstreamir gender in WHO, and violence against women. Sh co-ordinates a Multi-country Study on Women Health and Domestic Violence Against Wome being conducted in 7 countries.

Sofia Gruskin, JD, MIA, is the Director of th International Health and Human Rights Program the François-Xavier Bagnoud Center for Health ar Human Rights and Assistant Professor in Populatic and International Health at the Harvard School Public Health. The emphasis of her work is on th policy and practice implications of linking rights health. Ms Gruskin currently serves as an advisor both UNAIDS and WHO, is a Board Member Amnesty International USA and a founding memb of The Consortium for Health and Human Right She is the Editor of the International Journal Health and Human Rights, and has authore numerous chapters and articles on issues relatir to health and human rights.

arbara Klugman, MA, is Director of the Women's ealth Project in Johannesburg, South Africa. She as chairperson of the core group appointed by the inistry of Welfare in South Africa to develop a new opulation policy for the post-apartheid government, id was responsible for the development of a Green aper and a draft White paper on this topic. She was the South African government delegations to Cairo id Beijing, responsible for negotiations on health. ie has published widely on population policy, sexual id reproductive and women's health, gender and omen's rights. She is a member of the Editorial dvisory Committee of Reproductive Health Matters id the Essential National Health Committee of the outh African Department of Health. She is currently orking on national and international policy and aining initiatives to mainstream gender in health.

delina Ndeto Mwau, MA, is currently Executive irector of the Women's Resource Centre (Kenya) as ell as founder and steering committee member of e Coalition on Violence Against Women (COVAW). om 1994 to 1997 she was the East Africa ogramme officer for Women in Law and evelopment in Africa (WiLDAF) where she worked strengthen the capacity of women's rights NGOs roughout Eastern Africa. Prior to that she had orked for six years as gender programme officer for xfam, Kenya. She is the co-author of the Oxfam ender Training Manual. Ms Mwau is currently one the 21 commissioners nominated by all religious oups and civil society organisations to review the onstitution of Kenya.

undari Ravindran, PhD is an economist with tensive research experience in women's health and evelopment. She is currently Honorary Professor at e Achutha Menon Centre for Health Science udies, Kerala, India, and teaches courses on gender sues in health and health and development as part their MPH Programme. She is also Honorary ecutive Director of the Rural Women's Social ducation Centre, Tamil Nadu, India, a grassroots omen's organisation. Formerly co-editor of Repro- uctive Health Matters, Dr Ravindran has published extensively on various aspects of women's social development, and on the linkages between gender, development and health.

Rachel Snow, ScD is Unit Head for Reproductive Health at the Institute for Tropical Hygiene and Public Health, University of Heidelberg Medical School, Germany. She has been teaching international reproductive health courses for over 10 years, at Harvard, the University of Heidelberg, and internationally. She co-teaches the advanced module in Reproductive Health for Trop-Ed-Europe, a European Masters Program in International Heath. Her research focuses on improving measurement of the reproductive health burden in poor countries, improving delivery of appropriate contraceptive and diagnostic technologies, and wider application of a gender analysis in health. She is a founding editor of The African Journal of Reproductive Health.

Makhosazana Xaba, RN, RM, B.Cur E et A, is currently the Country Representative for Ipas-South Africa based in Johannesburg. In 1991 she co-founded the Women's Health Project and worked there for nine years. From 1996 to 2000 she was the Director of Training and Capacity Building. She has experience as a nurse and midwife, a health systems researcher and a gender trainer, and has published on women's health and quality of care. She is the co-chair of the Gender Advisory Panel of the Department of Reproductive Health and Research in WHO. Ms Xaba was an anti-apartheid activist and, while in exile, obtained a diploma in Journalism in Berlin, Germany, and subsequently worked as a radio journalist in Zambia.

“I'm better able to operationalise the gender approach to reproductive health, conduct better policy analysis and advocacy, and am more confident in addressing gender disparities.”

Participant at the pilot course in South Africa, 1997

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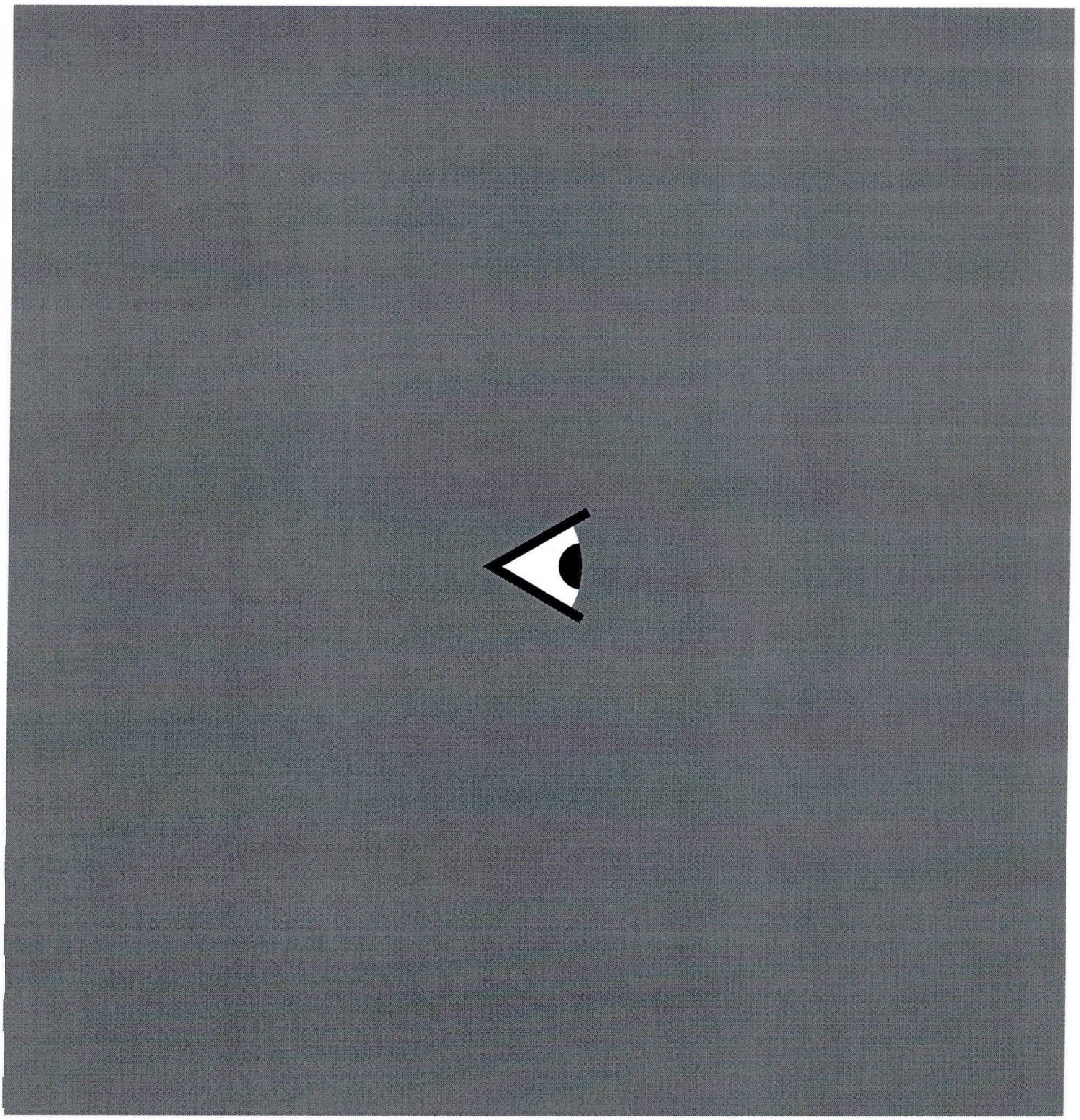


Sex Workers and their right to health care

Women and girls in the commercial sex industry -- including millions who are trafficked, forced or sold into the trade -- are overwhelmingly at risk of contracting HIV-AIDS. In Asia, an estimated 60 percent to 80 percent of those in the sex industry are infected with HIV.

Women in sex work almost always are compelled into it by sexual violence, poverty and discrimination. They often are debt-bonded to pimps and brothel owners, and they are marginalized within society. They are vulnerable to violent abuse, including rape and robbery, by local police. Many are young girls, who are much sought after. They often are unable to speak the local language and incapable of negotiating safe sex -- much less their freedom. Their situations are desperate and their lives short.

Almost all discussions of health and sex work focus on sexually transmitted diseases, until recently almost exclusively in terms of the risk of sex workers infecting others. Only in the last few years have discussants occasionally talked in terms of how to help sex workers protect themselves from STDs. This change in view does not go far enough: health care for sex workers should be more than concern for their reproductive system.

It is important to understand that health, per se, is not a major topic of discussion among sex workers. Rather, it is the effect of the laws and policies that segregate them from the rest of society and the need to change the legal and social context within which sex work takes place. Nonetheless, it is possible to identify some health issues that do concern sex workers.

Health issues

Perhaps the most important issue is violence and the threat of violence, which is encouraged by the illegality of sex work in most countries and the resistance of law enforcement agencies in all countries to take seriously sex workers' reports of being raped, or to seriously investigate murder when the victim is a sex worker. It is essential to not underestimate the impact of police on sex workers' lives. Even in countries where prostitution, per se, is not illegal, prostitutes and other sex workers are often arrested

under laws dealing with vagrancy, loitering, public health, and public order, and no matter where prostitutes work, they tell stories of police raids.

A second major issue is emotional stress and depression, associated with managing stigma and living with the fear of violence and arrest, which in turn affect the use of drugs and alcohol to manage stress. Both of those health hazards would be significantly reduced by the decriminalisation of all aspects of sex work and the development of occupational safety and health regulations governing the working conditions in managed sex work (e.g., brothels, strip clubs, massage parlours, night-clubs, etc.) The enforcement of laws against sexual assault, kidnapping, extortion, and similar offences, is necessary to deal with cases of coercion and violence.

Other health hazards, such as repetitive stress injuries (e.g., to the wrist and shoulder from hand stimulation of the client, jaw pain from performing fellatio), bladder and kidney infections, and sexually transmitted diseases can be prevented with proper training, and the use of barriers for wet sex (i.e., sex involving contact between mucous membranes and bodily fluids). However, an almost invisible health hazard has to do with the reluctance of sex workers to inform health care providers of their work, for fear of being treated with contempt.

Sex workers' health care

Health care for sex workers must consider the entire body, not simply the sexual and reproductive systems. In addition, health care providers who work with sex workers must accept them without moral judgments, must consider their sexual labour as work, not pathology, and must recognise the importance of and the right to safe working conditions. They must recognise the legitimacy of sex workers' relationships, and not assume that spouses and lovers are stereotypically violent `pimps' (anyone who receives an income from sex workers is defined by law as a pimp).

It is essential to provide good health care and other services it is a mistake to think that because there is not much money, it is better to focus on the health problem framed by outsiders - sexually transmitted diseases - because it will only perpetuate the stigma and shame that has caused such programmes to fail in the past. The emphasis must be on primary care, nutrition, and physical safety, and only then on how to prevent STDs.

Sex worker's ostracized status remains a fundamental challenge to improving their lot and reducing the threat of AIDS. Being women in sex work puts them into a caste – a class of their own. This caste-class occupies the lowest rung in the hierarchy and is structured outside the hierarchy, as we know it.

The human rights approach to sex work. explains that some of the rights particularly at stake for women in sex work are the right to be free from discrimination (Article 7); the right to be free from torture and from degrading and cruel treatment or punishment (Article 5); the right to equality before the law (Article 6); the right to freedom of movement (Article 13); the right to association (Article 20); the right to freedom of speech (Article 19); and the recognition of their families as legitimate units and sex workers' entitlement to state benefits such as education and housing (Articles 25, 26 and 27).

When sex workers are treated as second-class citizens, and in extreme cases, as less than human, then all women who dare to step out of their social constructs will be labelled as whores and treated accordingly. For these reasons, the rights of all women are dependent on the rights accorded to the most vulnerable women.

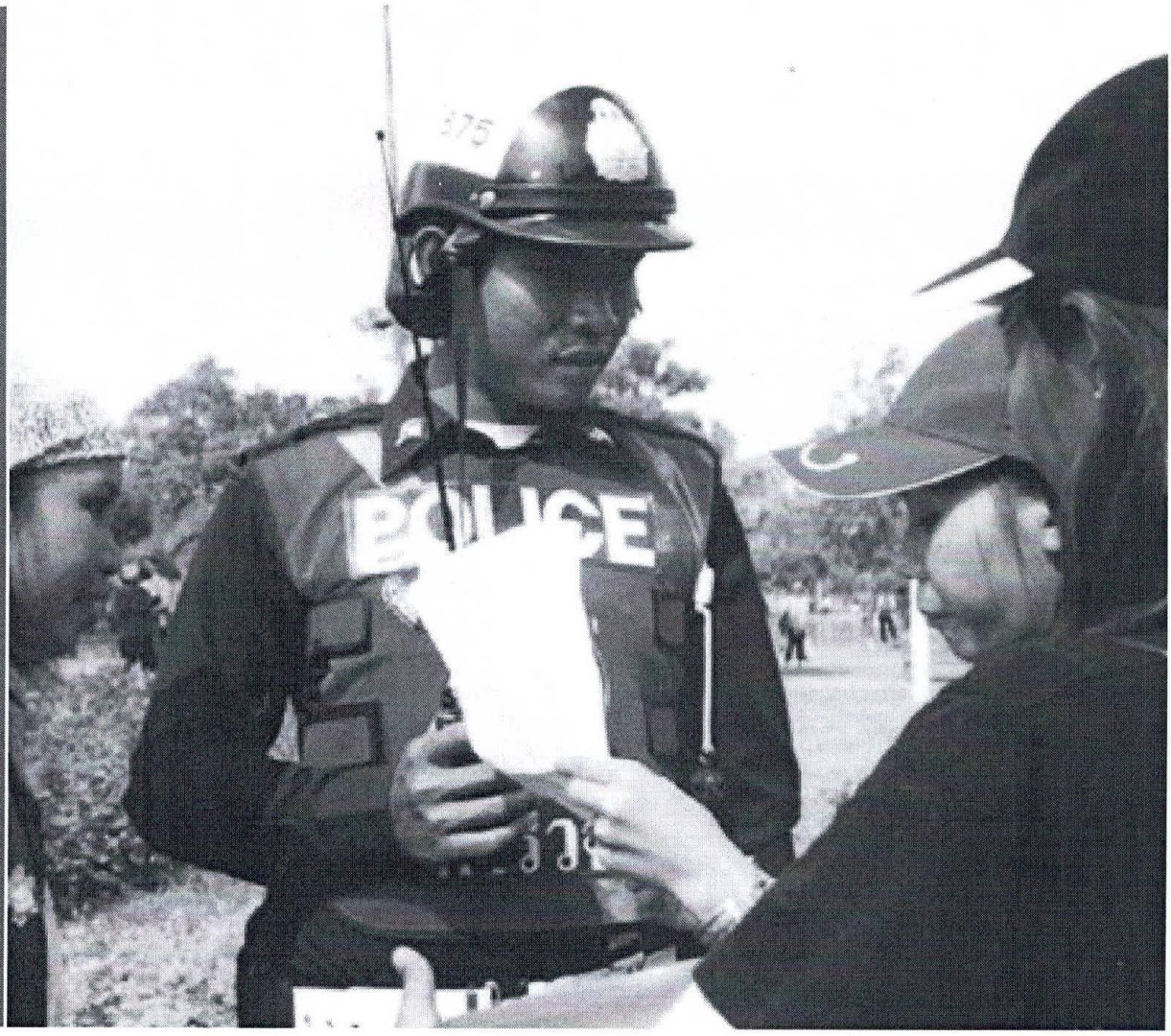
The only way to ensure that health care is provided in a way that is acceptable to sex workers is to involve them in the design, implementation, and evaluation of the programme. But not in a token manner. Form a managing board more than half of the members of which are sex workers, whether they call themselves prostitutes, dealers, working women, ladies of the evening, hustlers, drag queens, hospitality workers, entertainers, dancers, strippers, or people who have fun with foreigners. Hire sex workers on the same economic basis as other workers (i.e., not just for stipends or for the profits realised from social marketing of condoms). Not only can they be trained as medical assistants and counsellors; they often have managerial and organising skills that are invaluable in any workplace.

Adv Kamayani Bali Mahabal
CEHAT

RESEARCH FOR SEX WORK 8

ISSUE

SEX WORK AND LAW ENFORCEMENT



EDITORIAL

The theme of sex work and law enforcement was chosen at meetings about trafficking and HIV, highlighting the discrepancy between the agendas of sex workers and donors. Despite the fact that most programmes touching on sex workers address HIV/AIDS or, now, trafficking, most sex workers point to the state as their greatest problem. Most locations have laws and/or policies that adversely affect the lives of sex workers. Some limit sex workers' mobility. Even in places where sex work is not against the law, sex workers have reported difficulties with police. Sex workers around the world have been victims of police violence. Adding insult to literal injury, in many places law enforcement pays little attention to violence committed against sex workers, with little recourse even in places that take pride in the rule of law.

REAL-LIFE EXPERIENCES

Real-life experiences with law enforcement described in this issue include violence, bylaws used prejudicially against sex workers, abuse of power and migration issues.

A shocking 97% of sex workers in Phnom Penh reported having been raped in the past year in Carol Jenkins' article. Violence also features in articles from all over the world, from Africa to Asia, Australia, Europe and the Americas. The West prides itself on the rule of law in its less violent environments. However, this is not what sex workers described to researchers in Rachel Wotton's Sydney, Teela Sanders' Manchester and Juhu Thukral and Alex Murphy's New York.

Transgender sex workers suffer greater physical abuse than other sex workers in some places. Nicolé Fick offers an extreme example of anti-transgender violence by police in her piece.

Another abuse of power described by Thukral and Murphy involved sex workers being taken into police custody and in some cases detained without legal reason. This is remarkably similar to the reports received by Empower about sex workers extra-legally detained by anti-trafficking non-governmental organisations.

Sanders describes the use of Anti-Social Behaviour Orders against sex workers, and how these are used to make sex work more difficult. Consequences are serious: sex workers' health may be jeopardized because sex workers do not negotiate with and check out their clients before getting into the clients' cars. This leaves sex workers more vulnerable to client violence and to difficulties negotiating condom use.

Sex workers in Hong Kong suffer discrimination both on the street and indoors. Police visit sex workers in their workplaces and disrupt their business. Sex workers without legal residency are easier targets and suffer more than others.

Queensland has both legal and illegal sex work. Sex workers in the illegal sector reported far more harassment by police than sex workers in legal sex work.

CAMBODIAN SEX WORKE THEIR OWN RESEARCH

Carol Jenkins, PhD

In 2004, Cambodian sex workers had the opportunity to select a topic and conduct research on it, in order to improve policy that affects their lives and working conditions. As the Principal Investigator, I never set the topic or methods in advance but first discussed the possibilities with the two best organized groups of sex workers in the country, Women's Network for Unity (WNU) and the Cambodian Prostitutes Union (CPU). In early 2004, we met in two separate groups and I presented them with the opportunity by simply stating that there were funds designated for research and advocacy among sex workers and if they were interested, I could help them design a piece of research, train them to do it and help them in disseminating the results. Each group was quite enthusiastic and without hesitation prioritized violence, including sexual violence, from various types of men as the single greatest bane in their lives. I remember saying to WNU folks, "You know, if we do a truly representative sample and the frequency is not high, there will be little to advocate with." They all gave me a strong look, and said essentially, don't worry, the frequency is very, very high. As a researcher, one is always concerned with ad hoc frequency estimates made by individuals, because, after all, any single person only has a narrow view of the whole social scenario. How could he or she really know? So be it for my own naiveté.

I decided we would try the relatively new method called respondent-driven sampling (RDS), also sometimes known as chain referral sampling. I had attended a workshop that did some training on this method and had watched as a friend tried it in Myanmar. It wasn't without difficulties, but had enormous potential for reaching people who ordinarily would

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ENFORCEMENT IN SOUTH AFRICA

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THE LEGAL CONTEXT

Sex work is illegal in South Africa and the Sexual Offences Act prohibits the selling of sex and all related activities at present. However sex workers in South Africa are rarely arrested under this Act. It is easier for the police to prosecute sex workers for minor offences and to use local municipal bylaws referring to loitering, littering or even obstructing traffic in this regard.

SOURCES OF INFORMATION

Seventeen sex workers talked about their experiences for SWEAT's recent study. Many of the participants spoke of their difficulties with the police. Sex workers working on the street are more vulnerable to violence and harassment at the hands of the police because they are much more visible than those who work indoors. The experiences discussed here were mostly reported by street-based sex workers.

In addition SWEAT monitored arrests in four different areas of Cape Town between February and July 2004. Sex workers indicated that they had been arrested as often as four or five times in a month. Some individuals said that they had been arrested almost every day. When sex workers are arrested they are usually held for 48 hours, fingerprinted and released without appearing before a magistrate.

Sex workers are also often fined for minor offences like loitering, loitering with intent to solicit and littering. These fines vary between ZAR50 to ZAR500 (US $5 – 50). Sex workers have complained that they do not get receipts for fines. Sex workers have also reported to us that their clients have often been asked to pay a bribe to the police.

Sex workers experience other serious difficulties with the police and report that they have been harassed, insulted, physically abused, arrested when they were not working, or forced to have sex with members of the police.

what happened in the following way:

"I have a problem now with the police. We are looking for safety, but they just spray gun us or they beat us up."

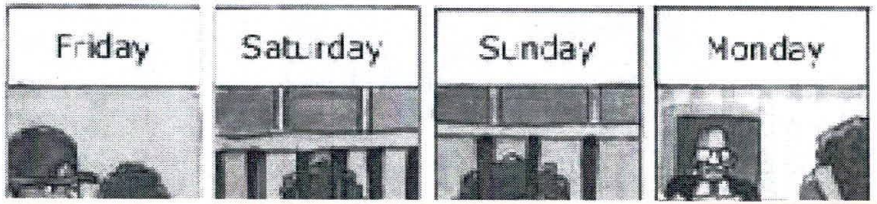
In a more extreme example of the abuse of sex workers while in police custody another person described how the police had physically assaulted a transgender sex worker. She told of the police kicked the person while she was lying on the ground in the cell and that they damaged her internal organs. While they were kicking her, the police officers told the sex worker that they would make her into a woman, implying that they would do this by kicking her genitals. They kept her in the police cell for two days before providing medical treatment. The doctor who examined her indicated that she had almost died from injuries to her stomach, liver and spleen.

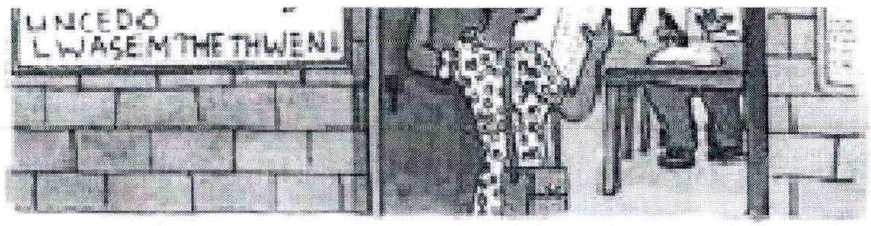
Transgender sex workers are particularly vulnerable to police abuse. They are not only vulnerable as a result of being sex workers but also on the basis of their gender identity. SWEAT has had a number of reports of transgender sex workers who identify as female being held in the male prison cells and of the police encouraging male prisoners to abuse them.

Sex workers in police custody are often refused permission to make a telephone call to let their families know where they are. We have had reports of people being refused medical treatment for burn wounds and a dislocated shoulder while in police custody. One sex worker spoke of the bad conditions in which they are held when they are arrested:

"The police are also a problem, if they arrest you on Friday they will keep you in the cells until Monday and you will be arrested without seeing the magistrate. We do not get food in the cells. We only get two slices of dry bread. You do not even get a chance to wash."

Another sex worker related her experience of the police asking her for sexual favours





if she had to say she had been raped:

"I don't think the police will believe anything, if I have to go there and tell them I'm raped now, I'm a sex worker, they're going to think that you then, in the job, you're then doing these things for money, so how can you say you have been raped, that, things like that, that's why I'm very scared, that's why I avoid being raped and stuff like that, but you can't avoid, so if you must get raped you rather, keep quiet, because I know the police are not going to believe."

SWEAT'S RESPONSE

SWEAT's broad approach to dealing with the [illegible] hum[illegible]ghts framework. One of our key arguments that could be better utilised elsewhere.

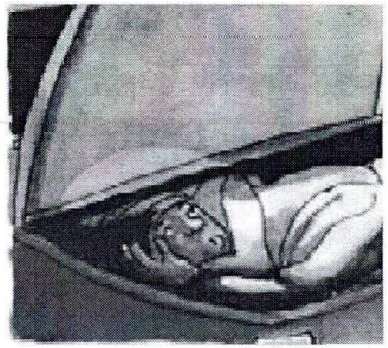
It is crucial that sex workers are informed of their rights and understand the legal procedure surrounding arrests. It also helps if sex workers are aware of some of the actions they can take to avoid arrest and protect themselves. To this end SWEAT produces informational pamphlets and engages in discussions around safety with sex workers during our outreach work.

SWEAT helps sex workers who want to make a complaint about police mistreatment by taking their legal statements and going with them to the police station when they make the complaint. We explain the process [illegible] to b[illegible] wec[illegible] th[illegible] want to make complaints against the

- If your friend does not come back on time get help
- Although [illegible] sex workers have [illegible] it is safe to work without them. If you work with other sex workers
- Tell other workers about bad clients – describe what the client and his car look like

Although SWEAT will assist any individual sex worker, our main focus is on engaging a number of sex workers experiencing the same mistreatment. This will enable us to take group litigation forward that will have a greater impact for sex workers overall. This litigation is difficult to follow through because ongoing information gathering and contact with the affected individuals is needed.

In the past law enforcement officers have said that they arrest sex workers largely when community members complain about sex work, but recently we have seen an increase in random targeting of areas and increased arrests. This has coincided with an inner city urban renewal policy in Cape Town that has adopted a "zero tolerance" approach. A number of business and civic interests have recently been lobbying for the removal of "crime and grime" from the streets of Cape Town. A bylaw has been proposed for the promotion of a safe and secure urban environment. This proposal was punitive [illegible]ure [illegible]arget [illegible]e h[illegible]ss,



- Always take down the number, colour and n
- Try to check the boot back seats before you
- Don't get into a car w client in it.
- Don't lean into the ca with a client - if he m hurt you.
- Check that the car do

arrest sex workers.

SWEAT has gathered statements about police actions in specific areas during the course of our outreach work in response to an increasing number of individual complaints. Once these statements were taken, the trends were summarised and we sent letters highlighting the kinds of complaints reported most often in an area to the specific police commissioners responsible for overseeing these areas.

We had a promising response from one of the police commissioners, indicating that they take our complaints seriously and that we should report specific incidents to them in future. We have committed to the ongoing monitoring

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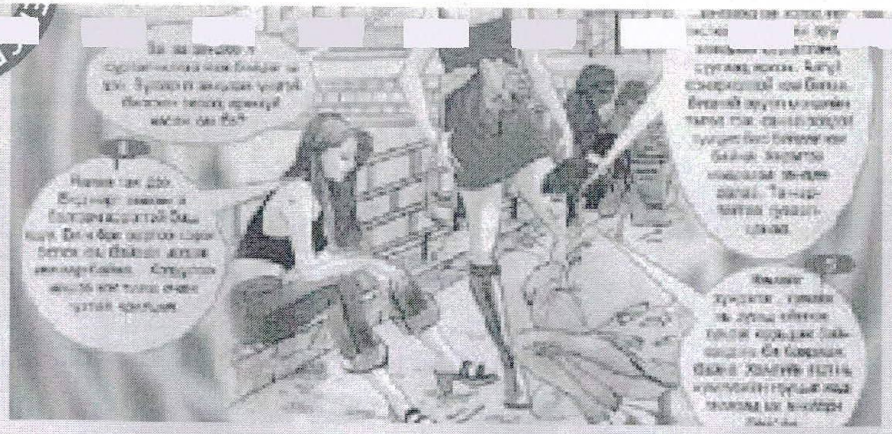
SERVICES FOR SEX WORKERS IN CENTRAL ASIAN REPUBLICS: POINTS FOR CONSIDERATION

Yury Sarankov, Senior Programme Advisor on IDU and Sex-Work Issues, AFEW, Kyiv, Ukraine
Vera Dite, Lead Trainer on HIV Prevention Among Sex Workers, AFEW, Almaty, Kazakhstan
Adrian Webster, Head of Monitoring and Evaluation, AIDS Foundation East-West (AFEW)
Robin Montgomery, Deputy Director of Programme Development, Head of Senior Programme Advisors, AIDS Foundation East-West (AFEW)

AIDS Foundation East-West (AFEW) is an international, non-governmental, humanitarian, public health organization working in the field of HIV/AIDS prevention, treatment, care and support in regions of Eastern Europe and Central Asia (EECA). AFEW has been operating in Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan since 2002 in a range of fields, including HIV/AIDS prevention, drug demand reduction and health promotion among women in the commercial sex industry.

Commercial sex in the countries of Central Asia seems to be a growing and widespread practice. AFEW has conducted a variety of research projects in this region, including several Rapid Situation Assessments and various qualitative studies, and maintains regular contact with relevant target groups and officials. In this context it has often been argued that the number of (mainly female) sex workers has rapidly increased in Central Asia during the last decade. The reasons given for this often include instability and diminished quality of life surrounding economic and political changes. In particular, following the fall of the Soviet Union in 1991 and the resulting turmoil in the region, many girls, women and their families have been trapped in poverty and often view sex work as one of the few options



cultural condemnation makes the industry not only complex in structure but somewhat hidden and difficult to penetrate from a public health perspective.

Throughout the territory of the former Soviet Union, one of the main problems noted by sex workers is the relationship they have with law enforcement. Women involved in the sex business frequently speak about police harassment, which may include blackmail, violence, coercion and extortion.

As a result, human rights issues have recently become a priority for sex work projects. They are frequently discussed at various seminars and conferences. Currently, however, there is no unified approach to the development of strategies for collaboration among the law-enforcement agencies.

> *In Tajikistan, sex services are often provided by women who identify themselves as housewives and, as a rule, have several children. This is often understood as a direct result of increasing labour migration out of Tajikistan. This migration leaves families with children unsupported financially by both parents. In some areas the cost of sex services is very low (less than US$ 1) and women frequently report providing services for no more than a single meal or in exchange for a small amount of alcohol or drugs.*

To resolve these issues, much depends on the legislation

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It is very likely that including the human rights aspect in these activities would add significantly to their effectiveness.

CONCLUSION

The development and introduction of effective legal services for sex workers in Central Asia is currently falling behind the need for these services. A more significant effort is required to improve the degree to which the basic human rights of sex workers are maintained in this region, particularly in regards to their legal protection.

The capacities of both governmental and non-governmental organizations should be built up and an appropriate and concerted effort on the behalf of both of these groups should be encouraged and facilitated. Furthermore, programmes are also required that focus specifically on key target groups, including sex workers themselves, the staff of law enforcement agencies, and client populations.

Through a well-coordinated effort targeting these areas it is believed that the human rights situation of sex workers in Central Asia can be dramatically improved.

CONTACT DETAILS

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Fax: + 7 095 250 6387
E-mail: yury_sarankov@afew.org;
robin_montgomery@afew.org;
Web: http://www.afew.org

Legal Aid to Sex workers is a pilot project conducted by the NGO 'Tais Plus' in Kyrgyzstan (Gulnara Kurmanova, 2004). Seventy-six male and female sex workers, those who direct the sex work themselves, and those whose lives are affected by sex work appealed to the project for aid over a period of one year.

This project had several components: (1) everyone who requested legal aid received it free of charge, (2) if needed, the legal rights of project beneficiaries were defended before the state attorney's office, (3) informa-
ion wor Tais ias ited

PREVENTION STRATEGIES

Rachel Wotton

Rachel Wotton is a permanent member of the Womens' Metropolitan Outreach (SWOP), the state-based sex worker outreach project in New South Wales, A organisation since 1990. Predominantly peer based, SWOP provides information state via telephone, a drop-in centre and by regular outreach services.

Rachel has been outreaching the Canterbury road area for the last four years. and thank all the wonderful women who work on Canterbury Rd who have truste sharing personal and painful events and stories over the years.

Rachel is also the International Spokesperson for Scarlet Alliance, the top natio Territory Sex Worker Organisations & Projects in Australia and the issues of Au This article has been adapted from the oral presentation Rachel Wotton did at t Bangkok, Thailand in July 2004.

For more information on SWOP or Scarlet Alliance, please see the following webs www.swop.org.au
www.scarletalliance.org.au

look through all their belongings
- a marked patrol car followed one of the workers and her client back to a house and sat outside with the lights flashing until the client left, and
- telling two of the workers that they had 10 minutes to get off Canterbury Road and then following the workers car for about 15 minutes.

The police predominantly arrested the women and not the clients. If clients were arrested they were given on the spot fines or a summons to go to court while the women were taken to the police station and kept there for up to four hours while their charge was being processed. In addition, unreasonably restrictive bail conditions were given, essentially banning the women from the area between the hours of 8pm and 6am. These restrictions would often be for either 7 days or until their court case.

THE EFFECTS OF OVER-POLICING ON THE STREET WORKERS

Sex workers reported that their fear of arrest, detention, harassment and intimidation led them to engage in risky, unsafe behaviour that was not acceptable to them before. Workers started carrying fewer condoms, hiding their safe sex and injecting equipment in surrounding areas and jumping into cars straight away instead of talking to the client first through the window. They weren't able to rely on their gut instincts to assess the client as fear of arrest was so great they reported jumping into any car to get away from the police. In addition, workers were taking the clients away from the usual industrial area and spreading out further into the local residential areas.

All of these actions are disturbing to note and the health and safety implications are immense.

If found breaching bail conditions, the workers were locked up straight away, regardless of whether the original charge was warranted. As many of the women lived in the area this was extremely problematic. One worker buying milk at the local petrol station was threatened with breaching bail, even though the police knew where she lived and could clearly see that she wasn't working.

Those working after 8pm were even harder to outreach and give supplies to as they were constantly on the move and couldn't risk to be seen talking to us in that area.

While most knew their legal rights and understood that the charges weren't justified, most pleaded guilty just to get the conditions removed. This meant another fine, (between A$250-500) and a larger criminal record that can be used to disadvantage them in the future. Each new fine also meant longer working hours for the women, with the threat of a warrant being issued for their arrest if they failed to pay on time.

WHAT SWOP DID AND THE OUTCOMES WE'VE ACHIEVED:

INTRODUCED THE WORKERS TO A PRO-BONO LAWYER

Jane Sanders is a solicitor for Shopfront Youth Legal Centre. Shopfront Youth Legal Centre is a service provided by Freehills, in association with the Mission Australia's Sydney City Mission and the Salvation Army. Sanders has a thorough understanding of the legislation surrounding the sex industry. A referral card was handed out with

was particularly important could clearly demonstrated he c
was unjustified and the police were actively discriminating against the workers. Over the next few months Jane and SWOP supported this worker to challenge this charge, moving from the local court up to District Court. Just before the final court appearance the Police withdrew the charge. Although this was a great success and no further workers have been charged with this offence since this time, the worker had still lost four days of her life in jail.

INITIATED CONTACT WITH THE POLICE

SWOP approached Bankstown Police to set up a meeting with both the Superintendent and the Crime Commander. A range of issues were discussed, including:
- the current attitudes and actions of their police officers towards the workers,
- demystifying commonly held beliefs about both the workers and the clients,
- reasons why there was a current dispersion of the women into the residential areas,
- complaints the police had received from the public, and
- options for legal working areas that have been successful in both NSW and overseas.

POSITIVE OUTCOMES INCLUDED:

- establishing agreement as to where the legal working area was, and
- an acknowledgment from the police that the church was no longer in operation,
- police also committed themselves to directing their officers to take a more objective approach to the policing of this area, and
- to remain courteous and polite to the women just like they would with any other citizen, and
- discussion also took place around the idea of identifying specific locations in this industrial area for the workers and their clients to park, in order to do the jobs without causing any disturbances or offence for the surrounding community.

SWOP PRESENTED TO THE BANKSTOWN COMMUNITY SAFETY COMMITTEE MEETING.

The Police also invited SWOP to present at the Bankstown Community Safety Committee, a meeting the Local Council co-ordinates. We discussed a range of topics concerning the local sex industry and outlined actions that could be taken to improve conditions for both the sex workers and the community in general. While it took a few months, at end of February 2004 a permanent container for used needles had been placed in the area, which was one of the suggestions for the area. Further discussion has continued between SWOP and council to place rubbish bins in the area and the council has continued to be supportive of SWOP initiatives.

RECOMMENDATIONS:

The role of police in regards to street-based sex workers cannot be understated. While this has always been a very contentious issue, in order to maximise a good working relationship between sex workers, service providers and the police, a number of things can be implemented:

ANALYSIS

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health services and other services. Where sex work activities are criminalized, sex workers are exposed to harassment and exploitation. Sex workers are less likely to report crimes and their rights are often not recognised. Prohibition of sex work means that police, legal and health services can discriminate against sex workers, creating an environment where sex workers are compromised by institutionalised prejudices. Prohibition promotes negative stereotypes of sex workers and stigma, which can severely affect the professional and personal lives of sex workers.

CURRENT AUSTRALIAN SITUATION

New South Wales (NSW) is widely regarded as the most collaborative and deregulated state of Australia with regard to the sex industry. Other Australian states and territories fluctuate between criminal and public health models. Decriminalisation was originally introduced to reduce police corruption in NSW. Decriminalisation has also removed significant barriers and has enabled sex worker communities to mobilise.

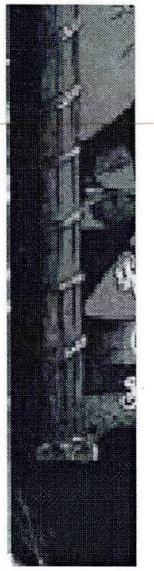
Australia does not implement decriminalisation of the sex industry on a national level. Each state and territory develops its own legislation for the sex industry. States and territories administer regulations and legalisations with police and local councils. This lack of national cohesion has created a situation in which brothel-based businesses, massage parlours, private workers escort agencies and street based sex workers are often dealt with in very different ways in each state or territory.

councils have become staunch regulators of the sex industry. Street-based sex work in NSW remains heavily regulated by local councils. Sex worker organisations and projects receive reports from sex workers that local councils have colluded with police to gain entry to their workplaces and enforce specific zoning regulations.

ENABLING SEX WORKER COMMUNITIES

The occurrence of HIV in Australia and internationally was a crucial moment in how governments approached the politics of health care. Community development is based on the fundamental understanding that successful interventions come from the knowledge and ideas inside the community rather than from outside the community (Ife 1995). Where Australia has followed this model, sex worker communities have mobilised as community-based organisations (CBOs) and work in partnership with the government to achieve public health goals. (Fawkes 2004). Sex worker communities working in partnership with the government are able to participate and collaborate with governments to achieve public health goals and have developed their own services and programs. Decriminalisation, and the funding of community-based responses including sex worker peer-based strategies, has been a resounding success in Australian public health.

Sex worker communities in Australia have developed and delivered diverse forms of services for their own members. Sex worker projects employ past and present sex workers as 'peer educators', who provide services, support and information to those in the sex industry. Sex workers in Australia have great knowledge about safe sex practices, and this knowledge can in part be attributed to decriminalisation and community-based ı ıses /. De ıalis of th indu ave



CONCLUSION

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Queensland University of Technology, Brisbane, Australia
and Alcohol Research and Education Centre, University

ossit gal ies a ssoc Polic conc in the 1980's concluded, "the law had reached too far into prostitution and highlighted that, when areas related to morality and human behaviour are over-regulated, corruption can find an opening" (in Carver and Mottier, 1998:185). The 'law' in this instance were the police themselves.

During the 1990s, legislation attempted to eradicate links between organised crime, police corruption and sex work. The Prostitution Amendment Act 1992 was enacted, allowing sex workers to work alone from private premises. The Prostitution Act 1999 saw the introduction of license boutique brothels throughout Queensland. One interpretation of the prevalent legislation is that it addresses community concerns about the public visibility of prostitution rather than the occupational health and safety of workers.

In 2002, our research was funded to inform a government evaluation of prostitution laws to determine if they had reduced illegal sex work, improved the health of sex workers and were acceptable to the general community. We hoped to systematically evaluate the extent to which the changes in legislative structure had been effective in improving health and well-being of sex workers, and to determine contemporary occupational health and safety concerns of female sex workers in Queensland. Community participation and support was sought at all stages of the research process. Initial development included extensive discussion with sex workers, sex worker advocacy groups, government and non-government organisations, brothel owners, and other key individuals about questionnaire content and methods for distribution. The draft questionnaire was developed, piloted and modified in response to comments provided by sex workers.

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PROBLEMS FACING SEX WORKERS WORK RIGHTS EXPLOITED

According to Hong Kong Law, a resident being a sex worker is not illegal, however, work rights of a sex worker are often exploited. Sex workers are often discriminated against, unreasonably arrested and mistreated by law enforcement agents. For instance, streetwalkers get arrested when they are simply walking on the street without any purpose of "soliciting". Police and courts often assume that streetwalkers must be the ones who solicit. But in certain occasions, customers are the ones to solicit. The spirit of "Soliciting for an immoral p[illegible]se" is simply being ignored. Besi[illegible] many [illegible]men who work independently in a "one-woman brothel", which is

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and for women sex workers ... ng ... AFRO provides direct services, including telephone help line and outreach service on streets, in karaokes, hair-salons and nightclubs. The Drop-In Centre offers a variety of activities including workshops, classes, legal clinic service, health service, counseling and part-time employment. Through our contacts with women sex workers, we aim to raise the awareness of both legal rights and health issues.

During the last year, the strategic direction of AFRO has clearly been steering towards raising sex workers' rights at a social level. More emphasis has been placed in advocacy, public education and, at the same time, boosting the self-esteem and thereby facilitating sex workers to form their own support groups.

After the program, 10 out of the 20 young participants determined to contribute, and by taking action to show their concern to the sex workers' community. They volunteered themselves for a video production project for AFRO's legal rights education for sex workers. From collecting stories and information, writing scripts, to acting and directing, the youngsters worked in a team to visualize the scenes of right-abuse cases experienced by sex workers and present in the video a could-be-different ending in case sex workers had been able to safeguard their entitled rights. The final product of the video now serves as a piece of in-house educational material for AFRO.

We see the Life Education Program as a success, not only as an education program for youth on building capacity in critical thinking and sense of social justice, but also as an empowerment and development process for sex workers' self-expression and self-representation. Appreciation and gratitude that the youngsters have shown to the sex workers undoubtedly warmed their hearts, yet boosted their self-esteems and made them feel more confident about their capacity in combating people's bias and prejudices against sex workers and the industry.

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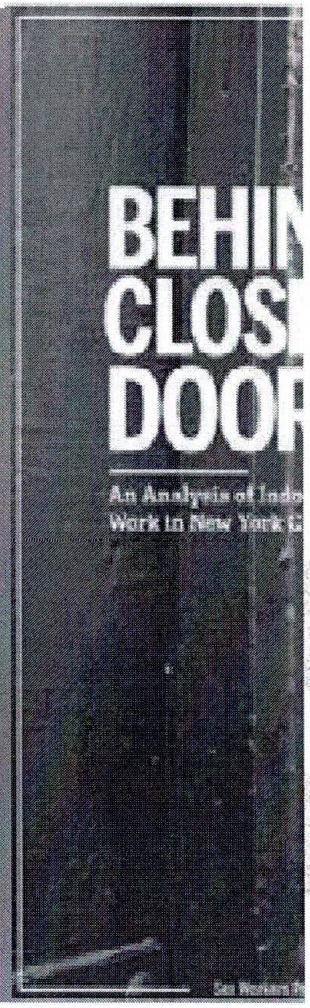
The Sex Workers Project at the Urban Justice Center, an NGO in New York City, interviewed 52 indoor female, transgender and male sex workers and found that sex workers live with the daily threat of arrest, deportation, and violence. Indoor sex workers work in brothels, via websites and newspaper ads, in private clubs, and through escort agencies. Some indoor sex workers interviewed also work on the street. The full report, Behind Closed Doors, is available from http://www.sexworkersproject.org.

Created in December 2001, the Sex Workers Project (SWP) is the first program in New York City and in the country to focus on the provision of legal services, legal training, documentation, and policy advocacy for sex workers. Using a harm reduction and human rights model, the SWP protects the rights and safety of sex workers who by choice, circumstance, or coercion remain in the industry.



POLICE INTERACTIONS

We asked how often respondents had "run-ins" with police, meaning that they did not call the police, but that the police came after them. Sixty-three percent (32 of 51) of respondents reported having experienced run-ins with police. For those who did experience run-ins, 63% (20 of 32) reported that these interactions were rare.

- 47% (24 of 51) of respondents had been arrested in relation to sex work, and 12% (6 of 51) said that they had

services that were remotely substantive. This person was supposed to receive job training—however, she found that the program was not helpful at all.

- Two women who had been trafficked into prostitution received services after having been arrested and held in immigration detention. These services were not offered through criminal court as a result of an arrest, but after the women were officially designated as trafficked persons.
- In addition to arrests, 29% (15 of 51) of sex workers interviewed stated

being forced to do something that the respondent did not want to do; having been threatened or beaten because the respondent was a sex worker; and/or having been robbed by a client:

Sara describes a client "who came in and had a knife... I was cornered and I was about to be attacked and raped... I didn't go to the police because it would be coming out about what I've been doing."

REPORTING VIOLENT INCIDENTS TO THE POLICE

- 16% (8 of 51) of respondents had gone to the police for help, as a sex worker, and found the police to be helpful.
- 43% percent (22 of 51) of respondents stated that they were open to the idea of asking police for assistance. However, many of these same people also worried about how helpful police might be, and ultimately thought of the police as unhelpful and untrustworthy.

Despite their worries about the police, a few participants had good experiences with the police. These good experiences can help police write guidelines for best practices when assisting sex workers who come to them for help. Police who see sex workers as legitimate members of society are more likely to be helpful offer the same level of assistance that they would offer another person. They are also more likely to follow through on the steps taken in response to violence against sex workers. Unfortunately, this understanding that a sex worker may be a crime victim appears to be the result of enlightenment or understanding on the part of individual officers, and not the result of training and best practices issued by the police department.

economic self-sufficiency and stability.

RECOMMENDATIONS FOR POLICE INTERACTION WITH SEX WORKERS

Policymakers should carefully consider the extent to which they make prostitution a criminal justice priority. Sex workers often engage in prostitution to earn money for themselves and their families, and sex workers could benefit from substantive services and assistance rather than arrest.

Where a person has not committed a crime, police should not bother them.

Local police and government agencies must keep arrest statistics so policymakers and advocates can examine criminal justice trends.

*All names have been changed.

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LEGISLATION ON STREET-BASED SEX V ANTI SOCIAL BEHAV ORDERS

Teela Sanders, University of Leeds, UK

THE INTRODUCTION OF ASBOS

In Britain, it is legal to engage in adult consensual commercial sexual transactions but the relationships that surround the interaction, such as advertising, negotiating, renting premises and living off the earnings, are all illegal. The most recent legal development for women involved in prostitution in the UK, especially street workers, has been through the Crime and Disorder Act, 1998. This Act introduced Anti Social Behaviour Orders (ASBOs) to be used against those who cause 'alarm, distress and harassment' to local communities. These prohibition orders have been rationalised as tools for both community safety and protection and the rehabilitation of offenders. Although no figures are known, informal networks suggest that hundreds of ASBOs have been served on street sex workers in a disjointed and ad hoc fashion. Some police forces apply ASBOs regularly as a strategy to reduce street soliciting, while others prefer more tolerant approaches to managing the street scene.

A breach of an Order can be punished by up to five years imprisonment. Many sex workers have been given custodial sentences for entering 'no go areas' defined under the Order. These Orders have never been evaluated. Legal experts criticize the ABSOs because they are 'not only ineffective but also discriminatory in application to street sex workers' (Jones and Sager 2001:873).

THE CONSEQUENCES: AN INCREASE IN RISK

ASBOs are not the only evidence of a return to the criminalisation of vulnerable, excluded street sex workers. Policing on the streets has become increasingly visible in some towns and cities. This visible police presence has resulted in

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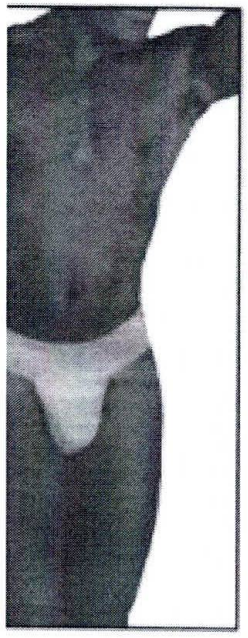
As the use of ASBOs increases and the strategies used to police prostitution are inconsistent across police force, the lack of coherent policy and approach to the management of prostitution means that the rights of sex workers are exposed to violation. The inconsistency of enforcing the law and the use of police discretion even within the same locality means that women do not know from one day to the next whether they can work free from criminalisation or whether the risks posed by policing are inevitable.



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School of Sociology & Social Policy

Wherever sex work remains a criminal offense, there is scope for abuse by law enforcement. One of the most pernicious of these is the police entrapment operation.

The Thai Prevention and Suppression of Prostitution Act 1996 which forbids the sale of sex is concerned with five main areas of criminality.

The Act specifically prohibits and penalizes:

- commercial sexual abuse of minors, i.e. under 18 years old,
- soliciting of clients,
- advertising sexual services,
- arranging for sex worker services for others and
- recruitment of others for sex work.

There is a growing national recognition of the need to repeal the latter four articles and decriminalize sex work in Thailand.

"The articles are exploitative, providing opportunities for police to take advantage of the girls," he said. "If we abolish those articles, they can do their profession within the law ... and with fewer opportunities for police and authorities to exploit them."
- Professor Narong Phetprasert a consultant adviser for the ruling Thai Rak Thai party of Thai Prime Minister Thaksin Shinawatra

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".... I know someone who knows your boss... and we're just going to rattle cages until you do your job... Start with a carrot. You can be a real hero in this community just by rescuing those girls. And if they will not go along, then you start rattling the cages.

"You find somebody, you have to piece something together, and then you hear, So-and-so is not going to go along. OK, how can we get to him? Oh, I know some way we can get to him. So-and-so will call him, and we'll move ahead on this. We are all experts ... at operating in Washington. And this work is what you have to go do in a third world or developing world context. People are the same everywhere and have somebody they are beholden to, somebody they answer to, somebody who can embarrass them, somebody who will not ever, ever, ever, ever want to see a copy of a congressional letter coming to an ambassador who hands it off to a person in Thailand who then gives it to the chief of police... You try whatever it takes."

This explanation of IJM procedure is both revealing and frightening. Clearly IJM is confident in the total support of the US government for their methodology and processes. They are equally confident that the US government can and will apply pressure on other governments if IJM require it. Sex workers should not be victims of exploitation or other human rights abuses by employers, customers, local authorities or anti-prostitution/anti-trafficking groups.

Quotes attributed to March Bell from the Protection Project website [online May 28, 2005] http://www.protectionproject.org/main2.htm. October 11, 2000.

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Phone: +66 53 282504

Empower is a sex workers organization in Thailand. They have four drop-in centres that offer literacy, computer training and non-formal education. Empower also co ng, I info n a er

Thailand. The large majority of the group was women from Burma, some of who had at some time been "victims of trafficking" and all of who had at one stage or other enlisted help to migrate for work in Thailand. They were unanimous in their recommendations that:

1. No person should be trafficked, or forced to work in work they have not chosen to do and that no child under the age of 18 years should be abused sexually either commercially or domestically.
2. Methods to combat trafficking must be revised and solutions found that do not violate the rights of workers but support true victims of trafficking.
3. The rights of adult trafficked victims as workers must be acknowledged. We should receive recognition of our work and compensation, so we are not financially worse off after our "rescue".
4. All women affected by trafficking or anti-trafficking measures must receive adequate compensation and if we are victims of trafficking we be given full support to seek asylum and/or residency with the right to work included.
5. The primary goal of prosecuting traffickers must be altered to a primary goal of assisting trafficked women and children. We propose that if trafficked women and children (whether trafficked or not) are continually rescued and assisted, the use of trafficked women and children will become unprofitable and entertainment places will only wish to employ those women who are over 18 years, informed and willing to work.
6. Understand that all women, who are unable to access travel documents and need or wish to migrate, must secure the assistance of an agent or broker. If our situation as refugees from Burma is not recognized we must secure work for the survival of our families and ourselves. While we are willing to work our illegal status leaves us with no recourse against exploitation by agents or employers regardless of the work we do. Anti-trafficking groups must work toward improving the human rights situation in Burma, securing the ability for women to travel independently, and fully supporting the recognition of our refugee status.
7. Currently women who work in entertainment places have their own methods of assisting trafficked women, those being forced to work, and those under 18 years. Anti-trafficking dialogue and groups have yet

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Global Alliance Against Traffic in Women: http://www.gaatw.org
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ND ETHICS UPDATE

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trial participants and their advocates were pleased that their concerns were taken seriously at this meeting. Everyone agreed that materials to prevent the spread of HIV should be readily available and that treatment should be guaranteed for trial participants who become HIV-positive during trials. However, no agreement about how to guarantee treatment for participants who become HIV-positive or who would pay for treatment was drafted.

Genuine participation including input from proposed trial participants at all stages was also discussed. This meeting was the first step toward real inclusion for research participants from marginal communities in the developing world in medical trials. Everyone will benefit if this continues. Everyone will lose

Abolition Abolitionists seek to end prostitution in all forms. The term comes from abolitionists opposing regulated legal brothels in Victorian England.

Criminalization is the inclusion of prostitution or related activities in the criminal legal code. This is different from the inclusion of prostitution in business or other other regulatory or civil legal codes.

Decriminalization is the removal of prostitution and related activities from the criminal legal code. This is the legal approach to prostitution recommended by most sex worker organizations and advocates of sex workers rights.

Entrapment is the inducement by police or their agent to do something that a person would not otherwise have done. This is not usually a successful defence for sex workers who have been arrested or known for prostitution.

Intent to commit prostitution means that a person seeks to engage in prostitution, as exhibited by some act. In other words, it's not a crime to have the intent to commit prostitution, you have to do something to show the intent.

Legalization is handled in different ways in different places. In some places, only some kinds of sex work are legal, while others remain criminal activity. Sometimes, sex-work related activity like advertising, or living off the earnings of a prostitute remain illegal. Legalization is often accompanied by regulations regarding who can be a sex worker, where sex work can be done, and other restrictions.

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Living off the earnings (of a prostitute) means being financially supported by a sex worker. This is illegal in places that want to

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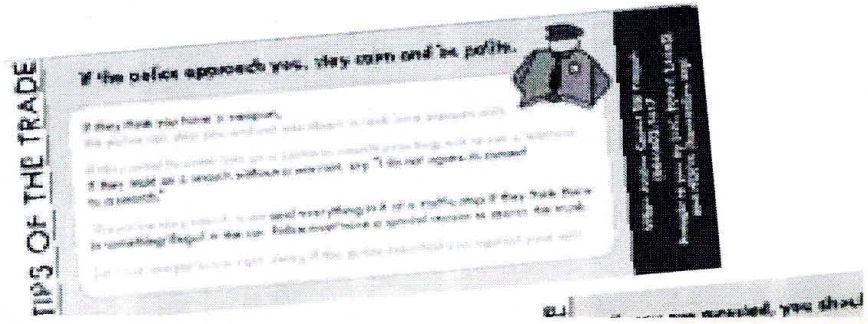

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Research for Sex Work was founded in 1998 by Ivan Wolffers at the Vrije University Medical Centre in the Netherlands and Licia Brussa of TAMPEP. Since then, there have been seven wonderful issues of Research for Sex Work. Members of the International Network of Sex Work Projects have increasingly contributed and collaborated on the production of Research for Sex Work since it appeared. The International Network of Sex Work Projects took over the production after No. 7 appeared in 2004. Founding editors Nel van Beelen and Ivan Wolffers have assisted this transition. NSWP member organization Empower Chiang Mai did the graphic design for this issue of Research for Sex Work.

The NSWP was founded in 1991 as an informal alliance which participates in independently financed projects in partnership with member organizations and technical support agencies. The NSWP is in the process of incorporating in Hong Kong. The Network promotes sex workers' health and human rights throughout the world with members on all continents.

This issue of Research for Sex Work is dedicated to the memory of Paulo Henrique Longo, founding coordinator of the NSWP. Paulo Longo worked with Nel van Beelen and Ivan Wolffers to arrange for the handover of Research for Sex Work to the NSWP. He would have become the editor in chief, but he died in October 2004.

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SEX WORK AND LAW ENFORCEMENT

ASSESSING THE IMPACT OF PARALLEL REPORTING ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH

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General Introduction

The purpose of this review study has been two-fold: to assess the impact of parallel reporting - on health issues in particular - on national and international level, and to suggest possible improvements to the health reporting process so as to optimise its efficacy potential. The subsequent exposition focuses on four UN bodies, which deal with the right to health and NGO reports related thereto: the Committee on the Rights of the Child (CRC); the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW); the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteur on the Right to Health (SRRH). Although other UN bodies may also deal with health issues, the aforementioned ones were selected for their most extensive involvement in the monitoring of states' compliance with treaty obligations to ensure the realisation of the right to health.

The substantive analysis, on which the conclusions of this study are based, has been accomplished through the compilation and review of a wide array of views and documents. These include accounts of NGOs, involved in the parallel reporting process in the past four years before the UN bodies mentioned above; interviews with Committees' members and with the staff of the Special Rapporteur on the Right to Health; reviews of NGO parallel reports and Committees' corresponding concluding observations; and digests of Committees' practice and NGOs' work and experiences on part of academics, various research institutes, think-tanks and staff members of the UN system. The guiding inquest has been to determine whether any discrepancies exist between the potential and actual benefits accruing through the reporting process on health issues and if so, whether, and how, NGOs could lessen this disparity.

Overally, gathering the necessary and relevant information for the following exposition has been a rather challenging task. This study summarises in a systematic manner the views of NGOs from a wide geographical range and a variety of political and socio-economic contexts. A request to share their experiences and opinions regarding parallel reporting on health issues was extended to more than 250 NGOs (and other organisations) worldwide, which have participated in the reporting process in the past four years. Less than half, however, expressed an interest in contributing to the present study. Identifying those NGOs, which have submitted a parallel report to one or more of the Committees that form the focus of this exposition, has been quite problematic in itself. Except for the CRC, none of the other treaty-monitoring bodies (CEDAW and CESCR) maintains an (electronic) easily accessible database recording the NGO submissions made for each Committee session. Therefore, neither the parallel reports nor the details of NGOs/NGO coalitions, which have submitted such reports for a given session are readily available on-line in the case of CEDAW and CESCR. The difficulty of locating such basic information and some Committees' incapacity to compile and maintain an updated list of NGO submissions that can be made easily accessible (on-line) to health and human rights practitioners following or contributing to the reporting process, call for greater pressure and/or initiative to have such information made more readily available. Assuming that the Committees do not have sufficient human or financial resources to effectuate this necessity, it might be a task well suited to NGOs to carry out – for their own benefit and for the benefit of their partners around the world. Without the availability and accessibility of such basic information it would be immensely difficult to monitor consistently the reporting

process on the right to health and to identify health-oriented NGOs worldwide for the purpose of pursuing working partnerships.

The Right to Health

The right to health is guaranteed in several international human rights instruments, although the precise scope of its content and application has been a matter of notorious ambiguousness. The Preamble to the Constitution of the World Health Organisation[1] offers the most comprehensive definition of the right to health, which has served as the basic point of departure for the formulation and interpretation of the provisions in most of the remaining instruments. The preamble formulates "*the highest attainable standard of health*" as a universal fundamental right and conceptualises its content as a "*state of complete physical, mental and social well-being and not merely the absence of disease or infirmity*". Along similar lines, most treaty provisions stipulating on the right to health, including the instruments of particular interest for the purposes of the present study, frame the right as "*the highest attainable level of physical and mental health*", although avoid equating it with complete human well-being. Thus, while upholding the fundamental character of the right to health, existing, and justiciable, international instruments, such as the CESCR, CEDAW and CRC, relate the realisation of this right to matters of available resources, levels of development as well as other state-to-state variations.

Generally, the right to health is considered to encompass both elements related to health care and factors characterised as "underlying preconditions for health". The first category pertains to the availability, quality, accessibility and equality of both restorative and preventive medical care, including issues of primary[2] and child care[3], family planning services[4], mental services[5] as well as pre- and post-natal care[6]. The latter cluster, on the other hand, addresses the various circumstances in the natural or man-made surroundings, which do exert impact on human health. Among the underlying preconditions for health are generally considered to be the availability and adequacy of drinking water[7], sanitation[8], nutritious foods[9], environmental[10] and occupational[11] hygiene, and health-related information[12], as well as the abolishment of harmful traditional practices[13].

The broad scope of the right to health as well as its general characterisation as a "second-generation" right have resulted, as in the case of other economic, social and

[1] Constitution of the World Health Organisation, 14 U.N.T.S. 186, 22 July 1946 (entered into force 7 April 1948)
[2] Article 24(2)(b) CRC
[3] Article 12(2)(a) CESCR; Article 24 CRC
[4] Article 12 CEDAW; Article 24(2)(d) CRC
[5] Article 12(1) CESCR
[6] Article 12 CEDAW; Article 24(2)(d) CRC
[7] Article 12(2)(b) CESCR; Article 24(2)(e) CRC
[8] Article 12(2)(b) CESCR; Article 24(2)(e) CRC
[9] Article 12(2) CEDAW; Article 24(2)c CRC
[10] Article 12(2)(b) CESCR; Article 24(1)(c) CRC
[11] Article 12(2)(b) CESCR
[12] Article 24(2)(e) CRC
[13] Article 24(3) CRC

cultural rights, in the formal permissibility of states phasing out its full realisation in accordance with their available resources and other national circumstances. However, despite the overall programmic duty for "progressive" fulfilment of state responsibilities in the health domain, a core content of the right to health has been delineated subjecting states to some immediate and unconditional obligations. 'Core content' is generally understood to designate the minimum essential threshold of state obligations to give effect of the particular right so that the right does not lose its essence. On the basis of this definition, the core content of the right to health is considered to encompass a number of basic health services, which states are under an obligation to provide immediately and unconditionally, irrespective of their available resources. These services encompass: maternal and child health care, immunisation against major infectious diseases, appropriate treatment of common ailments and injuries, essential drugs, and an adequate access to safe water and basic sanitation[14].

State Obligations with Regard to the Right to Health

States are under a tripartite duty to respect, protect and fulfil the right to health as any other human right. This duty gives rise to both positive and negative state obligations[15] – to fully, albeit progressively, realise the right to health (with the exception of core responsibilities, which are of immediate effect) and to refrain from health-harming activities as well as the implementation of retrogressive policies. The fact that the right to health imposes upon states both positive and negative obligations underlies its interrelatedness and interdependence with 'first-generation' human rights and may serve as a starting point for the effective development and implementation of the concept of 'justiciability' on domestic levels[16]. However, until justiciability has become firmly grounded in the national legal systems of state parties to the relevant human rights instruments, supervisory mechanisms, domestic and international, aimed at awareness-raising, advocacy and reputational loss for violating states remain the only existing alternative. As such, what do these mechanisms precisely entail?

UN Mechanisms for Monitoring the Realisation of the Right to Health

Committee on the Rights of the Child[17]

The Committee on the Rights of the Child, monitoring the implementation of the Convention on the Rights of the Child by State Parties, is composed of 10 independent

[14] B. Toebes, "Towards an Improved Understanding of the International Human Right to Health", in: *Human Rights Quarterly*, Vol. 21, 1999.
[15] Toebes, *supra*, n. 14.
[16] Toebes, *supra*, n. 14.
[17] An extensive exposition of the reporting process before the Committee on the Rights of the Child is contained in the 'Guide for Non-Governmental Organisations Reporting to the Committee on the Rights of the Child' by the NGO Group for the Convention on the Rights of the Child (www.crin.org/docs/resources/ publications/NGOCRC/NGOCRC-Guide-en.pdf).

experts, elected by State Parties to serve for terms of 4 years. The Committee meets three times per year in Geneva and is serviced by the Office of the High Commissioner for Human Rights.

Monitoring the fulfilment of obligations under the Convention consists of periodic reviews of State Parties' laws and policies related to children's rights, based on information provided by governments, NGOs, IGOs and other agencies. Each State Party is required to submit an initial report of the actions taken with view to implementing the Convention 2 years after ratification of the Convention. Thereafter, reports are required every 5 years, with the Committee reserving itself the right to request complementary reports or additional information at any time.

While initial reports should provide a comprehensive overview of the actions initiated by State Parties to fulfil all their obligations under the Convention, subsequent periodic reports are to be focused on those areas, identified as problematic by the Committee during previous report examinations. In order to assist states in fulfilling their reporting obligations under the Convention, the Committee has issued specific guidelines for states to follow when preparing their reports[18].

In general, the Committee attempts to examine state reports within a year of their receipt but due to the increasing backlog of reports, this is becoming increasingly impossible. Once the report has been assigned to a session, however, its examination takes place in two stages – during a pre-session working group and subsequently, at a public plenary session. NGOs may participate on both occasions.

Pending the examination of a state report, NGOs – international, national and local, are invited to submit parallel reports. Such reports may be all-encompassing, dealing with the totality of state obligations under the Convention, or issue-specific. The parallel reports may be prepared and submitted either by individual NGOs or in coalition with national and international partners. To assist NGOs in their endeavours to contribute to the implementation of the Convention through the mechanism of state monitoring, the Committee has issued guidelines regarding the form and content of both initial and periodic NGO reports[19].

The process of preparing, submitting and monitoring issue specific reports, e.g. on the right to health, is essentially the same as for general NGO parallel reports, dealing with the Convention in its entirety. The same guidelines apply to both types of reports and the Committee makes no differentiation at the review stage as to whether it is a general or an issue-specific report. Issue-specific parallel reports, therefore, such as reports targeting specifically the right to health, do not trigger any different preparatory or review procedures.

In order for parallel reports to be taken into account by the Committee's pre-session working group, they should be submitted within one year of the receipt of the corresponding state report by the Office of the High Commissioner for Human Rights

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[18] CRC General Guidelines for States (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/255f04bfca51a dba802568f6005bc482?Opendocument); for extensive guidelines on the reporting process before all six UN treaty-monitoring bodies, including CRC, CEDAW and CESCR, *see* UN Manual on Human Rights Reporting (http://www.unhchr.ch/pdf/manual_hrr.pdf).

[19] For CRC Guidelines for NGO Submissions and Participation, *see* http://www.unhchr.ch/html/ menu2/6/crc/ treaties/partners.htm.

in Geneva. The pre-session working group meets three times a year to identify in advance the main issues to be discussed with State Parties appearing at the subsequent public session. The working group's meetings are confidential, thus closed to governmental representatives. However, NGOs and relevant international organisations (UNICEF, WHO, ILO, etc.) may be invited to attend. NGOs wishing to participate must request to be admitted to a working group meeting when submitting their parallel reports. However, only those NGOs, which are deemed to be able to provide the most relevant and factual information pertinent to the examination of state reports, will receive an invitation for participation. Upon receipt of such invitation, NGOs may submit additional written statements to the Committee for consideration before the working group meeting and give a 15-minute oral presentation at the meeting itself.

The working meetings result in the preparation of lists of issues, usually based on the input of attending NGOs, which then the State Parties to participate in the next plenary session are requested to respond to. The lists of issues are also made available to NGOs with the possibility for NGOs to prepare their own written replies, if they so wish.

Since the year 2004, the CRC has also initiated, in co-operation with UNICEF, an additional method of evaluating specific country situations[20]. Committee members are being dispatched as rapporteurs on country missions, where they can collect first-hand information from a variety of sources, including civil society. This innovative approach has so far been well received and presents an excellent opportunity for NGOs, which cannot be present in Geneva, to still engage in active dialogue with the Committee[21].

The Committee plenary sessions are public. Although NGOs cannot intervene during the sessions, they may participate as observers with the possibility to informally meet with Committee members in order to present additional information, provide updates, or suggest questions to governmental representatives.

Following discussions with State Parties during the plenary sessions and on basis of all information made available and accordingly considered, through reports and working group findings, the Committee adopts concluding observations specific to each State Party. These concluding observations contain subjects of concern and recommendations for future action and are made public through the United Nations system.

Committee on the Elimination of All Forms of Discrimination against Women[22]

The enforcement mechanism of the Convention on the Elimination of All Forms of Discrimination against Women is based also on a reporting system. State Parties are required to submit an initial report on the implementation of the Convention within one year of ratification. Thereafter they are required to submit periodic reports every four years on the progress made since the prior report.

[20] This recent development in CRC practice – greatly praised by Committee members as effective and highly useful - is still not reflected in any guidelines for participation.

[21] Views expressed by CRC Committee members during interviews conducted in connection to the present study.

[22] A detailed exposition of the working methods of CEDAW is available through the International Women's Rights Action Watch publication 'Producing NGO Shadow Reports to CEDAW: a Procedural Guide' (iwraw.igc.org/shadow/CEDAWNGOguideJune2003.pdf).

The CEDAW Committee consists of 23 independent experts, elected by State Parties with regard to equitable geographical distribution and representation of the different legal systems in the world. The Committee holds two sessions each year (January and June) in New York and is being serviced by the United Nations Department on the Advancement of Women.

Although the CEDAW Convention does not explicitly require that the Committee collaborate with NGOs, co-operation has *de facto* been established in practice by means of formalised procedures. These procedures allow NGOs not only to submit parallel reports but also to actively partake in the Committee's pre-session working groups[23].

Parallel reports may be prepared by individual NGOs or by coalitions of partners and are then to be sent directly to the CEDAW chairperson at least 6 weeks in advance of the pre-session working group at which the relevant country will be discussed. Due to increasing backlog, state reports are reviewed only 2 years after their submission to the Committee, thus providing NGOs with the additional incidental opportunity to prepare sound parallel written accounts. There are no differences in the preparation requirements and review procedures of general and issue-specific NGO reports.

Existing guidelines on the content and structure of parallel reports stipulate that reports should be organised according to articles of the CEDAW Convention rather than thematic issues, in difference to the requirements of the CRC Committee. Reports should also be supported by detailed and reliable *disaggregated* data and contain *specific* recommendations for action. Periodic parallel reports, in specific, should focus on the issues that have remained open to consideration from prior reviews of state submissions, as detailed in the Committee's country-specific concluding observations.

The pre-session working group meets behind closed doors at the end of a previous plenary. It consists of four Committee members, each one of which is appointed a rapporteur for a particular country, whose report is pending review during the following plenary session. Country rapporteurs have the responsibility to examine all background information provided by other than state sources, such as IGOs, NGOs and various UN agencies, to present an analysis to the remaining Committee members and eventually to draft the concluding observations on that country. Therefore, in order to ensure maximum impact NGOs should provide their respective country rapporteur with their parallel report well in advance of pre-session working groups.

During the pre-session working group, NGOs submitting parallel reports on periodic state submissions may be invited to give a brief oral presentation. The information thus obtained usually serves as a basis for the Committee drafting a list of questions for state representatives to answer at the plenary session.

The CEDAW Committee plenary sessions are public, thus open to NGOs, but only in their capacity as observers. However, Committee members are easily approachable individually before and after country working sessions to talk informally about issues of concern to NGOs.

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[23] M. Bustelo, 'The Committee on the Elimination of Discrimination against Women at the Crossroads', in: P. Alston & J. Crawford (eds.), *The Future of the UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000.

At the end of each plenary session, the Committee issues publicly concluding observations on the status of the Convention's implementation in the countries reviewed, which are then made available through the United Nations Division for the Advancement of Women.

Committee on Economic, Social and Cultural Rights[24]

In difference with the CEDAW and CRC Committees, the Committee on Economic, Social and Cultural Rights was not established by its corresponding instrument but by the UN Economic and Social Council (ECOSOC). It consists of 18 experts, serving in their personal capacity, elected by State Parties on basis of equitable geographical distribution, with due account given to the representation of the major legal systems in the world. The committee convenes twice per year (May and November) in Geneva and is being serviced by the United Nations Centre for Human Rights.

The Committee's primary function is to monitor state implementation of and compliance with the Covenant on Economic, Social and Cultural Rights. State Parties to the Covenant are required to submit initial reports within two years of ratification, and thereafter once every five years, outlining the measures taken to ensure the enjoyment of the rights contained in the Covenant. To assist states in the reporting process, the Committee has adopted a set of guidelines to be followed[25].

In difference with CEDAW practice, reviews of state reports by the CESCR Committee cannot be deferred and are being carried out even in the absence of State Parties' representatives. Similarly, in cases in which a state report is overdue and not forthcoming, the Committee proceeds to considering the state concerned in light of other available information, provided by NGOs, IGOs and other sources.

Consideration of state reports is, similarly to the procedures adopted by CEDAW and CRC, a two-stage process. A five-person pre-session working group meets six months prior to a report being considered by the full Committee. The working group appoints country rapporteurs to examine in depth all available information and develops a list of issues necessitating further clarification from State Parties. State Parties are then required to reply in writing to the questions thus posed prior to their appearance before the full Committee.

NGOs may partake in the work of the Committee in several ways. They may submit, individually or in coalitions, parallel reports, give short oral presentations before pre-session working groups, thus drawing the experts' attention to issues to be included in the list of questions to State Parties, and attend the plenary session of the Committee to

[24] For extensive information on the structure and procedures of CESCR, *see* COHRE Guide to Using the UN System (http://www.cohre.org/unframe.htm); and K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 1999.
[25] CESCR Revised General Guidelines Regarding the Form and Contents on Reports to be Submitted by States Parties, E/C.12/1991/1.

informally raise additional issues with Committee members. In order to facilitate NGO participation, the Committee and various organisations[26] have developed guidelines on the form and content of reports as well as the practical involvement of NGOs during pre-session and plenary meetings. The parallel reports may be general or issue-specific and there are no differences as to the way in which they are reviewed by the Committee.

Similarly to the CEDAW and CRC Committees, plenary sessions of the CESCR Committee end with the adoption of country-specific concluding observations on the progress being made by State Parties in the implementation of the Covenant. As the CESCR is a body established by ECOSOC all concluding observations as well as requests for state visits and suggestions for international technical or other assistance are sent to ECOSOC for formal adoption. The process of formal adoption, however, is only a procedural formality and bears no consequence in terms of added legal value. ECOSOC has thus far neither refused to adopt a document of the aforementioned type, presented by the CESCR, nor has it ever taken the initiative to pass a resolution condemning a given state's (or states') insufficient efforts in the implementation of the rights guaranteed by the Covenant. The latter is understandably unlikely considering ECOSOC's political nature.

Special Rapporteur on the Right to Health

In 2002, the UN Commission on Human Rights appointed a Special Rapporteur on the enjoyment of everyone of the highest attainable standard of physical and mental health[27]. With a mandate to investigate violations of the right to health worldwide, the Special Rapporteur objective is three-fold: to promote awareness of the particular right; to clarify its meaning; and to highlight instances of good practice.

In order to carry out its role, the SRRH may issue urgent appeals to states to refrain from infringing on the right to health, submit annual reports through the UN Commission on Human Rights to the General Assembly for consideration, and undertake country missions to closely assess particular health situations.

For the purpose of fulfilling his mandate, the SRRH assembles and reacts to information provided from a variety of sources: NGOs, academic institutions, IGOs, health practitioners and other professionals. Following an assessment of the communications thus received, the SRRH may issue urgent appeals or seek to undertake country missions in order to carry out in-depth inquiries. Upon an invitation of UN treaty-monitoring bodies, such as the CESCR, CRC or CEDAW, the Rapporteur may also provide input on health references, contained in the Committees' General Comments, striving to elucidate the content and scope of application of different aspects of the right to health.

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[26] E.g. COHRE Guide to Using the UN System, *supra*, n. 24; 'NGO Shadow Reporting to CESCR: a Procedural Guide' by the International Women's Rights Action Watch (http://iwraw.igc.org/shadow/CESCRNGOguideJune2003.doc); in particular with regard to the participation of health activists in the CESCR reporting process, *see* e.g. http://www.johannes-wier.nl/publicaties/ download/guidelines.pdf.

[27] For further information relating to the mandate of the Special Rapporteur on the Right to Health, *see* http://www.unhchr.ch/html/menu2/7/b/mhealth.htm.

Following the completion of a country mission, the SRRH produces a country report, expounding on his findings. The report is then submitted to the UN Commission on Human Rights for adoption. Country-specific investigations, encompassing a mission, an urgent appeal or compilations of communications, are all included in an annual report, which is then also conveyed to the Commission. If it so chooses, the Commission may, in its turn, submit the Rapporteur's reports to the UN General Assembly for further consideration.

General Remarks on the Impact of Parallel Reporting

Formally enshrined in treaty-monitoring bodies' constitutive instruments (CRC, CESCR) or primarily developed outside the set treaty framework (CEDAW), parallel reporting has evolved as a potentially effective 'advocacy for change' tool on both international and national level.

The benefits accrued through parallel reporting to the work of treaty-monitoring bodies are substantial[28]. NGO reports are particularly useful in providing the Committees with a critical view of states' efforts to implement the principles of the relevant Conventions. As state reports tend to focus primarily on achievements, however inadequate, NGO reports are highly instrumental in acutely pointing out the insufficiency of state actions to fulfil treaty obligations, as well as any other discrepancies and misrepresentations in governmental reports. Parallel reporting is also greatly valuable in placing country-specific human rights circumstances in their historical, political, socio-economic and cultural context. As Committees' members may or may not be sufficiently familiar with specific country situations, they benefit from NGO reports establishing the particular consequences, which this context (or changes thereof) bear on the enjoyment of human rights for all, or some segments, of the population. Considerable is the value of parallel reporting also for supplementing state reports, providing a deeper understanding of the human rights situation on national levels and voicing the concerns of un- or under-represented societal groups (minorities, refugees, detainees, etc.).

Given the process of parallel reporting is taken advantage of to the maximum of its potential, it is an effective tool for mobilising grass-root support and for drawing international attention to necessary changes in domestic policies and practices. Whether domestic and international pressure would exert greater state compliance with UN standards would ultimately greatly depend on states' willingness to undertake change, their priorities and availability of resources. Nonetheless, the potential of parallel reporting for influencing, from both the grass-root and the international level, national agendas remains significant. To exert maximum impact though, this potential must be optimised on more consistently that it is being done at present.

[28] A view generally shared by NGOs, academics, Committees' members and representatives of different international organisations, interviewed for the purpose of the present study.

Quantity and Quality of Parallel Reports Dealing with Health Issues

The right to health is among the most frequently addressed issues in both state and parallel reports as well as Committees' concluding observations. The attention given to health issues apparently stems from the prominence of the right to health in the relevant Conventions and the extensive interpretation of its content and recommended methods of implementation in a number of General Comments[29]. The comprehensiveness and detail, in which health issues are addressed, however, vary among countries depending on the magnitude of their respective health problems. Due to financial and human resources constraints NGOs reportedly opt to concentrate on occasions only on those human rights matters of immediate urgency or direct concern to them[30]. Given there exist only minimal impediments to the enjoyment of the right to health in a given country, it appears that Committees members' attention is also likely to focus on more pressing issues[31] (discrimination, trafficking, etc.). Thus it seems that both NGOs and the Committees, although in general dealing frequently and extensively with the right to health, are prone every now and then to overlook its equal status failing to recall that its realisation should not be approached from a comparative perspective.

With regard to the quantity of parallel reports dealing with the right to health, it is notable that nearly all reports invariably deal with health issues, some more extensively than others, but there are hardly any instances of NGO reports exclusively focused on the right to health. Similarly, as parallel reports attempt to cover broad areas, they usually lack in regional and/or group-specific focus. Concerning the latter, however, it must be recognised that as the Committees already struggle with a substantial backlog, they lack the capacity to deal with a large number of 'specific' reports. To overcome this drawback, nonetheless, it would be useful if NGOs were to put forward regional and group-specific issues (i.e. health issues) in a joint parallel national report, prepared in a coalition with partners. Such a report would reflect comprehensively, and in a single document, country-wide but also group/region-focused human rights concerns that NGOs wish to raise with the Committees, thus ensuring depth of the report while alleviating the workload of the Committees.

As far as quality is concerned, parallel reports are generally instrumental in drawing Committees' attention to health care issues. However, the reports usually share some common deficiencies.

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[29] E.g. CRC General Comment No. 3 on HIV/AIDS and the Rights of the Child (CRC/GC/2003/3); CRC General Comment No. 4 on Adolescent Health and Development (CRC/GC/2003/4); CEDAW General Comment 14 on Female Circumcision (A/45/38); CEDAW General Comment 24 on Health (A/54/38); CESCR General Comment 14 on the Right to the Highest Attainable Standard of Health (E/C.12/2000/4).

[30] A view shared by NGO representatives, interviewed for the present study.

[31] An opinion expressed by a CRC member, interviewed during the research phase of this report.

First, similarly to state reports, NGO reports fall short of procuring adequately disaggregated data[32]. While this deficiency on part of NGOs is understandable for lack of sufficient human and financial resources, it does not facilitate the work of the Committees, which often have to have recourse to various UN specialised agencies in order to obtain more complete and correct data.

Second, as parallel reports generally tend to adopt an overly medical perspective when dealing with health issues, they fail to adequately address these issues from a human rights perspective[33]. There is insufficient recognition of the interrelation between various national and international policies and their (potential) impact on health rights. Moreover, NGO reports are deficient in that they reflect the wanting knowledge of NGOs of the conundrum of all relevant to the right to health international instruments and the difficulties NGOs encounter in the proper *legal interpretation* of these instruments. Such difficulties translate into the ability of NGOs to apply the existing legal framework, in which the treaty-monitoring bodies are situated, to particular national circumstances so as to ensure comprehensive evaluation of the existing health situation during parallel reporting and adequate follow-up to the Committees' concluding observations. NGOs appear somewhat unaware of the legal value of health-related international instruments and their justiciability on both international and national level (whether the instruments are indirectly incorporated in national legislation or directly applicable, whether national courts have jurisdiction to adjudicate on alleged violations of socio-economic rights, whether and to what extent basic domestic constitutive and other documents enshrine the right to health, etc.). NGO efforts towards the protection and promotion of the right to health also seem to fall short of sufficiently exploiting the available national legislative frameworks, relying exclusively on international monitoring processes instead of focusing on existing national legislations (their relation to international standards) and the possibilities (judicial and others) that they might offer.

Third, as a consequence of the aforementioned, NGO reports in general, and in particularly when dealing with the right to health, tend to be predominantly descriptive[34]. While the Committees invariably establish the linkages between health problems, identified in parallel reports, and the broader human rights setting, they relate to, it would be useful for NGOs to attempt a more analytical approach themselves – establishing causality, cross-linking different issues of impact to health, making specific recommendations for change. To this end, however, NGOs need to acquaint themselves with (and increasingly adopt) a *legal* human rights perspective. This is likely to facilitate the monitoring process and create a greater focus in concluding observations and other international recommendations. It is only reasonable to assume that NGOs are better placed than international bodies to correctly assess the health situation in a given country and to make a proper judgement as to what changes are necessary and viable in any particular political, socio-economic and cultural circumstances.

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[32] One of the most pervasive shortcomings of parallel reporting identified by Committees' members interviewed for the purpose of the present study.

[33] For a detailed analysis of this particular matter, *see* HeRWAI, Health Rights of Women Assessment Instrument, developed by the Netherlands Humanist Committee on Human Rights (http://www.hom.nl).

[34] A feature of parallel reports frequently acknowledged by Committee members.

Despite some of the deficiencies of parallel reports, there is a general agreement among academics, NGO and inter-governmental representatives as well as Committees' members that their impact on the work of the Committees is significant. On the basis of information, provided by NGOs in their reports, particular governmental practices and legislation come under detailed scrutiny (the better the quantity and quality of alternative information brought to the Committees' attention, the more extensive the examination). Given health issues are among the more pressing problems facing a specific country, NGO concerns, comments, and even suggestions, usually find their way into the Committees' concluding observations. While CEDAW generally strives to avoid direct references to NGO ideas, it is not infrequent for the CRC, alternatively, to literally transpose NGO wording into its concluding observations. Openly or covertly represented in the end product of state evaluations, parallel reports are invariably taken into consideration by all the Committees.

The only apparent, and rare, instances, according to Committees' members, in which NGO concerns would not be reflected into concluding observations, are those in which the issues raised are of scientific uncertainty, which renders reliable supporting data controversial (e.g. negative health consequences for children raised by gay couples). Also, if data available from other sources – governments or UN specialised agencies – does not support, or refutes, NGO information, concerns based on such unsubstantiated data will naturally not find a place in the Committees' concluding observations. Lastly, NGO propositions, lacking in quality of exposition of argument and supporting material, as well as in relevance, may not be taken into account by the Committees and included in their observations.

Not infrequently, health problems are among the most pressing to both developed and developing States Parties to the CRC, CEDAW and CESCR. While developing countries face the challenge of dealing with a wide spectrum of problematic health issues, developed countries struggle to bring their policies and practice in greater conformity with their international obligations, guaranteeing the enjoyment of the right to health to disadvantaged segments of the population. Given the prominence and attention, which health issues are given by all the Committees, the majority of concerns raised by NGOs in parallel reports usually find place in the Committees' concluding observations. Usually the more pressing and substantial the concerns are, the more detailed coverage that is being accorded to them in Committees' recommendations to states. However, the lack and/or inadequacy of specific supporting information with regard to health-related issues may preclude the Committees from rendering any express recommendations.

Case study – Dominican Republic

In 2000 a coalition of Dominican NGOs submitted a parallel report on the observance of children's rights in the Dominican Republic to the CRC. Among the basic health and welfare concerns raised by the coalition in its report were high average infant mortality rates, unsafe water consumption being a major source of numerous children's diseases and the spread of HIV/AIDS among children and adolescents.

In response, in 2001 the Committee adopted its concluding observations on the Dominican Republic, which recommended in relation to health, that the State Party "undertake initiatives to reduce infant mortality" and "continue taking measures for the prevention of HIV/AIDS". The Committee further concurred with NGOs in concluding that the "persistence of health problems related to insufficient access to safe water and sanitation are matters of concern".

Case study – Germany

In their joint parallel report to CEDAW in 2003, German NGOs expressed only limited concern about health-related issues affecting the well-being of women in the country. Criticisms were centered primarily on the denial of access to medical services to migrant women and girls with illegal or insecure residence status as well as to women from the Roma and Sinti minorities.
In this regard, the concluding observations of CEDAW on Germany did include a reference to the vulnerable situation of migrant and minority women and their susceptibility to discrimination, trafficking and sexual exploitation. However, the Committee refrained from expressly dealing with the health situation of these segments of society as according to the Committee's members specific information was lacking as regards the access of migrant/minority women to health care, the various forms of violence committed against them and the rate of forced marriages.

Case study – Greece

In 2002 the Greek Helsinki Committee submitted a parallel report to the CESCR on Greece's compliance with its obligations under the Convention. The NGO report dealt partially with the right to health noting, inter alia, the lack (or inadequacy) of health care services in remote areas populated by Roma communities, the rising percentage of excessive smokers and the dramatic divide between rich and poor segments of the population, which significantly affected the Greek health system.
In its concluding observations on Greece, the CESCR expressed concern about the high tobacco consumption rate in Greek society and recognised the poverty divide and the inadequacy of health services in rural area populated by the Roma minority as problematic matters. However, the Committee expressed regrets that it was not provided with sufficient information (statistical and other) to allow it to assess the State Party's efforts in this regard.
Interestingly, NGO concerns pertaining to Greek legislation obliging medical personnel to report non-nationals seeking health treatment to the authorities, rising abortion rates, which are among the highest in the world, and pervading lack of information about contraception among all societal groups, were not reflected in the CESCR's concluding observations.

In customarily including health-related recommendations in their concluding observations, the Committees have also exhibited tendencies to examine or refer to certain health issues somewhat more extensively and persistently than others. Thus for instance the CRC recommendations related to adolescent healthcare and quality of healthcare in general are most systematically included in the Committee's concluding observations[35]. CEDAW in its turn gives greatest emphasis to reproductive health (pre- and post-natal health care, issues pertaining to abortion, HIV/AIDs, family planning,

[35] From an interview with a CRC Committee member, conducted in connection to the present study.

harmful traditional practices) and (sexual) violence against women[36]. Less elaborately addressed by CEDAW are matters related to environmental health, adequate nutrition, drug and alcohol abuse and mental health[37]. Only rarely discussed are issues related to occupational health, safe drinking water and adequate sanitation[38]. The attitude of the CESCR in dealing with health-related issues is, in comparison to CRC and CEDAW, more difficult to trace, as the Committee appears to deal with the right to health in a somewhat random manner[39]. In its concluding observations the CESCR does not appear to stress some issues more than others, touching upon the various elements of the right to health as far as they apply to each and every State Party.

Parallel Reports versus State Reports: Value and Impact

Generally, parallel reports are given as much time and consideration as state reports, with the exception of the rare instances in which a particular country situation engenders an overwhelming number of NGO responses (e.g. in 2002 Japanese NGOs submitted parallel reports amounting to several thousand pages to CEDAW)[40]. In such circumstances, although not all NGO concerns would find their place in final concluding observations, the most pertinent ones would usually be reflected in a recommendation, with considerations relating to the right to health frequently being among those ones mentioned[41].

NGO reports are particularly valuable in drawing the Committees' attention to issues overlooked in state reports and in critically assessing the actual progress made by states in the implementation of their obligations on the basis of previous Committees' concluding observations. Parallel reporting is also highly useful in its non-written form - NGOs presenting their views at Committees' pre-session working groups – in that this type of 'supplementary' reporting is critical for focusing the Committees' attention to particular areas of concern. Oral presentations by NGOs are, moreover, instrumental in pushing forward for detailed public inquiries by the Committees into specific state actions or inaction, having repercussions on the realisation of specific rights. The stimulation of such extensive inquiries during public Committees' sessions guarantees that no issues of great significance to NGOs are overlooked while at the same time potentially "shames" states, evoking reputational concerns and possibly subsequent changes.

Inter-Committee Co-operation and Exchange of Information on Health Issues

There appears to be little, if any, formal co-operation among the Committees. They all have recourse to the same independent health data compiled by UN specialised agencies but do not have a system in place for the exchange of country-specific information obtained through NGO sources.

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[36] B. C. A. Toebes, *The Right to Health as a Human Right in International Law*, Intersentia, 1999.
[37] Toebes, *supra*, n. 36.
[38] Toebes, *supra*, n. 36.
[39] Toebes, *supra*, n. 36.
[40] From interviews with members of the CRC and CEDAW Committees.
[41] *supra*, n. 40.

Although the Committees refer to each other in General Comments on the scope and interpretation of particular rights, no similar cross-references tend to appear in state-focused concluding observations. Nonetheless, Committee members usually strive to acquaint themselves with other Committees' concluding observations although it is only the CRC that has more formally incorporated this process in its work. The CRC has initiated a trend of including in its country files, to be examined in the course of formal sessions, concluding observations of other Committees, such as CEDAW and the CESCR.

Moreover, there is no database of good practices maintained to assist NGOs in the reporting process and in the case of CEDAW and CESCR parallel reports are not even easily (electronically) accessible to either health and human rights activists or the public in general. It therefore seems imperative that if the reporting process on the right to health, and state implementation actions, are to be monitored consistently by health-focused NGOs, a comprehensive database of parallel reports be established. This database should consistently document NGO reports to all Committees touching on the right to health as well as to the Special Rapporteur on the Right to Health, providing tools for easy access to, and comparison of, data. It should also at the same time seek to provide a comprehensive compilation of relevant training resources for health-oriented NGOs – thus making essential for NGOs materials available in an easily accessible and centralised manner. The existence of such a focal point of information is likely to facilitate co-operation, national and international, with other NGOs, and also with UN specialised agencies, working on common health issues. Increased co-operation, in its turn, would promote more sustained action campaigns as a follow-up to Committees' concluding observations.

Impact of Alternative Reporting on National Levels

Potential for concluding observations to evoke change

Committees' concluding observations, although of recommendatory nature, must be positioned and evaluated in the broader legal context of the relevant Conventions. The CRC, CEDAW and CESCR do impose a legally binding obligation on states to ensure the realisation of the right to health. While this obligation for realisation is of a predominantly progressive nature, there are certain core elements of the right to health, which states are under an immediate and unconditional legal duty to guarantee, irrespective of the availability of their resources. The lack of a stringent enforcement mechanism for ensuring the proper fulfilment of states' undertaken obligations does not nullify the existence of the legal right to health *per se*. NGOs need to develop greater awareness of the legal meaning of the right to health and also learn to position it vis-à-vis a broader legal framework, national and international[42]. In this way, voicing their health concerns translated through parallel reporting into concluding observations could potentially assume greater 'bargaining for change' power on national level.

Understanding the interrelation among various existing instruments relating to the right to health (treaties, general comments, concluding observations, domestic legislation, etc.) and shaping advocacy strategies to take account of the overall legal context would

[42] *supra*, n. 33.

give increased impact to NGOs, in the national and international domains. Parallel reporting would thus become a part of an ongoing and integrated process advocating fuller realisation of the right to health, rather than an *ad hoc* and isolated periodic exercise, unable to procure sufficient follow-up.

Effective follow-up to Committees' concluding observations, however, would not only depend on NGOs' familiarity with the overall legal context, in which the right to health is positioned, but also on the maintenance of NGO coalitions, sharing common objectives and complementing expertise.

Generally, states tend to perceive the reporting process as a one-off activity, likely to produce only negligible repercussions on both national and international level. Excluding states in which NGOs are pressured into playing little, if no role at all, such complacency is somewhat fuelled by NGOs' failure to ensure sustained follow-up action and monitoring, once their complementary views have found reflection in Committees' concluding observations. Without ongoing efforts on part of NGOs to advocate for change in health rights, in a broad legal context, concluding observations in themselves can do little to bring about tangible results. They may be instrumental in helping NGOs and states identify priority actions to be taken and areas, for which technical assistance is to be sought. However, the sustained advocacy of NGOs for ongoing change is crucial[43].

To this end, rather trivial at first sight actions might in fact bear significant impact. Widely disseminating, both at the grass-root level and among governmental officials, state and parallel reports, as well as the Committees' concluding observations, is of critical importance.

Case study – India[44]

In India, NGOs have reported that state officials and other civil servants, involved in the formulation of India's policies but not having participated in the periodic reporting process before CEDAW in 2000, were unaware of either the concluding observations adopted or of India being a State Party to CEDAW and the state's corresponding obligations. Having been familiarised by NGOs with the relevant documents through a sustained educational campaign, it is recounted that high ranking officials in some of India's provinces have stimulated the formulation of 'Plans for Action' taking greater regard of women's rights (including the right to health).
The wide dissemination of both reports and concluding observations on the grass-root level, however, is not without its challenges, as NGOs in India, promoting the implementation of CEDAW, have experienced. Apart from the impossibility, due to insufficiency of human and financial resources, to translate the relevant documents into more than 100 regional languages, additional difficulties were encountered in light of the high levels of illiteracy and the general complexity of the CEDAW-related documents concerned. To overcome these impediments, some regional NGOs have opted for the dissemination of self-explanatory posters, to which the general population can easily relate (e.g. depicting the difference between the availability of healthcare during childbirth and the lack of such healthcare as the difference between life and death). Posters have been accompanied by the circulation of brochures

[43] A widely-shared perception among NGO representatives, interviewed for the purpose of the present study.
[44] Information on the case study kindly provided by the KRITI Resource Centre, India.

summarising the facts relating to the status of women's health in India and in juxtaposition, India's obligations under CEDAW. The campaign has been considered a success and it is being modelled after in other regions of India.

The maintenance and expansion of NGO coalitions for the purpose of ensuring sustained follow-up actions to Committees' concluding observations pertaining to the realisation of the right to health is also of critical importance. Partnerships of medical and human rights experts are particularly useful so as to ensure a range of knowledge and experience from the two sectors, whose co-operation is essential for the optimisation of the reporting process and its follow-up. Coalition arrangements also enhance visibility, boost bargaining power and occasionally serve as protection umbrellas, decreasing vulnerability to intimidation and prosecution by the authorities[45].

Potential for the parallel reporting process to evoke change

The benefits of parallel reporting in general, as well as with regard to health issues in particular, depend primarily on the commitment and co-operation of governments, NGOs and relevant international agencies. The impact that the reporting process can exert depends ultimately on the ability and willingness of the various actors concerned to channel their joint efforts towards the identification of common goals and priorities, and the sustained pursuit of follow-up actions. Engagement in joint efforts would be affected by the type of political system, in which NGOs function, the availability of national resources, the openness of the relationship between NGOs and states, as well as the capacity and commitment of NGOs to undertake effective monitoring and follow-up[46]. Some of these factors may be so rigid in given states that they yield themselves to only slow and incremental change, impeding the work of civil society. Whenever possible, however, in order to extract the maximum benefit from the parallel reporting process, in specific with a focus on health issues, the potential tools for ensuring greater impact must be internalised and more extensively employed by NGOs.

- Ownership of the reporting process by national NGOs is critical. Nonetheless, coalition-building should be optimised on, engaging the expertise and experience of partners from both the health and human rights sectors. Coalitions are also instrumental in ensuring protection and greater impact on international as well as national level. Partnership arrangements for the purpose of engaging in the parallel reporting process also contribute, through the affirmation of commitment to shared objectives, to wider and more sustained follow-up actions[47].

- The parallel reporting process should engage grass-root society in order not only to provide a more complete picture of the state of health of different segments of the population but also to familiarise and empower them with their entitlement to healthcare. NGO parallel reports should thus be a part of an ongoing process rather

[45] '*A Tool for Change? Reporting to the UN Committee on the Rights of the Child*', a publication by Save the Children UK, 2003 (http://www.savethechildren.org.uk/scuk/jsp/resources/details.jsp?id=1826&group=resources&section=policy&subsection=details&pagelang=en).
[46] *supra*, n. 45.
[47] *supra*, n. 45.

than an isolated occurrence. They should also be action-oriented, identifying goals and tangible benchmarks and specific actions for their achievement[48].

- Maintenance of continuous dialogue between civil society and government in preparation of the reporting process as well as subsequently to the publication of the Committees' concluding observations is crucial. Wide familiarisation of governmental officials with both the reporting process and its outcome as well as identification of the particular departments bearing the responsibility for the implementation of the concluding observations pertaining to health issues is imperative[49].

- In circumstances in which NGOs are impeded by a general lack of comprehensive data and mechanisms for collecting it or by impossibility to partake in the reporting process due to lack of resources or political repression, co-operation with international specialised agencies (UNICEF, WHO, etc.) is useful[50]. Not only do these agencies dispose of specialised and regularly updated health information but some of them may also contribute to the reporting process – directly or through technical assistance. As international NGO reports, however, are not generally perceived as sufficiently representative of and empowering for civil society at national level (where existent and adequately organised), it is preferable that international NGOs focus mostly on capacity building[51] – an activity in which they are regarded by national NGOs as much useful.

- Careful planning is a key[52]. As the programming cycles of NGOs, governments and the UN treaty-monitoring bodies do not coincide, but rather differ in years, close monitoring of governmental policies and updating of health data is necessary so as to ensure both factual correctness and relevance of parallel reports when examined by the Committees. As NGO participation in pre-session working groups has significant potential to exert impact on the Committees but is rather limited in time, careful preparation and clear definition of top priority issues is essential. The formulation of common sets of priorities among NGO coalition partners and specialised agencies, capable of providing technical assistance, and hammering these priorities into concluding observations, further facilitates more focused and manageable follow-up actions.

- Lastly, widely publicising the parallel reporting process, its outcome and planned follow-up – both nationally and internationally – is of critical importance for attracting technical assistance, possibly donors, inflicting reputational loss on governments and raising awareness of the content of the right to health and the legal entitlements it gives rise to.

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[48] *supra*, n. 45.
[49] Opinions of NGOs interviewed in connection to the present study.
[50] Views expressed by interviewed Committees' members in the process of preparing this report.
[51] Views expressed consistently by national NGOs, interviewed for the present study.
[52] *supra*, n. 45.

Recent Instances of Impact of Parallel Reporting on National Levels

NGOs surveyed for the present study all reported that despite their general satisfaction with Committees' handling of their parallel reports and the adequate reflection of their health concerns in concluding observations, change at national levels has been predominantly slow and incremental. As obstacles to the timely and effective implementation of the Committees' recommendations pertaining to the right to health, NGOs frequently name: lack of political will, financial constraints and lack of skilled manpower to devise and implement better health policies, bureaucratic dominance stifling innovative legislative initiatives, prioritisation of other areas (i.e. civil and political issues), and economic liberalisation, impelling the state to withdraw from its role of a welfare provider, shifting responsibility to the private sector.

Despite the general slowness of change and the numerous hurdles in its way, the reporting process (including Committees' concluding observations) is credited for frequently triggering at least some responses on national levels. The adequacy and tangible usefulness of these responses, however, ultimately depend on the sustained joint effort of NGOs to educate and advocate for change. National developments to guarantee and more fully realise the right to health have included the following:

- Subsequent to the CRC adopting its concluding observations on the **United Kingdom**[53] in 2002, which made some specific references to the health situation in Northern Ireland, the Northern Ireland Department with responsibility for human rights initiated a process of developing a ten-year overarching Children's Strategy for Northern Ireland. The Northern Ireland Department of Health, Social Services and Public Safety (DHSSPS) has become closely involved in the development of the overall Strategy. Although the Children's Strategy is scheduled to become finalised in 2005, good NGO representation in the task forces, delegated the drafting of the text, has resulted in substantial efforts to give tangible effect to the CRC concluding observations. A drawback identified by participating NGOs at this point of the drafting process, however, is the predominantly general nature of formulated health strategies, targeting entire communities rather than children's needs in specific. Also DHSSPS appears to be favouring a retrospective approach to the Committees' concluding observations, collating policies and initiatives already fitting the recommendations, rather than developing a novel approach to problematic areas.

- Following CRC's 30th session in 2002 **Belgium**[54] adopted a law concerning the "rights of patients". The law entitles minors to a certain level of participation in their medical treatment, defining rights, such as right to informed consent, right to a free choice of health carers, right to privacy, right to complain, etc. A recommendation to this end was made by the CRC in its concluding observations on Belgium on the basis of NGO advice to this end. The law has been criticised for some minor shortcomings (e.g. no harmonisation of the minimum legal age for the exercise of patient's rights by minors) and has not yet been fully implemented but

[53] Information on the case study kindly provided by Save the Children UK and the UK Children's Law Centre.
[54] Information on the case study kindly provided by UNICEF, Belgium.

it is a tangible reflection of the impact, which Belgian NGOs have produced by means of the reporting process.

- In 2000 a coalition of Indian NGOs submitted an exhaustive parallel report on women's rights, including impediments to the enjoyment of the right to health, in **India**[55] to CEDAW. On the basis of alternative information thus provided, the Indian government came under considerable pressure when CEDAW presented its delegation with a list of over 100 questions to be clarified, touching upon numerous health issues. Following the adoption of the Committee's concluding observations, the Indian government held several follow-up meetings with NGOs, having participated in the reporting process, and undertook steps to gradually realise a number of health initiatives in response to the Committee's recommendations. Initiatives included: expansion of the existing health infrastructure, programme to holistically address women's health throughout the life cycle, National Nutrition Mission and National AIDS Control Programme.

- Taking into consideration Ukrainian NGO parallel reports, in 2002 CEDAW adopted its concluding observations on **Ukraine**[56], paying considerable attention to health issues. The Committee expressed concern about the state of reproductive health of Ukrainian women, noting the high number of abortions and maternal and child mortality rates. Anxiety was further expressed about the wide spread of alcohol and tobacco addictions as well as the severe insufficiency of family planning and sexual education programmes. As a consequence of CEDAW's concluding observations on this and previous occasions, the President of Ukraine adopted a *National Programme on Reproductive Health 2001 – 2005,* detailing a plan for action to improve reproductive health through increased awareness of issues pertaining to sexual health and contraception and the need for responsible parenthood. The Ukrainian government further initiated drafting a 'Nation's Health' programme for 2002 - 2011, addressing issues of women's health throughout the life-cycle and striving to ensure concurrence with established European policies.

NGOs and the Special Rapporteur on the Right to Health[57]

Given the rather recent mandate of the Special Rapporteur, the role of NGOs thus far has neither been extensive nor clearly defined. This situation, however, is the outcome of the novelty of the appointment rather than an attempt to prevent civil society from active involvement. As a matter of fact, the role that NGOs can play in the SRRH procedure is critical.

The organised and timely input of civil society is crucial for the issuance of urgent appeals to states to cease violations of the right to health occurring generally or in specific situations. As the Rapporteur's funding is quite limited, therefore restricting the number of country missions that can be undertaken, NGOs' communications are furthermore essential for helping the SRRH determine the severity of health problems

[55] Information on the case study kindly provided by NAWO, India.
[56] Information on the case study kindly provided by KCWS, Ukraine.
[57] From an interview with staff of the Special Rapporteur on the Right to Health.

and thus the immediacy with which a given country mission is required. The role of NGOs, however, is not exhausted with alerting the Rapporteur about right to health violations. Once a country mission has been undertaken, NGOs can be highly instrumental in providing organised assistance as well as further information to the Rapporteur 'on the field'. Communications supplied during country-based missions as well as to the Office of the Special Rapporteur in Geneva usually find their way, when substantiated, into both country-specific and annual reports, submitted to the UN Commission on Human Rights. On the basis of these reports, states will be required to elucidate on their polices and practice before both the SRRH and the Commission.

The SRRH procedure can also be very useful in furthering the work of NGOs involved in other branches of the UN reporting process. The Rapporteur on the Right to Health may be employed as a follow-up means to not only his own country and annual reports, but also to the concluding observations of treaty-monitoring bodies and the health-related work of other thematic or country rapporteurs. Thus the momentum of the reporting process will be maximised, allowing for sustained long-term follow-up on both national and international level.

Naturally, the very same considerations, raised earlier, with regard to the necessary optimisation of NGOs' involvement in the UN treaty-monitoring processes, hold true for the SRRH procedure as well. This optimisation is even more critical given that the mandate of the Special Rapporteur on the Right to Health offers somewhat greater opportunities for informal involvement of NGOs in comparison to the UN treaty-monitoring bodies. The accruing benefits of consistent follow-up to the health-related work of other UN bodies as well as states' compliance also appear to be substantial.

Limitations, in terms of financial and human resources, facing the Special Rapporteur, admittedly curtail the potential, which the mandate itself offers. Nonetheless, civil society should strive to maximally exploit the rather open, informal and broad opportunities for participation, which the SRRH procedure offers. Such participation needs to be more proactive than it has been so far and possibly more organised so as to enhance value and impact respectively on the international and national levels.

Conclusions and Suggestions

To briefly recapitulate the findings of this study, NGO reporting on health issues would need to be optimised so as to have the potential that the available UN processes offer more fully realised. Opportunities for improvement are present at all levels – from the stage of preparation of NGO reports through the exchange with treaty-monitoring or thematic bodies to the securing of sustained long-term follow-up to international recommendations.

In this regard, some practical suggestions for the enhancement of the capacity and impact of NGOs and parallel reporting on the right to health include but are not exhaustively limited to:

- more systematised monitoring of relevant concluding observations and states' actions taken in implementation thereof;

- the creation of a central electronic database recording Committees' and Special Rapporteur's conclusions, state and NGO reports, and other pertinent to the right to health information (e.g. guidelines for parallel reporting, assessment tools for monitoring health-related developments on the national level, manuals on the interpretation of the scope and content of the right to health, etc.);

- greater NGO co-operation on the national level so as to ensure comprehensiveness and depth of parallel reports;

- increased awareness of the overall legal context (national and international), in which the monitoring and realisation of the right to health take place;

- consistent and extensive substantiation of parallel reports with supporting data, examples and suggested solutions to identified problems;

- better understanding of the reporting process and the opportunities it offers for NGO participation as well as the maximisation of these opportunities through careful planning, optimised quality of reporting and consistent follow-up;

- greater co-operation with relevant international agencies in the areas of data collection and capacity building;

- dissemination of information related to states' obligations with respect to the right to health not only on the grass-root level, but also among governmental institutions and officials;

- maximised use of the open, informal and broad possibilities for participation that the office of the Special Rapporteur on the Right to Health offers.

Education and advocacy campaigns need to disperse the prevailing notion that the responsibility of states to ensure the full enjoyment of the right to health is not a *legal* duty. Awareness should be installed of the interconnectedness of health issues with the fulfilment of a wide array of other human rights and also of the need for the adoption of a more holistic human rights approach to campaigning for the realisation of the right to health.

NGOs need learn to better exploit the opportunities, however limited, that reporting as a whole offers. The process need not necessarily be viewed solely as an occasion to criticise state policies and practice. Rather, reporting can be used as a means for engaging in constructive dialogue, strengthening coalition networks and educating for a change at all levels so as to ensure ongoing efforts to bring about tangible, albeit slow, changes in the implementation of the right to health on national levels. ♦

♦ *IFHHRO is a federation of independent human rights organisations committed to the protection and promotion of health-related human rights through advocacy, education, research and publications. It strives to bridge the medical - human rights divide by serving as a focal point of information, capacity building and technical support for NGOs willing to partake in the reporting processes that the UN offers.*

THE INTERNATIONAL CRIMINAL COURT:

How Nongovernmental Organizations Can Contribute To the Prosecution of War Criminals

September 2004

INTRODUCTION

In many conflicts around the world, armies or rebel groups attack ordinary people and commit terrible human rights abuses against them. Often, these crimes are not punished by the national courts. But since July 2002, we have an international court for such crimes. The International Criminal Court (ICC) is a permanent international tribunal created for the prosecution of crimes against humanity, genocide, and war crimes. The International Criminal Court is currently in the process of preparing its first cases and is based in The Hague.

The Democratic Republic of the Congo (DRC) will become the first place where grave crimes are prosecuted by the International Criminal Court.

On June 23, 2004, the Court's Prosecutor, Louis Moreno Ocampo, announced that he was opening his first investigations in the DRC, for crimes committed since July 2002. This announcement was an answer to a formal referral of the situation in the country to the ICC by the DRC government in March 2004. The Office of the Prosecutor had been conducting a "preliminary analysis" of the situation in DRC, initially focusing on the situation in Ituri, Oriental Province, as "the most urgent situation to be followed."

In Uganda, the government has referred the situation regarding the rebel Lord's Resistance Army (LRA) to the International Criminal Court. In a press conference, the Prosecutor of the Court has explained that the LRA has indeed committed grave crimes against civilians and that the Court will take this matter seriously.

Congolese and Ugandan nongovernmental organizations (NGOs) can play a vital role by cooperating with the International Criminal Court. This guide answers some of the frequently asked questions about the Court. In particular it explains how NGOs can contribute to the Court's work of prosecuting war crimes, crimes against humanity, and genocide at the international level. It does so by answering frequently asked questions about the International Criminal Court and the way NGOs can contribute to its efforts. However this guide does not provide a legal commentary or detailed explanation of the ICC crimes, nor does it tell the history of the International Criminal Court.

THE MANDATE OF THE INTERNATIONAL CRIMINAL COURT

How was the Court created?

The Statute for the creation of the Court was adopted at an international conference in Rome on July 17, 1998. After intense negotiations, 120 countries voted to adopt the treaty. One hundred thirty-nine states have signed the treaty as of mid-2004. Sixty-six countries – six more than the threshold needed to establish the court - ratified the treaty on April 11, 2002. This meant that the ICC's temporal jurisdiction commenced on July 1, 2002. In February 2003, the Court's Assembly of States Parties - the ICC's governing body - elected the Court's first eighteen judges. The resulting high quality and diverse judicial bench (the judges include 7 women and represent all the regions of the world) were sworn into office on March 11, 2003, in The Hague, the seat of the court. On April 21, 2003, the Assembly of States Parties elected the chief prosecutor, Luis Moreno Ocampo. As of July 8, 2004, ninety-four countries have ratified the ICC treaty.

Each state party has to adopt laws that set out how the state is going to implement its obligations under the Rome Statute. Such laws cover, for example, the technicalities of the cooperation between the state and the Court, and define the crimes covered by the Rome Statute. Such laws are often called "implementing legislation."

The Jurisdiction of the Court

Which crimes will the Court prosecute?

The Court will prosecute the most serious crimes that are of concern to the international community. These are crimes of genocide, crimes against humanity, and war crimes. It has been proposed that the Court should prosecute the crime of aggression but the state parties have yet to agree on a definition. Below are brief definitions of the crimes as agreed to in the Rome Statute.

What is genocide?

Genocide occurs when acts are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Such acts of genocide can be carried out by:

- killing members of the targeted group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- imposing measures intended to prevent births within the group;
- or forcibly transferring children of the group to another group.

This definition of genocide is based on the definition found in the 1948 U.N. Convention on the Prevention and Punishment of the Crime of Genocide, which confirmed genocide as a crime under international law in the aftermath of the Holocaust.

What are crimes against humanity?

Crimes against humanity are crimes that are "committed as part of a widespread or systematic attack directed against any civilian population." They can include acts such as:

- murder
- extermination
- enslavement
- deportation
- forcible transfer of population
- imprisonment
- torture
- rape
- sexual slavery
- enforced prostitution
- forced pregnancy
- enforced sterilization
- other forms of sexual violence
- persecution against any identifiable group or collectivity
- enforced disappearance of persons
- the crime of apartheid
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

What are war crimes?

War crimes are grave breaches of the Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in armed conflicts. The Geneva Conventions are international agreements defining the rules of war. They set international standards for the protection of the civilian population and the treatment of combatants in international and internal armed conflicts.

War crimes are committed in the context of armed conflict. Some war crimes are specifically linked to internal armed conflict – such as civil war – and others are linked to international armed conflict. But most war crimes can occur in both situations.

Given that foreign troops have fought on Congolese soil, the DRC conflict has both an international and an internal dimension.

In northern Uganda, foreign troops have not been involved directly, and hence the war there is understood to be an internal armed conflict.

War crimes in international armed conflicts consist of acts such as:

- willful killing
- torture or inhuman treatment including biological experiments
- willfully causing great suffering or serious injury to body or health
- extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly
- compelling a prisoner of war or other protected person to serve in the forces of a hostile power
- willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
- unlawful deportation or transfer or unlawful confinement
- taking of hostages.

War crimes in internal armed conflicts include acts such as

- violence to life and person, in particular murder of all kinds
- mutilation, cruel treatment and torture;
- outrages upon personal dignity, in particular humiliating and degrading treatment
- taking of hostages
- conscripting and enlisting children under the age of fifteen years

In addition to the Geneva Conventions, other violations of the laws and customs of war can also be war crimes. The Rome Statute lists a wide range of such acts. Examples include:

- intentionally directing attacks against the civilian population;

- intentionally directing attacks against civilian objects;
- intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;
- killing or wounding a combatant who, having laid down his arms or having no further means of defence, has surrendered..

Under international law, such acts can be war crimes even if they are not committed as part of a systematic or widespread attack on civilians, but if they are only rare or sporadic. However, the authority of the International Criminal Court is more limited. According to the Rome Statute, « the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes ».

Can the Court prosecute crimes of aggression?

No. When the statute of the International Criminal Court was prepared, countries could not agree on a definition of aggression as individual crime. Seven years after the entry into force of the Rome Statute (in 2009), the issue of aggression will be reviewed. If a sufficient number of states agree on a definition, it will be included in the Rome Statute, and only then could the Court prosecute crimes of aggression.

The question of aggression is of great importance to the DRC because troops from Rwanda and Uganda attacked and occupied part of the DRC for several years. The Security Council stated that "Uganda and Rwanda... have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo..." (Resolution 1304 on 16 June 2000), and many others have adopted a similar viewpoint.

Can the Court prosecute acts of sexual violence?

Yes. The jurisdiction of the Court explicitly names a number of sexual and gender-based crimes: rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilization; and other forms of sexual violence, gender-based persecution and enslavement, including trafficking in women and girls. These crimes constitute crimes against humanity if they are carried out as part of a systematic or widespread attack on the civilian population. Acts of sexual violence can also be prosecuted as a war crime if they were committed in the context of, and associated with, an international or internal armed conflict.

Can the Court prosecute the recruitment and use of child soldiers?

Yes. The Rome Statute says that "conscripting and enlisting children under the age of fifteen years into armed forces or using them to participate actively in hostilities" is a war crime. This is the case in internal as well as international conflicts.

The Rome Statute does not deal with the recruitment of children between fifteen and eighteen years. Nonetheless, states may be prohibited from recruiting children between fifteen and eighteen years.

For example, the Congolese government has signed and ratified the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict, which prohibits recruitment of children under the age of eighteen. The Ugandan government has also acceded to the Optional Protocol, raising the legal age for recruitment to the age of eighteen. In addition it has made a binding declaration affirming eighteen as its minimum age for voluntary recruitment.

Can the Court prosecute child soldiers who have committed crimes?

No. The Rome Statute excludes prosecution of a person who was under the age of eighteen at the time of the alleged commission of a crime.

Can the Court prosecute acts of economic exploitation or pillage?

Economic exploitation as such is not part the Court's jurisdiction. However, it can be a war crime to pillage, starve civilians, or destroy or seize enemy property. A leader or member of an army or armed group involved in such crimes can be prosecuted.

Individuals can become criminally responsible by facilitating a crime. For example if an individual involved in economic exploitation activities facilitates a war crime, he or she can be prosecuted. Corporations cannot be prosecuted.

Can the Court prosecute crimes from the past?

The Court has jurisdiction over crimes committed after July 1, 2002, i.e. the date when the Rome Statute entered into force. Crimes committed before that date cannot be prosecuted by the Court. For those crimes, other solutions need to be found, such as prosecution in the national justice system, in an ad hoc international tribunal such as the International Tribunal for Rwanda, or any other special tribunal such as the Special Court for Sierra Leone or before the courts of a third country where individuals could be prosecuted under universal jurisdiction. If a country ratifies the Rome Statute later than

July 2002, the Court will only be able to prosecute crimes committed after the date of ratification

In which countries can the Court prosecute crimes?

The Court can prosecute crimes committed in states that are party to the Rome Statute. The DRC signed the Rome Statute on September 8, 2000, and ratified it on April 11, 2002. Uganda signed the Rome Statute on March 17, 1999, and ratified it on June 14, 2002. Therefore crimes that have been committed after July 1, 2002 on the territory of the DRC and Uganda can be prosecuted by the Court.

Can the Court prosecute crimes committed by foreigners, i.e. individuals who do not have the nationality of the country where the crimes occurred?

Yes, in two cases. The Court can prosecute crimes committed on the territory of a country that has ratified the Rome Statute whether the accused are citizens of that country or another. (There is an exception with regards to members of peacekeeping forces though; see below). And, the Court can prosecute crimes committed by citizens of a country that is party to the Rome Statute, whether the crimes are committed on the territory of their home country or of another country. Since the DRC and Uganda are party to the Rome Statute, their citizens can be prosecuted for crimes they commit in any country.

Can the Court prosecute crimes committed by U.N. peacekeeping forces?

This depends on the nationality of the peacekeepers. If the peacekeepers are from a country that has ratified the Rome Statute, they can be prosecuted. But peacekeepers from states that have not ratified the treaty are currently exempt from the Court's jurisdiction. This was decided by the U.N. Security Council in July 2002, and the rule was renewed for another year in June 2003. As a result, crimes committed by peacekeepers between July 14, 2002 and June 12, 2004 are exempt from the Court's jurisdiction (if the peacekeepers come from a country that has not signed or ratified the Rome Statute). This exception, however, has not been renewed after June 2004.

When is a person criminally responsible for genocide, crimes against humanity, or war crimes?

Crimes of such a magnitude are almost always committed by more than one person. The Court has jurisdiction over those who physically committed such crimes, as well as over persons who intentionally ordered the crimes, incited others to commit them, and assisted others in carrying out the crimes. The Court also has jurisdiction over military

commanders or persons effectively acting as military commanders who failed to exercise control over their forces when they committed such crimes.

Can a Head of State or Government, a member of a government or parliament be prosecuted?

Yes. The Rome Statute applies equally to all persons, regardless of their status. Government officials are not granted immunity.

Can the Court prosecute individuals who are not members of any government or armed group?

Yes. The Court can prosecute persons who facilitate a crime. For example, if a person knows about plans to commit a crime and gives the perpetrator funds or arms to commit the crime, he or she might be prosecuted for having given this help. In the language of the Rome Statute such as person "aids, abets or otherwise assists" the commission of the crime.

Can the Court prosecute governments or armed groups?

No. The Court is based on the principle of individual criminal responsibility. It will not try governments and armed groups, but rather individual members of governments or armed groups, analyzing how each one in the hierarchy committed, ordered, assisted, or tolerated the crime.

How many accused will the Court be able to try?

We do not know how many accused the Court will prosecute in each situation, but it will be a very small number. The Court will concentrate on those who bear the greatest responsibility for the most serious crimes. Each case demands large amounts of resources and time, and the Court will most certainly not be able to deliver justice on all such crimes committed in any particular situation. As a result the Court by itself will not be able to bring justice throughout a country such as the DRC, where more than 3 million people have died as a direct or indirect result of the war.

Complementarity

How will national courts and the International Criminal Court work together?

The International Criminal Court was created to complement national courts. The Court will not begin investigating a crime if the state concerned is already investigating or

prosecuting it, or even if the state has investigated it and then decided not to prosecute the persons concerned. However, under the Rome Statute, the Court has the power to prosecute cases if the national state is "unwilling or unable" to carry out a genuine investigation or prosecution. This part of the Statute is meant to make it less likely for perpetrators to escape punishment for crimes because their own state is not willing to investigate and prosecute them.

- In order to determine if a state is "unwilling" to genuinely investigate and prosecute a case, the Court considers whether it has taken measures to shield the suspect from criminal responsibility, whether it has unduly delayed the proceedings and whether it conducted proceedings in an independent and impartial way.

- In order to determine if a state is "unable" to genuinely investigate and prosecute a case, the Court considers whether it is unable to arrest the accused, to obtain the necessary evidence, and to otherwise carry out judicial proceedings. This could be the case if the national justice system has collapsed, totally or substantially.

Structure and Organization of the Court

Where is the Court based?

The Court is based in The Hague. Its address is:

International Criminal Court

174 Maanweg

2516 AB The Hague

The Netherlands

Website: www.icc-cpi.int

The Court can open field offices for investigations in other countries. It can also decide to hold hearings in a place that is closer to the site of the crime than The Hague. For example, if the Court does prosecute crimes committed in the DRC, it is possible that it would open an office in the DRC.

How is the Court organized?

The Court has three organs: the Office of the Prosecutor, the Chambers, and the Office of the Registrar. NGOs will most often be in contact with the Office of the Prosecutor, but there are also opportunities for contact with the Registrar.

Who is the Prosecutor and what does he do?

The Prosecutor and his Office gather information about crimes and present evidence against an accused before the Court. The Prosecutor's Office acts independently as a separate organ from the Court.

The Prosecutor of the International Criminal Court is Luis Moreno Ocampo. Previously an Argentinean state prosecutor, Mr. Moreno Ocampo played a key role in prosecuting members of the military junta following Argentina's "dirty war." As Assistant Prosecutor he was involved in the prosecution of nine military commanders for their role in crimes against humanity committed during the military government of 1976-1983. In 1985, five of these commanders were sentenced to prison terms. Since 1992, he has been in private practice as a lawyer. During that time he pushed for the prosecution of organized crime and corruption in business and has advised governments and international bodies on controlling corruption in Argentina and elsewhere.

What are the chambers?

The judicial functions of the Court are carried out by chambers. The chambers are each composed of several judges. The Court has three chambers, the Pre-Trial Chamber (with seven judges), the Trial Chamber (with six judges) and the Appeals Chamber (with five judges).The Pre-Trial Chamber decides whether the Prosecutor is allowed to start a formal investigation into a case. The Trial Chamber decides whether the accused person is guilty as charged and if they find him or her guilty, will assign the punishment for the crime and any damages to be paid to the victims. It also must ensure that a trial is fair and expeditious, and is conducted with full respect for the rights of the accused with regard for the protection of victims and witnesses. When the Prosecutor or the convicted person appeals against the decision of the Pre-trial or Trial Chambers, the case comes to the Appeals Chamber. The Appeals Chamber may decide to reverse or amend a decision, judgment, or sentence. It can also order a new trial before a different Trial Chamber.

What are the functions of the Registrar and the Registry?

The Registrar has the task of running the administration of the Court and keeping records. The Registry locates witnesses and victims and provides for their protection in participation during investigations and trials.

How are the Prosecutor and judges elected?

The Prosecutor as well as the judges are elected by the Assembly of State Parties, i.e. all countries that have ratified the Rome Statute. In February 2003, the first eighteen judges were elected, and in April 2003, the Prosecutor was elected.

Who are the judges?

The eighteen judges are:Rene Blattman from Bolivia

Maureen Harding Clark from Ireland

Fatoumata Dembele Diarra from Mali

Adrian Fulford from the United Kingdom

Karl T. Hudson-Phillips from Trinidad and Tobago

Claude Jorda from France

Hans-Peter Kaul from Germany

Philippe Kirsch from Canada (President)

Erkki Kourula from Finland

Akua Kuenyehia from Ghana (First Vice-President)

Elizabeth Odio Benito from Costa Rica (Second Vice- President)

Gheorghios M. Pikis from Cyprus

Navanethem Pillay from South Africa

Mauro Politi from Italy

Tuiloma Neroni Slade from Samoa

Sang-hyun Song from the Republic of Korea

Sylvia H. de Figueiredo Steiner from Brazil

Anita Usacka from Latvia

Rights of the Accused and Punishment

What are the rights of those accused of a crime by the Court?

Under the Rome Statute, any accused person is guaranteed the highest standards of fair trial. Hence, no person can be tried for a crime for which he or she has already been convicted. The accused has a right to be presumed innocent until proven guilty.

The accused also has a right to choose his or her own counsel, or if the person does not have legal assistance, to have legal assistance assigned to him or her. The accused does not have to pay the legal counsel if he or she does not have the means to pay. Furthermore, the accused has the right to get a competent interpreter if necessary. The accused has a right to be questioned only in the presence of counsel, to present evidence, to remain silent, and to have charges proved beyond reasonable doubt. The Rome Statute also makes explicitly clear that the accused shall not be subjected to any form of coercion, duress or threat, torture or cruel, inhuman and degrading treatment.

Under which circumstances can someone be excluded from criminal responsibility?

The Court can exclude someone from criminal responsibility when that person has lost the intellectual capacity to understand that he or she is committing a crime. This can be the case when a person suffers from a mental disease, was in a state of unwanted intoxication at the time of the crime, or acted to defend him or herself.

Persons can also be excluded from criminal responsibility when they did not know that they were committing a crime or committed a crime under a legal obligation to obey orders of the government or a superior.

What is the maximum sentence of the Court?

The maximum sentence is life imprisonment. The Court plans to have pre-trial detention facilities in The Hague. A sentence of imprisonment will be served in a state that has indicated its willingness to incarcerate a convicted person. The enforcement of a sentence of imprisonment in the host State is subject to the supervision of the Court and must be consistent with international standards governing treatment of prisoners, including the right of prisoners to be free of any torture or cruel, inhumane, or degrading punishment.

The Start of an Investigation

How is the Court's authority triggered?

There are three ways in which the Court can initiate investigations.

First, a state that is party to the Rome Statute can refer a case to the Prosecutor of the Court. This is what the Ugandan government did in January 2004, about the situation in northern Uganda. In March 2004, the government of DRC referred crimes in the DRC to the Court.

Second, the U.N. Security Council can refer a case to the Prosecutor.

Third, the Prosecutor can initiate investigations into a case on his own initiative, based on credible information that he has received. This information can come from states, NGOs, victims, or any other source.

How will the Court decide whom to prosecute?

The Court is likely to consider the gravity of the crime and the degree of individual responsibility for it. It will probably give priority to prosecuting persons accused of committing the most serious crimes and those who are suspected of being directly responsible for those crimes.

What does the Prosecutor do to start an investigation?

In those situations where the Prosecutor decides to take action by himself – without a state referral – he first carries out a preliminary examination and then submits a request for authorization of a formal investigation to the Pre-Trial Chamber of the Court.

In those situations where the Prosecutor receives a referral from a State Party, he must check whether the referral is admissible under the requirements of the Rome Statute and whether crimes under ICC jurisdiction appear to have been committed. If those criteria are satisfied, the prosecutor must launch an investigation to determine the persons bearing responsibility for the crimes committed.

HOW NATIONAL NONGOVERNMENTAL ORGANIZATIONS CAN WORK WITH THE COURT

The Interaction between NGOs and the Court

What role can NGOs play vis-à-vis the Court?

NGOs can play a central role before, during, and even after an investigation. Their contributions fall into three main categories:

Telling others about the Court

NGOs can play an important role in informing the media and the general public about the Court. They can do this through radio, leaflets, posters, conferences and information sessions. They may want to use materials produced by the Court itself or this guide.

Providing information to the Court

NGOs can inform the Office of the Prosecutor about crimes committed, a specific case, the historical and political context of human rights abuses, or the capacity or will of a state to investigate or prosecute crimes. This information could help the Prosecutor decide whether or not to open an investigation.

Serving as a link between the Court and victims and witnesses

NGOs are often close to the victims and witnesses. They can play an important role by accompanying victims and witnesses throughout the process of providing evidence to the Office of the Prosecutor. They can inform victims and witnesses about procedures at the Court and prepare their work with the Court for example by informing them about security risks, helping them to take action collectively, and putting their information into a form most easily used by the Office of the Prosecutor.

How can NGOs submit information to the Court?

Ordinarily persons from outside the Court will be in touch with the Office of the Prosecutor rather than other branches of the Court. They can send information on a number of issues, illustrated below. Sometimes NGOs send information directly to other branches of the Court. In particular, they can send submissions to the any of the Chambers in a legal document called an Amicus Curiae. NGOs may also directly address the Court in order to represent victims. Moreover, NGOs can also apply to participate to the proceedings when they have suffered a crime themselves. In addition, NGOs can

represent victims who want to submit information regarding the Prosecutor's decision not to investigate a case.

NGOs can also send case information to a government that is party to the Rome treaty, or even to the U.N. Security Council, and ask them to refer a case to the Court.

Can NGOs help in launching proceedings before the Court?

Yes. NGOs regularly publish reports on human rights crimes that may fall under the jurisdiction of the International Criminal Court. If NGOs believe that the abuses they have documented are serious enough to merit investigation by the Court, they should send the most solid reports on the most serious crimes to the Prosecutor. NGO reports have already played a role in spurring the investigation in DRC. The Prosecutor received six communications regarding the situation in Ituri, among them "two detailed reports from nongovernmental organizations." Evidently, the reports from the NGOs prompted the Prosecutor to identify the situation in Ituri as "the most urgent situation to be followed." However NGOs should refrain from sending the Office of the Prosecutor every piece of information they have, in order to avoid the Prosecutor getting swamped and paying less attention to reports he receives.

What information should NGOs send to the Office of the Prosecutor?

NGOs can send information on crimes regarding individual cases or patterns, providing as much detail as possible. In addition, NGO reports could explain the historical and political context of the crimes investigated, in order to provide the Prosecutor with a better understanding of the situation. By reporting on the capacity or will of a state to investigate or prosecute crimes, NGOs can also help the Prosecutor determine whether a case falls under the jurisdiction of the Court or should be left to the national courts. NGOs could also inform the Prosecutor about the practical feasibility of investigations.

It is not possible to give a precise list of all the kinds of information that NGO reports might include, but when an NGO sends information about human rights crimes, it should include the following:

- Location (in DRC: province, territoire, collectivité, groupement; in Uganda: district, county, sub-county),
- Time, date, and duration of the incident
- Chronology of the incident
- Nature of crime (i.e. torture, rape, killings), and methods used
- Possible reasons for the incident

- Identity of alleged perpetrators (the army, armed group, or individuals involved)
- The identity of the victim (name, age, gender, occupation, address, relevant information about ethnicity, religion, or other affiliation)
- A list of evidence available such as photos, written records. However do not send the evidence itself unless requested by the Prosecutor.

When sending information to the Court, the NGO should always ensure that they have one copy of their communication in their own files.

What should NGOs do with other evidence they might have, such as photos, video films, documents, medical certificates, or even objects?

They should provide the Office of the Prosecutor with a list of all such evidence in their possession and keep it safe until they hear from his office. They should not send the evidence itself unless requested by the Prosecutor, as it could otherwise get lost, damaged, or be overlooked.

Should NGOs work like criminal investigators?

No. NGOs can provide information on crimes which they gather in the course of their normal work. They are not expected to be "mini-prosecutors." In fact it is the role of the Office of the Prosecutor alone to develop solid evidence that can be used in Court.

Do NGOs have to follow a specific format when sending information to the Office of the Prosecutor?

No. NGOs can submit their own reports to the Prosecutor and do not need to fill in forms or fulfill other formalities. However, as noted above, those reports should include specific information.

Will NGOs get a reply from the Prosecutor's Office when they send information?

In principle the Office of the Prosecutor must send a reply to all communications received, if only to acknowledge receipt. However, in practice, they might not always have the capacity to do so. The Office of the Prosecutor will probably just receive the information and use it as wishes, unless it has a specific question for the NGO. In that case, the Prosecutor's Office will contact the NGO. NGOs submitting information to the Prosecutor should avoid raising expectations among the victims and other possible witnesses, as they cannot know what the response of the Prosecutor will be. The

Prosecutor may well decide not to proceed farther with the information, taking into account a variety of factors.

How can NGOs submit information in an Amicus Curiae?

In addition to factual information NGOs can provide to the Court, they can also submit legal analysis or policy arguments in an Amicus Curiae, a legal document accepted by one of the Court chambers (it means "Friend of the Court"). A Court Chamber can invite a state, organization, or individual to submit a written statement on a specific topic, a so-called Amicus Curiae brief. The Amicus Curiae is prepared by an organization that has a professional interest in the topic. It presents the issue at stake in a concise manner and makes suggestions to the Court how to settle the matter. The Amicus Curiae gives NGOs the opportunity to be heard on a number of legal and practical issues, for example, the competence of national courts to prosecute a case. NGOs can also contact a Chamber and propose to submit an Amicus Curiae.

Can representatives or members of NGOs be called to testify?

Yes. The Prosecutor or the defence lawyers can call anyone to testify in Court. NGOs might have to answer questions about the information gathered on crimes or about the circumstances of their research. Such testimony might include elements of information collected by researchers that were not previously made public – and NGOs could potentially be forced to disclose information that they intended to keep confidential.

The Court will only be able to prosecute a few cases – what does that mean for NGOs?

Because the Court will prosecute only a small number of cases, NGOs should think strategically about which are the most important cases to submit, and not expect that "their" case will necessarily be prosecuted. Where possible, NGOs should coordinate among themselves and decide to push jointly for a particular case or situation to be investigated.

Should NGOs send only material on the geographic areas in which the Prosecutor has expressed a special interest – Ituri in DRC and northern Uganda?

In the DRC, the Court is likely to concentrate on Ituri for a while. But that does not mean that NGOs should limit their submissions to Ituri. When the Prosecutor announced the launch of the investigation in DRC in June 2004, he made clear that the scope of the investigation would cover the whole territory of the DRC. If NGOs have

relevant information about crimes committed in other parts of DRC, they should send this to the Office of the Prosecutor.

In Uganda, the Prosecutor will concentrate on the north as requested by the Ugandan government. Hence NGOs should concentrate on sending information on the crimes committed by all sides in relation with the conflict in northern Uganda.

Will the Court intervene on behalf of human rights defenders who are threatened, arrested, or face danger because of their submission of information to the Court?

NGOs should not expect to be protected by the Court. The Court will take all possible measures to ensure the safety of those assisting it, but it will not be able to protect everyone who brings it information. Human rights defenders should therefore develop their own strategies for protection and not wait for the Court's help. Nevertheless it would be important to inform the Court of any attacks on human rights defenders resulting from their contribution of information to the Court.

NGO Assistance to Victims and Witnesses

What can NGOs do to assist victims and witnesses in contacting the Court?

NGOs can become a bridge between victims and witnesses and the Court:

- They can send information gathered from victims and witnesses to the Court
- They can inform victims and witnesses about different possibilities of participation in the Court proceedings, and assist them in this participation
- They can help victims and witnesses get legal representation
- They can represent victims at any stage of the trial
- They can help victims and witnesses organize themselves in groups
- They can help victims apply for reparations
- They can inform victims and witnesses about the security risks involved and help them take measures for their protection

Who are victims and witnesses under the Court rules?

The Court rules define victims as "persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" Organizations such as NGOs that have "suffered direct harm" can also be victims. Witnesses are persons

called by the Prosecution or the Defence to give testimony to the Court, including victims, persons who saw a crime committed, experts, or relatives of a suspect.

What is the difference between participating in Court proceedings as victim and as witness?

Victims can ask the Court to allow them to express their views and concerns in the proceedings. This is quite an unusual and innovative element for an international court. It means that there is a real opportunity to bring the viewpoint of the victims to the Court. Victims who participate will probably have legal representation. They will not be asked to tell their story in Court; rather, their legal representatives will have to answer specific questions. The role of victims in the ICC is somewhat similar to the role of the partie civile in the civil law system which is in place in the DRC. When victims come to participate in this way, they have to pay their own expenses. The Court might not cover the costs for the legal representation either.

The Prosecutor or the Defence might call some victims as witnesses to testify in Court. When that happens, they must answer questions from the Prosecution, the Defence, and the legal representatives of the other victims. If victims are invited as witnesses, the Court covers their costs and organizes their stay for them. Victims cannot apply to become witnesses. The Prosecution or the Defence decides whom to call as witnesses.

How should NGOs present their relationship with the Court to victims and witnesses?

When talking to victims and possible witnesses, NGOs need to make clear that they are not working as agents of the Court. They collect their information independently, as part of their own work, although they might later submit some or all of this information to the Court.

Should NGOs send statements from victims and witnesses to the Court?

No. When speaking to victims and witnesses about alleged crimes, NGOs should avoid taking statements that contains word by word what the victims and witnesses are saying (these are called verbatim statements). They should record a summary of the information provided by the victim or witness. Only the Prosecutor's Office should decide what questions to ask victims and witnesses and in what form to take down their answers. Since NGOs are not part of the Prosecutor's office, they might make mistakes in interviewing witnesses that would complicate the work of the Prosecutor. This is why they should just take a summary of the information and provide it to the Prosecutor's office, along with information about how the victim or witness can be contacted in the

future. Of course the NGO must seek the agreement of the victims and witnesses when doing so.

But if victims or witnesses insist on making formal, verbatim statements or if the NGOs have already collected such statements in the past, NGOs can send the statements to the Prosecutor. When doing so, NGOs must make sure not to comment on, alter, or edit any statements made by victims and witnesses or any documents that they want to submit to the Prosecutor's Office.

How can NGOs help victims to decide if they want to apply to participate in a case?

First of all, NGOs can help victims assess the security risks that might arise for the victim from participation in a case. They can also take protection measures on the local level.

Secondly, the NGOs should explain to victims the different stages of examination and formal investigation. NGOs should encourage those victims to apply whose cases are connected with the situation under investigation; and they should discourage others from making contact with the Court.

Finally NGOs can assist victims in filling in the forms needed to apply for participation in a case. The forms are not yet available but should become available during 2004 on the Court's website, at www.icc-cpi.int. Victims can apply for participation when a formal investigation has been launched or even before that if the Prosecutor has launched an investigation on his own initiative.

Victims will apply to the Registrar of the Court who will pass the form onto the relevant Chamber. The Chamber will decide whether and how victims can participate. It can reject the application if (i) it considers that the applicant is not a victim, if (ii) the victim has no personal interest in the proceedings or if (iii) it determines that the participation of the victim would be contrary to the rights of the Defence and the requirements of a fair and impartial trial. A victim whose application has been rejected by the Chamber may file a new application later in the proceedings.

How can NGOs help victims participate before an investigation is formally launched?

NGOs can assist victims in providing evidence to the Office of the Prosecutor (see above). In addition, NGOs can also help victims in applying to the Pre-Trial Chamber to

be heard when the Prosecutor has decided that it is in the interest of justice not to prosecute a case. They can also assist the victims in presenting their views.

How can victims participate in the trial itself?

Once the trial has started, victims can ask to be heard and express their views through their legal representatives.

Victims might also be invited to give their view in Court on a number of issues. For example, victims might be invited to express a view when Court decides whether to judge a group of accused together or separately.

The Registrar should notify the victims regularly of developments and decisions by the Court. Particularly important steps are:

- The decision of the Prosecutor not to initiate an investigation or not to prosecute
- The Pre-Trial Chamber's decision to hold a hearing to confirm charges against the accused
- The progress of the proceedings, in particular the date of hearings and any postponements, and the date of the judgment
- Requests, submissions, and motions that are important for the case.

How can NGOs assist victims with legal representation?

NGOs can assist victims in identifying qualified, trusted lawyers who can represent them at the Court. They can also propose lawyers to the Court itself, which can choose legal representatives for the victims in some situations. There will be an office of Public Counsel within the Registry of the ICC. The office will provide support and assistance to the legal representatives of victims or victims, including legal research and advice or appearing in Court.

Furthermore, NGOs can help victims organize themselves in groups and seek common legal representation. This will be important to ensure effectiveness in situations when there are many victims. The Court itself can decide to group victims and designate a common legal representative.

Does the Court keep the information provided by victims and witnesses confidential?

The Court rules require the Prosecutor to protect the confidentiality of the information he has received and collected. This means he cannot release the names of his sources publicly. However under due process rules, the Prosecutor must provide the Defence with the names of witnesses he intends to call. The accused has a right to know who is testifying against him or her.

If there are security concerns, a Court Chamber may decide to prohibit the public disclosure of the name or location of a victim or witness, or even of another person who is neither victim nor witness. In certain cases victims and witnesses can be heard in closed sessions (in camera), or they can be given pseudonyms. Sometimes their testimonies might be presented with technologies that alter their voice or image in order to keep their identity confidential. But there is no guarantee that this will happen in all cases where victims might wish for it to happen.

Under certain circumstances the Court has to respect the confidentiality of information, and cannot force disclosure of the information as evidence. This is the case with information that was given by representatives of the International Committee of the Red Cross (ICRC), to the legal representative of an accused person, medical doctors, or others in professional confidential relationships. Other information is not protected and might hence be used – and disclosed – in Court.

Protective measures can also be requested by the Prosecutor, the defense or victims and witnesses themselves. The Victims and Witnesses Unit can make recommendations in this sense to the Chambers.

What other measures are available to protect victims and witnesses?

The Victim and Witnesses Unit within the Registry of the International Criminal Court is in charge of the security and well-being of the victims and witnesses. The Court's rules define this role in general terms such as planning for their protection, providing them with medical and psychological assistance, and ensuring that victims of gender-based violence receive necessary help

However in practice, it is likely that there will be a number of problems and the Victim and Witness Unit might not be able to protect all victims and witnesses. Each case will probably involve a high number of victims and witnesses; but the funds allocated to victim's and witness protection are very limited.

How can NGOs ensure the safety and confidentiality of victims and witnesses?

NGOs can closely observe the progress of the trial to ensure that the Court respects its own rules. They should help the victims understand the limitations of the Court in protecting them, while also pushing for better protection measures where possible. Victims and witnesses who want to testify or otherwise participate need to be told about risks to their security, as well as the protection measures that are available.

NGOs themselves should take precautionary measures to ensure that a victim's or witness' identity is protected. If an NGO wishes to send information from victims or witnesses to the Court, it must inform those persons about the Court's proceedings and about the possible security implications. Only after doing that should the NGO seek the agreement of the victim or witness for sending on information to the Prosecutor's Office. They should only transmit documents from victims and witnesses to the Prosecutor's Office if the victims and witnesses expressly agree to this being done.

When planning to contribute information to the Court, NGOs should carry out a security assessment and decide on a strategy for protecting their own staff and others in contact with them. In some cases, discretion is the best strategy; in others, openness may work better (though that does not mean divulging the identity of victims and witnesses).

There is a range of measures NGOs can take to protect the confidentiality of information:

- regularly carry out risk assessments
- join national and international human rights networks
- build channels with security officers
- ensure security of the office premises and control the flow of visitors
- recruit people you can trust
- be discreet about your interactions with the International Criminal Court
- always be careful about what you say on the phone, in emails, faxes, and letters; possibly using code words for sensitive information or using encryption.
- use the addresses of other trusted organizations for sending and receiving mail
- interview victims and witnesses without other persons present
- interview victims and witnesses in a location and in circumstances that do not arouse the interest of outsiders

- ask a local contact to interview the victim or ask the victim to come to you, in order to avoid raising suspicion through your visit
- change plans where necessary, for example if you realize you are being followed
- store the information about the interview safely, i.e. use passwords and encryption
- keep notebooks in safe locations
- delete the name of the source of information from your notes
- avoid using information that could easily betray the identity of the informant

(some of the suggestions are taken from Amnesty International/ CODESRIA: "Ukweli, Monitoring and Documenting Human Rights Violations in Africa, A Handbook," Amsterdam/ Dakar 2000).

Can victims obtain reparation from the Court?

Yes. Victims or their close relatives can obtain reparation, including restitution of property and compensation for losses. The compensation granted to the victim can come from the funds of an accused. The states that founded the Court also created a trust fund to give reparations to victims and the Court may decide to give victims money from this fund. The judges of the Court determine the amount of compensation. The Court can determine the amount of compensation without a specific request from the victim when it finds that the victim is unable to claim reparation. In order to allow the greatest number of victims to obtain reparation, the Court rules require the Registrar to give adequate publicity of the reparation proceedings before the Court. The Court can also allow collective reparation that is, reparation to a whole group of victims – if the number of victims is too high for individual reparation or if the provision of individual reparation is too difficult.

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QUESTIONS AND ANSWERS on the International Criminal Court

"The International Criminal Court promises, at last, to supply what has for so long been the missing link in the international legal system: a permanent court to judge the crimes of gravest concern to the international community as a whole — genocide, crimes against humanity and war crimes."
- Kofi Annan, United Nations Secretary-General

1. What is the International Criminal Court?

The International Criminal Court (ICC) is the first permanent, independent court capable of investigating and bringing to justice individuals who commit the most serious violations of international humanitarian law, namely war crimes, crimes against humanity, genocide and, once defined, aggression. The Court is seated in The Hague, The Netherlands and was established in accordance with the Rome Statute, the ICC's founding treaty, on 1 July 2002. To date, the ICC treaty has been ratified by nearly 100 States, with representation from every region of the world.

The legal framework of the Court was established at a United Nations-sponsored conference in Rome involving representatives of 160 countries. Following five weeks of the intense deliberations, the Rome Statute of the International Criminal Court was adopted by an overwhelming majority on 17 July 1998. By the established deadline of 31 December 2000, 139 countries had signed the Rome Statute. In a record four years, the ICC treaty was ratified by the required 60 States on 11 April 2002, and the treaty entered into force and became law on 1 July 2002.

2. Why is the International Criminal Court needed?

Over the past century, we have witnessed the worst violence in the history of humankind. In the past 50 years alone, more than 250 conflicts have erupted around the world; more than 86 million civilians, mostly women and children, died in these conflicts; and over 170 million people were stripped of their rights, property and dignity. Most of these victims have been simply forgotten and few perpetrators have been brought to justice.

The United Nations General Assembly first recognized the need for a permanent mechanism to prosecute mass murderers and war criminals in 1948, following the Nuremberg and Tokyo trials after World War II. Since that time, numerous laws, treaties, conventions and protocols have defined and forbidden everything from war crimes to poison gas and chemical weapons, yet no system was proposed to enforce these norms by holding

individuals criminally responsible for the most serious violations of international law until the adoption of the Rome Statute of the International Criminal Court in 1998. In addition to bringing justice to victims of such atrocities, the ICC hopes to serve as a deterrent to the future Hitlers, Milosevics and Pol Pots, bringing an end to the culture of impunity.

3. What has the ICC achieved to date?

Since the establishment of the Court in July 2002, the ICC has set up its offices in The Hague and has grown from a three-person staff to more than 250 personnel working in the Court's four principal organs: Office of the Prosecutor, Presidency Judges and Registry.

All senior officials of the Court – the Prosecutor, Judges and Registrar – have been elected or appointed. As of August 2004, the Office of the Prosecutor, headed by chief Prosecutor Luis Moreno Ocampo, has begun investigations in the Democratic Republic of Congo and Uganda, at the request of those States. The 18 Judges of the ICC, under the Presidency of Judge Philippe Kirsch, have adopted the Regulations of the Court; and the Registry, or administrative arm of the Court, headed by Bruno Cathala, has been involved in the many practical and policy decisions involved in setting up a new international judicial institution.

4. How does the ICC differ from the International Court of Justice and the ad hoc tribunals for former Yugoslavia and Rwanda?

The International Court of Justice (ICJ), the principal judicial organ of the United Nations, was designed to deal primarily with disputes between States. It has no jurisdiction over matters involving individual criminal responsibility.

The two ad hoc tribunals for the former Yugoslavia and Rwanda differ from the International Criminal Court in geographic jurisdiction and temporal scope. Created by the UN Security Council, the ad hoc tribunals are mandated to deal only with crimes committed in those regions during specific periods of time.

In contrast, the International Criminal Court is a permanent and independent institution capable of addressing the crimes identified in the Rome Statute which have been committed by individuals since 1 July 2002.

5. What crimes does the ICC address?

The Court has jurisdiction over the most serious crimes committed by individuals: genocide, crimes against humanity, war crimes and once defined, aggression. The first three crimes are carefully defined in the Statute to avoid ambiguity or vagueness. The crime of aggression will be dealt with by the Court when the Assembly of States Parties has agreed on the definition, elements and conditions under which the Court will exercise jurisdiction; this cannot happen until the Review Conference which will be held in 2009, seven years after entry into force of the Rome Statute. It is important to note that the Rome Statute does not identify any new categories of crimes, but rather reflects existing conventional and customary international law.

Genocide covers those specifically listed prohibited acts (e.g. killing, causing serious harm) committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

Crimes against humanity cover those specifically listed prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population. Such acts include murder, extermination, rape, sexual slavery, the enforced disappearance of persons and the crime of apartheid, among others.

Genocide and crimes against humanity are punishable irrespective of whether they are committed in time of "peace" or of war.
War crimes cover grave breaches of the Geneva Conventions of 1949 and other serious violations of the laws of war, committed on a large scale in international as well as internal armed conflicts. The inclusion of internal conflicts is consistent with customary international law and reflects the reality that in the past 50 years, the most serious violations of human rights have occurred not in international conflicts but within States.

The definitions of the crimes in the Statute are the product of years of hard work involving many delegations and their experts. The judges of the Court are required to strictly construe the definitions and are not to extend them by analogy. The aim is to establish objective international standards, leaving no room for arbitrary decisions. In cases of ambiguity, the definitions are to be interpreted in favor of the suspect or accused.

6. When does the ICC have jurisdiction over crimes?
Since the entry into force of the Rome Statute on 1 July 2002, the ICC has jurisdiction over crimes committed by nationals of States that have ratified the ICC statute, as well as over crimes committed on the territory of States that have ratified the treaty. The ICC is designed to *complement* existing national judicial systems, however, the Court can exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute such crimes. Therefore, the Court also serves as a catalyst to States' investigating and prosecuting such crimes committed either within their territories or by their nationals. The ICC's jurisdiction is not retroactive, but its very existence serves as a deterrent to future architects of genocide, war crimes and crimes against humanity by sending a strong signal that never again will such acts be met with impunity.

Matters can be referred to the Court by a State Party to the Rome Statute, by the Prosecutor, and by the UN Security Council. The Court may then exercise its jurisdiction over the matter if either the State in whose territory the crime was committed, or the State of the nationality of the accused, is a party to the Statute. Non-States Parties may accept the Court's jurisdiction on an ad hoc basis. When a matter is referred by the Security Council, the Court will have jurisdiction regardless of whether the State concerned is a party to the ICC treaty.

7. Can a citizen from a country that is not party to the Rome Statute be prosecuted?
Yes, citizens of any country fall within the jurisdiction of the Court under one of the following conditions: 1) the country where the alleged crimes occurred is a State Party to the ICC treaty;
2) that country accepted the ICC's jurisdiction on an ad hoc basis; or 3) the UN Security Council referred the situation to the Court. However, under the principle of complementarity, the Court will act *only* if the national court of the accused does not initiate investigations and prosecution, if appropriate.

8. Can high-level government officials or military commanders be prosecuted by the ICC?
Yes. Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a Head of State or government, a member of a government or parliament, an elected representative or a government official. It will also not be possible for such official capacity to constitute a ground for reduction of sentence.

The fact that a crime has been committed by a person on the orders of a superior will not normally relieve that person of criminal responsibility. A military commander may be held criminally responsible for crimes committed by forces under his/her command and control. Criminal responsibility may also arise when a military commander knew or should have known that the forces were committing or were about to commit such crimes, but nevertheless failed to prevent or repress their commission.

In addition, civilians effectively acting as military commanders may be held criminally responsible when they knew of or consciously disregarded information clearly indicating that crimes were being or were about to be committed.

9. Does the ICC violate international law by having jurisdiction over members of national forces or of peacekeeping missions?
Under existing international law, the State in whose territory genocide, war crimes or crimes against humanity have allegedly been committed, or whose nationals are victims of such crimes, has the right to and is often legally obligated to investigate and prosecute persons accused of committing such crimes. The ICC Statute does not violate any principle of treaty law and has not created any entitlements or legal obligations not already existing under international law. The cooperation of a non-State Party is purely voluntary and no legal obligation is imposed on a non-State Party.

The ICC Statute provides for special protection of peacekeepers by including among its punishable crimes intentional attacks against personnel, installations, material units or vehicles involved in humanitarian assistance or peacekeeping missions. Such violations constitute war crimes or crimes against humanity under certain circumstances. The Statute does not otherwise affect existing arrangements with respect to UN peacekeeping missions since troop-contributing countries retain criminal jurisdiction over their members of such missions.

10. Does the International Criminal Court infringe on the jurisdiction of national courts?

No. The International Criminal Court will *complement*, not supercede, the jurisdiction of national courts. National courts will continue to have priority in investigating and prosecuting crimes within their jurisdiction. Under the principle of complementarity, the ICC will act only when national courts are unable or unwilling to exercise jurisdiction. If a national court is willing and able to exercise its jurisdiction, the ICC cannot intervene and no nationals of that State can be brought before it. The grounds for admitting a case to the Court are specified in the Statute and the circumstances that govern inability and unwillingness are carefully defined so as to avoid arbitrary decisions. In addition, the accused and interested States, whether they are parties to the Statute or not, may challenge the jurisdiction of the Court or admissibility of the case. They also have a right to appeal any related decision.

11. What role does the UN Security Council have in the Court's work?

The work of the Security Council and the International Criminal Court will continue to complement each other. The Rome Statute recognizes the role of the Security Council in the maintenance of international peace and security. Specifically, the treaty notes that under Chapter VII of the UN Charter, the Security Council may refer a "situation" to the Court when one or more of the crimes covered by the Statute appear to have been committed. This would provide a basis for the Prosecutor to initiate an investigation.

Since the referral of a situation by the Security Council is based on its competence under Chapter VII, which is binding and legally enforceable in all States, the exercise of the ICC's jurisdiction becomes part of the Council's enforcement measures. Its jurisdiction becomes binding even when neither the State in whose territory crimes have been committed nor the State of nationality of the accused is a party to the Statute. In those instances, the International Criminal Court, through investigation and prosecution, helps the Security Council in maintaining peace and security. This jurisdiction, resulting from a Security Council referral, enhances the role of the ICC in enforcing international criminal law. At the same time, the Court's jurisdiction is expanded to cover even non-States Parties, in these instances.

Furthermore, the Security Council, by adoption of a resolution under Chapter VII of the UN Charter, may request that the ICC defer an investigation or prosecution for a renewable period of 12 months. This deferral is to ensure that the Security Council's peace-making efforts will not be hindered by the Court's investigations or prosecutions.

In order to ensure the independence of the Court, a Security Council referral is only one of three ways the ICC can obtain jurisdiction: a matter can also be initiated by a State Party to the treaty or by an independent Prosecutor.

12. How does the Rome Statute ensure the independence of the Prosecutor?

While the Prosecutor may initiate investigations when sufficient evidence points to serious violations, detailed provisions are included in the Rome Statute to ensure proper checks and balances with respect to this power. In the first place, the Prosecutor must defer to States willing and able to pursue their own investigations. Before initiating an investigation, the

Prosecutor is required to submit all supporting materials collected and to obtain permission to proceed from the Pre-Trial Chamber, composed of three judges. The suspect and the States concerned also have the right to challenge the ICC's jurisdiction or the admissibility of the case either prior to or at the commencement of the trial. These measures provide ample opportunity to ensure that the case is substantial and deserves investigation and prosecution by the Court.

Luis Moreno Ocampo of Argentina was elected as the first Prosecutor of the ICC on 21 April 2003 by secret ballot by the Assembly of States Parties – the Court's oversight body made up of all States that have ratified the Rome Statute. He was sworn into office on 16 June 2003 and immediately began his work. The Rome Statute requires that the Prosecutor possess the highest moral character, competence and experience in the prosecution or trial of criminal cases. The Prosecutor will not be allowed to participate in any case in which his or her impartiality may be in doubt. Any question concerning disqualification will be decided by the Court's Appeals Chamber. The Assembly of States Parties has the power to remove the Prosecutor if he or she is found to have committed serious misconduct or a serious breach of duties.

13. What guarantee is there that suspects will receive due process and a fair trial?
The Rome Statute of the ICC created a truly international criminal justice system as it reflects input from all major legal systems and traditions. The Statute recognizes a full range of rights of the accused, and even extends the standards embodied in major international human rights instruments. It will provide impartial and qualified judges, due process and fair trials to individuals accused of crimes falling within the jurisdiction of the Court.

Additional protections of the rights of the accused include the screening mechanisms by the investigative and prosecutorial organ and the judicial organ of the Court, which are designed to protect innocent individuals from frivolous, vexatious or politically motivated criminal investigations or prosecutions. In addition, the persons who are entrusted with making decisions relating to the initiation of a criminal investigation or trial must possess the highest qualifications of competence, independence and impartiality.

Furthermore, the ICC Statute also contains elaborate provisions (over 60 articles) on criminal law principles, investigation, prosecution, trial, cooperation and judicial assistance and enforcement. These provisions required the harmonization of divergent and sometimes diametrically opposed national criminal laws and procedures. That agreement was reached on these highly technical matters represents a major achievement in international law.

14. What guarantee is there that judges will be qualified and impartial? What safeguards are included to prevent outside political influence on the Court?
The Rome Statute requires that ICC judges possess the highest professional competence, must be persons of high moral character, impartiality and integrity and must possess the qualifications required in their respective States for appointment to the highest judicial offices or to the ICJ. They must also be independent in the performance of their functions, and cannot engage in any activity that is likely to interfere with their judicial functions or to affect confidence in their independence.

Each judge must have competence in criminal law and procedure, and the necessary relevant experience in criminal proceedings, or competence in relevant areas of international law such as international humanitarian law and human rights law. To ensure that the composition of the bench would be truly balanced and international, the election of judges took into account the need to represent the principal legal systems of the world and ensured the inclusion of judges with equitable geographical representation, a fair representation of female and male judges, and the inclusion of judges with expertise on violence against women or children. No two judges are nationals of the same State and judges are elected for three-, six-, or nine-year terms.

A judge may be removed from office if he or she is found to have committed serious misconduct or a serious breach of his or her duties. All these safeguards are intended to ensure independence, integrity and competence and to prevent outside political influence.

The ICC is comprised of 18 judges, who were sworn in on 11 March 2003. Of these, seven judges are women, a statistic which represents the highest number of women at any international judicial institution.

15. To whom is the ICC accountable? And how will this affect its independence?
The Assembly of States Parties (ASP) – comprised of all States that have ratified the treaty as full participants and those States that have signed the treaty as observers – oversees the work of the Court; provides management oversight regarding the administration of the Court for the President, the Prosecutor and the Registrar; decides on the budget for the Court; decides whether to alter the number of judges; and considers any questions relating to non-cooperation of States with the Court. The ASP cannot interfere with the judicial functions of the Court. Any disputes concerning the Court's judicial functions are to be settled by a decision of the Court itself.

To date, 94 States are members of the Assembly of States Parties, representing many of the world's democracies and all regions of the world.

16. How strong has the support been for the creation of the International Criminal Court?
One hundred and sixty States participated in the United Nations Diplomatic Conference (held in Rome from 15 June to 17 July 1998), which led to the adoption of the Rome Statute of the International Criminal Court. The draft text submitted to the Diplomatic Conference was fraught with competing options, with over 1,400 brackets indicating disagreement on the text. Through working groups, informal negotiations and open debates, a delicately balanced text emerged and a generally agreed solution was found for the many politically sensitive and legally complex issues.

The Statute and the Final Act were put forward as a complete "package" for adoption. This package was the product of intense negotiations and judicious compromises designed to reach widespread agreement. The most dissidence came from India and the United States, which both tried to amend the final package. In each case, a "no-action motion" — a

procedural device for not considering these amendments — was adopted by an overwhelming majority. The package was thus maintained and then agreed on in its entirety by those delegations in attendance on the final day, by a vote of 120 in favor and 7 against, with 21 abstentions.

Article 125 of the Rome Statute called for the Statute to remain open for signature at the United Nations headquarters until 31 December 2000. On 31 December 2000, the United States, Iran and Israel were the last to sign the Rome Statute, bringing the total number of signatures to 139[1]. Although many predicted that it would take decades to obtain the 60 ratifications needed for the Statute to enter into force and the Court to be created, this landmark was reached on 11 April 2002, within four years of the adoption of the treaty. Currently, nearly 100 democracies from every region of the world have ratified the Rome Statute.

17. Why did some States vote against the Statute?
Seven States voted against the Statute in an unrecorded vote. Three States – China, USA and Israel – stated their reasons for voting against the treaty. China indicated its view that the power given to the Pre-Trial Chamber to check the Prosecutor's initiative was not sufficient and that the adoption of the Statute should have been by consensus, not by a vote. The principal objection of the United States was over the application of the Court's jurisdiction to non-States Parties. The US also stated that the Statute must recognize the role of the Security Council in determining an act of aggression. Israel stated that it failed to comprehend why the act of transferring populations into an occupied territory was included in the list of war crimes.

18. Will the ICC prosecute crimes of aggression, terrorism and drug trafficking?
Support was widespread from both States and the NGO community at the Rome Conference for the inclusion of aggression as a crime under the ICC's jurisdiction. However, there was not time to reach a definition of aggression that was acceptable to all. As a result, the Statute includes this crime but provides that the Court may not exercise jurisdiction over the crime of aggression until agreement is reached by States Parties at the Review Conference on the definition, elements, and conditions under which the Court may exercise jurisdiction with respect to this crime.

Under the United Nations Charter, the Security Council has competence to determine whether an act of aggression has been committed. It is provided in the Statute that the final text on the crime of aggression must be consistent with the relevant provisions of the UN Charter.

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[1] On 6 May 2002, the Bush administration announced in a foreign policy address and letter to UN Secretary-General Kofi Annan that it did not recognize the United States' signature of the Rome Statute, (which occurred during the Clinton presidency) and had no intention to become party to the Statute. The signature of the United States now appears in UN records marked with an asterisk to this effect.

Although there was also considerable interest in including terrorism and drug crimes in the ICC's mandate, countries could not agree in Rome on a definition of terrorism, and some countries felt investigation of drug offences would be beyond the Court's resources. A consensus resolution was passed recommending that States Parties consider inclusion of such crimes at a future review conference.

19. Will the ICC prosecute sexual crimes? How will the ICC address the needs of victims and witnesses?

Yes. The Statute includes crimes of sexual violence such as rape, sexual slavery, enforced prostitution and forced pregnancy as crimes against humanity when they are committed as part of a widespread or systematic attack directed against a civilian population. They are also considered war crimes when committed in either international or internal armed conflict.

In Rwanda and the former Yugoslavia, rape and gender-based violence were widely used as weapons to inflict terror and to humiliate and degrade the women of a particular ethnic group as well as the entire community to which they belonged. In prosecuting cases of rape and other gender-based violations, the ad hoc tribunals found that victims were often afraid to come forward with their stories and even feared being victimized by the process.

To help victims and witnesses face the judicial process, the International Criminal Court has created a Victims and Witnesses Unit within the Registry, to provide protective measures and security arrangements, counseling and other assistance for witnesses and victims, while fully respecting the rights of the accused. The Court must also take appropriate measures to protect the privacy, the dignity, the physical and psychological well-being and the security of victims and witnesses, especially when the crimes involve sexual or gender violence.

20. Will victims be entitled to compensation?

The ICC has established a Victims Trust Fund to provide reparations to victims and their families, including restitution, compensation and rehabilitation. The Court is empowered to determine the scope and extent of any damage, loss and injury to victims, and to order a convicted person to make specific reparation. Sources for the Fund may include money and other property collected through fines and forfeiture imposed by the Court. States and individuals are encouraged to contribute to the Victims Trust Fund, the first ever reparations mechanism set up by an international tribunal.

21. How will persons indicted be brought before the ICC?

All States Parties to the Statute have to commit themselves to comply with ICC orders and requests. A failure to fulfill such a solemn commitment will be a violation of international law, subjecting that State to immense pressure to comply. For more than a century, States have complied with almost every judgment issued by international courts established by treaty – such as the International Court of Justice and the European Court of Human Rights – and the political cost of refusing to cooperate is usually too high to permit defiance forever. The handful of cases where states fail to comply is front page news.

Some countries are prevented by their laws from extraditing an accused war criminal to another country for prosecution. However, during the ICC negotiations, many countries

stated that their laws would not prevent them from delivering a suspect to an international court as it would be considered a surrender rather than an extradition. Other countries indicated they would change their laws.

22. What sentence can the ICC impose? Can the ICC impose the death penalty?
Consistent with international human rights standards, the International Criminal Court has no competence to impose a death penalty. The Court can impose lengthy terms of imprisonment of up to 30 years or life imprisonment when so justified by the gravity of the case. The Court may, in addition, order a fine, forfeiture of proceeds, property or assets derived from the committed crime.

23. What obligations will States that do not ratify the treaty have towards the Court?
While there is no expressed general obligation in the Rome Statute requiring non-States Parties to cooperate, all States – whether parties to the ICC treaty or not – are obliged under existing international law to bring to justice those responsible for genocide, crimes against humanity and war crimes. If States are incapable of this, they are expected to extradite suspected individuals to a state willing and able to conduct a fair trial. Moreover, in December 1973, the UN General Assembly adopted the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* in Resolution 3074, which declares that all States are to cooperate with each other on a bilateral or multilateral basis to bring to justice persons responsible for these crimes.

The ICC complements existing national judicial systems and while it will step in only if national courts are unwilling or unable to investigate or prosecute such crimes, the Court may invite national courts to cooperate under an ad hoc agreement. If a State chooses to conclude such an agreement, it would be bound to comply with requests for assistance. Additionally, if the Security Council refers a situation to the ICC that threatens international peace and security, it can use the powers under Chapter VII of the UN Charter to compel non-States Parties to cooperate with the ICC's requests for assistance.

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The information contained in this document is derived from papers by the United Nations Department of Public Information, Amnesty International and the Lawyers Committee for Human Rights (now Human Rights First). It is the product of the CICC Secretariat and does not necessarily represent the views of these organizations.

THE PROTECTION OF HUMAN RIGHTS ACT, 1993

(No 10 of 1994)

An Act to provide for the constitution of a National Human Rights Commission. State Human Rights Commission in States and Human Rights Courts for better protection of Human Rights and for matters connected therewith or incidental thereto.

Be it enacted by the parliament in the forty-fourth year of the Republic of India as follows—

Chapter I

PRELIMINARY

1. Short title, extent and commencement

(1) This Act may be called the Protection of Human Rights Act, 1993.

(2) It extends to the whole of India.

Provided that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or List III in the Seventh Schedule to the Constitution as applicable to that State.

(3) It shall be deemed to have come into force on the 28th day of September, 1993.

2. Definitions

(1) In this Act, unless the context otherwise requires—

(a) "armed forces" means the naval, military and air forces and includes any other armed forces of the Union;

(b) "Chairperson" means the Chairperson of the Commission or of the State Commission, as the case may be;

(c) "Commission" means the National Human Rights Commission under section 3;

(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

(e) "Human Rights Court" means the Human Rights Court specified under section 30;

(f) "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966;

(g) "Member" means a Member of the Commission or of the State Commission, as the case may be, and includes the Chairperson;

(h) "National Commission for Minorities" means the National Commission for Minorities constituted under section 3 of the National Commission for Minorities Act, 1992;

(i) "National Commission for the Scheduled Castes and Scheduled Tribes" means the National Commission for the Scheduled Castes and Scheduled Tribes referred to in article 338 of the Constitution;

(j) "National Commission for Women" means the National Commission for Women constituted under section 3 of the National Commission for Women Act, 1990;

(k) "Notification" means a notification published in the official Gazette;

(l) "Prescribed" means prescribed by rules made under this Act;

(m) "Public servant" shall have the meaning assigned to it in section 21 of the Indian Penal Code;

(n) "State Commission" means a State Human Rights Commission constituted under section 21.

(2) Any reference in this Act to a law, which is not in force in the State of Jammu and Kashmir, shall, in relation to that State, be construed as a reference to a corresponding law, if any, in force in that State.

Chapter II

THE NATIONAL HUMAN RIGHTS COMMISSION

3. Constitution of a National Human Rights Commission

(1) The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.

(2) The Commission shall consist of:

(a) a Chairperson who has been a Chief Justice of the Supreme Court;

(b) one Member who is or has been, a Judge of the Supreme Court;

(c) one Member who is, or has been, the Chief Justice of a High Court;

(d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of section 12.

(4) There shall be a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.

(5) The headquarters of the Commission shall be at Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

4. Appointment of Chairperson and other Members

(1) The Chairperson and other Members shall be appointed by the President by warrant under his hand and seal.

Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of

(a) The Prime Minister-Chairperson

(b) Speaker of the House of the People-Member

(c) Minister in-charge of the Ministry of Home Affairs in the Government of India- Member

(d) Leader of the Opposition in the House of the People-Member

(e) Leader of the Opposition in the Council of States-Member

(f) Deputy Chairman of the Council of States-Member

Provided further that no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

(2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Committee.

5. Removal of a Member of the Commission

(1) Subject to the provisions of sub-section (2), the Chairperson or any other Member of the Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.

(2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment out side the duties of his office: or

(c) is unfit to continue in office by reason of infirmity of mind or body; or

(d) is of unsound mind and stands so declared by a competent court; or

(e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

6. Term of office of Members

(1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.

(2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re—appointment for another

term of five years. Provided that no Member shall hold office after he has attained the age of seventy years.

(3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or under the Government of any State.

7. Member to act as Chairperson or to discharge his functions in certain circumstances

(1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the President may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

8. Terms and conditions of service of Members

The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed. Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.

9. Vacancies, etc., not to invalidate the proceedings of the Commission.

No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission.

10. Procedure to be regulated by the Commission

(1) The Commission shall meet at such time and place as the Chairperson may think fit.

(2) The Commission shall regulate its own procedure.

(3) All orders and decisions of the Commission shall be audited by the Secretary-General or any other officer of the Commission duly authorised by the Chairperson in this behalf.

11. Officers and other staff of the Commission

(1) The Central Government shall make available to the Commission:

(a) an officer of the rank of the Secretary to the Government of India who shall be the Secretary-General of the Commission; and

(b) such police and investigative staff under an officer not below the rank of a Director General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.

(2) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.

(3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed.

Chapter III

FUNCTIONS AND POWERS OF THE COMMISSION

12. Functions of the Commission

The Commission shall perform all or any of the following functions, namely:

(a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf, into complaint of

(i) violation of human rights or abetment thereof or

(ii) negligence in the prevention of such violation,

by a public servant;

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the protection of human rights.

13. Powers relating to inquiries

(1) The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular in respect of the following matters, namely:

(a) summoning and enforcing the attendance of witnesses and examine them on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.

(2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code.

(3) The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, in so far as it may be applicable.

(4) The Commission shall be deemed to be a civil court and when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973.

(5) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

14. Investigation

(1) The Commission may, for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.

(2) For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under sub-section (1) may, subject to the direction and control of the Commission.

(a) summon and enforce the attendance of any person and examine him;

(b) require the discovery and production of any document; and

(c) requisition any public record or copy thereof from any office.

(3) The provisions of section 15 shall apply in relation to any statement made by a person before any officer or agency whose services are utilised under sub-section (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The officer or agency whose services are utilised under sub-section (1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.

(5) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report subbed to it under sub-section (4) and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.

15. Statement made by persons to the Commission

No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement —

(a) is made in reply to the question which he is required by the Commission to answer; or

(b) is relevant to the subject matter of the inquiry.

16. Persons likely to be prejudicially affected to be heard

If, at any stage of the inquiry, the Commission—

(a) considers it necessary to inquire into the conduct of any person; or

(b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry;

it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached.

Chapter IV

PROCEDURE

17. Inquiry into complaints

The Commission while inquiring into the complaints of violations of human rights may—

(i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it;

Provided that—

(a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;

(b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;

(ii) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

18. Steps after inquiry

The Commission may take any of the following steps upon the completion of an inquiry held under this Act namely:

(1) where the inquiry discloses, the commission of violation of human rights or negligence in the prevention of violation of human rights by a public servant, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

(2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(3) recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

(4) subject to the provisions of clause (5), provide a copy of the inquiry report to the petitioner or his representative;

(5) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission

may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;

(6) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

19. Procedure with respect to armed forces

(1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:

(a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

(b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.

(2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

(3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

(4) The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.

20. Annual and special reports of the Commission

(1) The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

(2) The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non—acceptance of the recommendations, if any.

Chapter V

STATE HUMAN RIGHTS COMMISSIONS

21. Constitution of State Human Rights Commissions

(1) A State Government may constitute a body to be known as the ..... (name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this chapter.

(2) The State Commission shall consist of

(a) a Chairperson who has been a Chief Justice of a High Court;

(b) one Member who is, or has been, a Judge of a High Court;

(c) one Member who is, or has been, a district judge in that State;

(d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

(3) There shall be a Secretary who shall be the Chief Executive Officer of the State Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.

(4) The headquarters of the State Commission shall be at such place as the State Government may, by notification, specify.

(5) A State Commission may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution:

Provided that if any such matter is already being inquired into by the Commission or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter:

Provided further that in relation to the Jammu and Kashmir Human Rights Commission, this sub-section shall have effect as if for the words and figures "List II and List III in the Seventh Schedule to the Constitution", the words and figures "List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir and in respect of matters in relation to which the Legislature of that State has power to make laws" had been substituted.

22. Appointment of Chairperson and other Members of State Commission

(1) The Chairperson and other Members shall be appointed by the Governor by warrant under his hand and seal:

Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of

(a) the Chief Minister — Chairperson

(b) Speaker of the Legislative Assembly — Member

(c) Minister in—charge of the Department of Home, in that State — Member

(d) Leader of the Opposition in the Legislative Assembly — Member

Provided further that where there is a Legislative Council in a State, the Chairman of that Council and the Leader of the Opposition in that Council shall also be members of the Committee.

Provided also that no sitting Judge of a High Court or a sitting District Judge shall be appointed except after consultation with the Chief Justice of the High Court of the concerned State.

(2) No appointment of a Chairperson or a Member of the State Commission shall be invalid merely by reason of any vacancy in the Committee.

23. Removal of a Member of the State Commission

(1) Subject to the provisions of sub-section (2), the Chairperson or any other member of the State Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.

(2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be -

(a) is adjudged an insolvent; OR

(b) engages during his term of office in any paid employment outside the duties of his office; OR

(c) is unfit to continue in office by reason of infirmity of mind or body; OR

(d) is of unsound mind and stands so declared by a competent court; OR

(e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

24. Term of office of Members of the State Commission

(1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier;

(2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re—appointment for another term of five years;

Provided that no Member shall hold office after he has attained the age of seventy years.

(3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India.

25. Member to act as Chairperson or to discharge his func tions in certain circumstances

(1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the Governor may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.

(2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the Governor may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

26. Terms and conditions of service of Members of the State Commission

The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed by the State Government.

Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.

27. Officers and other staff of the State Commission

(1) The State Government shall make available to the Commission

(a) an officer not below the rank of a Secretary to the State Government who shall be the Secretary of the State Commission; and

(b) such police and investigative staff under an officer not below the rank of an Inspector General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the State Commission.

(2) subject to such rules as may be made by the State Government in this behalf, the State Commission may appoint such other addministrative, technical and scientific staff as it may consider necessary.

(3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section (2) shall be such as may be prescribed by the State Government.

28. Annual and special reports of State Commission

(1) The State Commission shall submit an annual report to the State Government and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.

(2) The State Government shall cause the annual and special reports of the State Commission to be laid before each House of State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House along with a memorandum of action taken or proposed to be taken on the recommendations of the State Commission and the reasons for non-acceptance of the recommendations, if any.

29. Application of certain provisions relating to National Human Rights Commission to State Commissions

The provisions of sections 9, 10, 12, 13, 14, 15, 16, 17 and 18 shall apply to a State Commission and shall have effect, subject to the following modifications, namely:—

(a) references to "Commission" shall be construed as references to "State Commission";

(b) in section 10, in sub-section (3), for the word "Secretary General", the word "Secretary" shall be substituted;

(c) in section 12, clause (f) shall be omitted;

(d) in section 17, in clause (i), the words "Central Government or any" shall be omitted;

Chapter VI

HUMAN RIGHTS COURTS

30. For the purpose of providing speedy trial of offences arising out of violation of human rights, the State

Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences.

Provided that nothing in this section shall apply if

(a) a Court of Session is already specified as a special court; or

(b) a special court is already constituted, for such offences under any other law for the time being in force.

31. Special Public Prosecutor

For every Human Rights Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

Chapter VII

FINANCE, ACCOUNTS AND AUDIT

32. Grants by the Central Government

(1) The Central Government shall after due appropriation made by Parliament by law in this behalf, pay to the Commission by way of grants such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.

(2) The Commission may spend such sums as it thinks fit for performing the functions under this Act, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

33. Grants by the State Government

(1) The State Government shall, after due appropriation made by Legislature by law in this behalf, pay to the State Commission by way of grants such sums of money as the State Government may think fit for being utilised for the purposes of this Act.

(2) The State Commission may spend such sums as it thinks fit for performing the functions under Chapter V, and such sums shall be treated as expenditure payable out of the grants referred to in sub-section (1).

34. Accounts and Audit

(1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The Accounts of the Commission shall be audited by the Comptroller and Auditor—General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor—General.

(3) The Comptroller and Auditor-General or any person appointed by him in connection with the audit of the accounts of the Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government ac counts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

(4) The accounts of the Commission as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon shall be forwarded only to the Central Government by the Commission and the Central Government shall cause the audit report to be laid as soon as may be after it is received before each House of Parliament.

35. Accounts and Audit of State Commission

(1) The State Commission shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the State Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the State Commission shall be audited by the Comptroller and Auditor-General at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the State Commission to the Comptroller and Auditor-General.

(3) The Comptroller and Auditor-General or any person appointed by him in connection with the audit of the accounts of the State Commission under this Act shall have the same rights and privileges and the authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the State Commission.

(4) The accounts of the State Commission, as certified by the Comptroller and Auditor-General or any other person appointed by him in this behalf, together with the audit report thereon, shall be forwarded annually to the State Government by the State Commission and the State Government shall cause the audit report to be laid, as soon as may be after it is received, before the State Legislature.

Chapter VIII

MISCELLANEOUS

36. Matters not subject to jurisdiction of the Commission

(1) The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

(2) The Commission or the State Commission shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.

37. Constitution of special investigation teams

Notwithstanding anything contained in any other law for the time being in force, where the Government considers it necessary so to do, it may constitute one or more special investigation teams, consisting of such police officers as it thinks necessary for purposes of investigation and prosecution of offences arising out of violations of human rights.

38. Protection of action taken in good faith

No suit or other legal proceeding shall lie against the Central Government, State Government, Commission, the State Commission or any Member thereof or any person acting under the direction either of the Central Government, State Government, Commission or the State Commission in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or any order made thereunder or in respect of the publication by or under the authority of the Central Government, State Government, Commission or the State Commission of any report paper or proceedings.

39. Members and officers to be public servants

Every Member of the Commission, State Commission and every officer appointed or authorised by the Commission or the State Commission to exercise functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

40. Power of Central Government to make rules

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely:

(a) the salaries and allowances and other terms and conditions of service of the Members under section 8;

(b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the Commission and the salaries and allowances of officers and other staff under sub-section (3) of section 11;

(c) any other power of a civil court required to be prescribed under clause (f) of sub-section (1) of section 13;

(d) the form in which the annual statement of accounts is to be pre pared by the Commission under sub-section (1) of section 34; and

(e) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

41. Power of State Government to make rules

(1) The State Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the salaries and allowances and other terms and conditions of service of the members under section 26;

(b) the conditions subject to which other administrative, technical and scientific staff may be appointed by the State Commission and the salaries and allowances of officers and other staff under sub-section (3) of section 27;

(c) the form in which the annual statement of accounts is to be prepared under sub-section (1) of section 35.

(3) Every rule made by the State Government under this section shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

42. Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government, may by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty.

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each house of Parliament.

43. Repeal and Savings

(1) The Protection of Human Rights Ordinance, 1993 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of this Act.

Public interest Litigation

"Public interest Litigation", in simple words, means, litigation filed in a court of law, for the protection of "Public Interest", such as pollution, Terrorism, Road safety, constructional hazards etc.

PUBLIC INTEREST LITIGATION is not defined in any statute or in any act. It has been interpreted by judges to consider the intent of public at large. Although, the main and only focus of such litigation is only "Public Interest" there are various areas where a PUBLIC INTEREST LITIGATION can be filed. For e.g.

- Violation of basic human rights of the poor
- Content or conduct of government policy
- Compel municipal authorities to perform a public duty.
- Violation of religious rights or other basic fundamental rights.

WHEN CAN A PUBLIC INTEREST LITIGATION BE FILED?

A PUBLIC INTEREST LITIGATION can be filed only in a case where "Public Interest" at large is effected. Merely because, only one person is effected by state inaction is not a ground for PUBLIC INTEREST LITIGATION

These are some of the possible areas where a PUBLIC INTEREST LITIGATION can be filed.

- Where a factory / industrial unit is causing air pollution, and people nearly are getting effected.
- Where, in an area / street there are no street lights, causing inconvenience to commuters
- Where some "Banquet Hall" plays a loud music, in night causing noise pollution.
- Where some construction company is cutting down trees, causing environmental pollution.
- Where poor people, are affected, because of state government's arbitrary decision to impose heavy "tax".
- For directing the police / Jail authorities to take appropriate decisions in regards to jail reforms, such as segregation of convicts, delay in trial, production of under trial before the court on remand dates.
- For abolishing child labour, and bonded labour.
- Where rights of working women are affected by sexual harassment.
- For keeping a check on corruption and crime involving holders of high political officer.
- For maintaining Roads, Sewer etc in good conditions.

- For removal of Big Hoarding and signboard from the busy road to avoid traffic problem.
- Recently a PUBLIC INTEREST LITIGATION has been filed, for directing the "Delhi Traffic Police" to stop the method of sending challans to address by post, as it is being misused

WHO CAN FILE A PUBLIC INTEREST LITIGATION?

- Earlier it was only a person whose interest was directly affected along with others, whereby his fundamental right is affected who used to file such litigation.
- Now, the trend has changed, and, any Public-spirited person can file a case (PUBLIC INTEREST LITIGATION) on behalf of a group of person, whose rights are effected.
- It is not necessary, that person filing a case should have a direct interest in this PUBLIC INTEREST LITIGATION

For e.g. a person in Bombay, can file a PUBLIC INTEREST LITIGATION for, some labour workers being exploited in Madhya Pradesh or as someone filed a PUBLIC INTEREST LITIGATION in supreme court for taking action against Cracker factory in Sivakasi Tamilnadu, for employing child labour or the case where a standing practicing lawyer filed a PUBLIC INTEREST LITIGATION challenged a government policy to transfer High Court judges and similarly a lawyer filed a PUBLIC INTEREST LITIGATION for release of 80 under trials in a jail, who had spent more number of years in jail, than the period prescribed as punishment for offence, for which they were tried.

It is clear that, any person, can file a PUBLIC INTEREST LITIGATION on behalf of group of affected people. However it will depend on every facts of case, whether it should be allowed or not.

AGAINST WHOM A PUBLIC INTEREST LITIGATION CAN BE FILED?

- A PUBLIC INTEREST LITIGATION can be filed only against a State / Central Govt., Municipal Authorities, and not any private party.
- However "Private party" can be included in the PUBLIC INTEREST LITIGATION as "Respondent", after making concerned state authority, a party.

  For example - If there is a Private factory in Delhi, which is causing pollution, then people living nearly, or any other person can file a PUBLIC INTEREST LITIGATION against:

  · Government of Delhi
  · State Pollution Control Board, and
  · Also against the private factory

- However, a PUBLIC INTEREST LITIGATION can not be filed against the Private party alone concerned state Govt. /, and state authority has to be made a party.

PROCEDURE TO FILE A PUBLIC INTEREST LITIGATION

A "Public Interest Litigation", is filed in the same manner, as a writ petition is filed.

IN HIGH COURT

If a PUBLIC INTEREST LITIGATION is filed in a High court, then two (2) copies of the petition have to be filed. Also, an advance copy of the petition has to be served on the each respondent, i.e. opposite party, and this proof of service has to be affixed on the petition.

IN SUPREME COURT

If a PUBLIC INTEREST LITIGATION is filed in the Supreme court, then (4)+(1) (i.e. 5) sets of petition has to be filed opposite party is served, the copy only when notice is issued.

COURT FEES

A Court fee of RS. 50, per respondent (i.e. for each number of opposite party, court fees of RS. 50) has to be affixed on the petition.

PROCEDURE

- Proceedings, in the PUBLIC INTEREST LITIGATION commence and carry on in the same manner, as other cases.
- However, in between the proceedings if the judge feels he may appoint a commissioner, to inspect allegations like pollution being caused, trees being cut, sewer problems, etc.
- After filing of replies, by opposite party, and rejoinder by the petitioner, final hearing takes place, and the judge gives his final decision.

CAN A LETTER EXPLAINING CERTAIN FACTS TO CHIEF JUSTICE BE TREATED AS A PUBLIC INTEREST LITIGATION

- In early 90's there have been instances, where judges have treated a post card containing facts, as a PUBLIC INTEREST LITIGATION some of them are :
- Letter alleging the illegal limestone quarrying which devastated the fragile environment in the Himalayan foothills around Mussoorie, was treated as a PUBLIC INTEREST LITIGATION
- A journalist complained to the Supreme Court in a letter, that the national coastline was being sullied by unplanned development which violated the

central government directive was treated as a PUBLIC INTEREST LITIGATION

THE PRESENT SCENARIO:

In the past, many people have tried to misuse the privilege of PUBLIC INTEREST LITIGATION and thus now the court generally require a detailed narration of facts and complaint, & then decide whether to issue notice and call the opposite party.

- However as there is no statute laying down rules and regulations for a PUBLIC INTEREST LITIGATION Still the court can treat a letter as a PUBLIC INTEREST LITIGATION
    - However the letter should bring the true & clear facts, and if the matter is really an urgent one, the court can treat it is a PUBLIC INTEREST LITIGATION
    - But still it depends upon facts and circumstances, and court has the entire discretion.

RELIEFS AVAILABLE BY PUBLIC INTEREST LITIGATION

There are many kinds of remedies, which can be given in a PUBLIC INTEREST LITIGATION, to secure the public interest, at large. They are:

INTERIM MEASURES

The court can afford an early interim measure to protect the public interest till the final order for example:

- Release of under trial on personal bonds ordering release of all under trial who have been imprisoned for longer time, than the punishment period, free legal aid to the prisoners, imposing an affirmative duty on magistrates to inform under trial prisoners of their right to bail and legal aid. Or
- Closure of Industrial plant emitting poisonous gas, setting up victim compensation scheme, ordering the plaint reopening subject to extensive directions etc. Or
- Prohibiting cutting of trees or making provisions for discharge of sewage, till the disposal of final petition.

Relief in most of the PUBLIC INTEREST LITIGATION cases in the Supreme Court is obtained through interim orders.

APPOINTING A COMMITTEE

- The court may appoint a committee, or commissioner to look into the matter, and submit its report.

- Such committee or commissioner may also be given power to take cognizance of grievances and settle it right in the public intent.

FINAL ORDERS

The court may also give final orders by way of direction to comply within a stipulated time.

PUBLIC INTEREST LITIGATION IN HIGH COURT OR SUPREME COURT

- Both the High court and supreme court have the power to entertain a PUBLIC INTEREST LITIGATION
- Since there are no statutes or rules, there cannot be a specific difference, as to which court will have jurisdiction on the PUBLIC INTEREST LITIGATION
- It will purely and solely depend on the "Nature of the case", if the question involves only a small group of people being effected by action of State authority, the PUBLIC INTEREST LITIGATION can be filed in high court. For e.g. if there is a sewage problem in a locality effecting 50 families, the PUBLIC INTEREST LITIGATION can be filed in High court.
- If a large section of people is effected whether by State Government or Central Government, PUBLIC INTEREST LITIGATION can be filed in Supreme Court For e.g. placing a ban on adult movies, prohibition industrial unit from causing pollution etc

PUBLIC INTEREST LITIGATION

By: Jasveen Kaur

Public Interest Litigation--- It's meaning :- IN BLACK'S LAW DICTIONARY :- "*Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.*"

Public Interest Litigation's explicit purpose is to allenate the suffering off all those who have borne the burnt of insentitive treatment at the hands of fellow human being. Transparency in public life & fair judicial action are the right answer to check increasing menace of violation of legal rights. Traditional rule was that the right to move the Supreme Court is only available to those whose fundamental rights are infrigned.

But this traditional rule was considerably relaxed by the Supreme Court in its recent rulings: *Peoples Union for Demcratic Rights v. Union of India (A.I.R.. 1982 , S C 1473).* The court now permits Public Interest Litigation or Social Interest Litigation at the instance of " Public spirited citizens" for the enforcement of constitutional & legal rights of any person or group of persons who beacause of their socially or economically disadvantaged position are unable to approach court for relief. Public interest litigation is a part of the process of participate justice and standing in civil litigation of that pattern must have liberal reception at the judicial door steps.

In the *Judges Transfer Case - AIR 1982, SC 149* : Court held Public Interest Litigation can be filed by any member of public

having sufficient interest for public injury arising from violation of legal rights so as to get judicial redress. This is absolutly necessary for maintaining Rule of law and accelerating the balance between law and justice.

It is a settled law that when a person approaches the court of equity in exercise of extraordinary jurisdiction, he should approach the court not only with clean hands but with clean mind, heart and with clean objectives.

Shiram Food & Fertilizer case AIR (1986) 2 SCC 176 SC through Public Interest Litigation directed the Co. Manufacturing hazardous & lethal chemical and gases posing danger to life and health of workmen & to take all neccessary safety measures before re-opening the plant.

In the case of *M.C Mehta V. Union of India (1988) 1 SCC 471* :- In a Public Interest Litigation brought against Ganga water pollution so as to prevent any further pollution of Ganga water. Supreme court held that petitioner although not a riparian owner is entitled to move the court for the enforcement of statutory provisions , as he is the person interested in protecting the lives of the people who make use of Ganga water.

Parmanand Katara V. Union of India - AIR 1989, SC 2039 :- Supreme Court held in the Public Interest Litigation filed by a human right activist fighting for general public interest that it is a paramount obligation of every member of medical profession to give medical aid to every injured citizen as soon as possible without waiting for any procedural formalities.

Council For Environment Legal Action V. Union Of India - (1996)5 SCC281 : Public Interest Litigation filed by registered voluntary organisation regarding economic degradation in coastal area. Supreme Court issued appropriate orders and directions for enforcing the laws to protect ecology.

A report entitled *"Treat Prisoners Equally HC"* published in THE TRIBUNE , Aug 23 Punjab & Haryana High Court quashed the provisions of jail manual dividing prisoners into A , B & C classes after holding that there cannot be any classification of convicts on the basis of their social status, education or habit of living .This is a remarkable ruling given by High Court by declaring 576-A paragraph of the manual to be " Unconstitutional".

State V. Union Of India --AIR 1996 Cal 181 at 218 :- Public Interest Litigation is a strategic arm of the legal aid movement which intended to bring justice. Rule Of Law does not mean that the Protection of the law must be available only to a fortunate few or that the law should be allowed to be abused and misused by the vested interest. In a recent ruling of Supreme Court on " GROWTH OF SLUMS" in Delhi through Public Interest Litigation initiated by lawyers Mr. B.L. Wadhera & Mr. Almitra Patel Court held that large area of public land is covered by the people living in slum area . Departments despite being giving a dig on the slum clearance , it has been found that more and more slums are coming into existence. Instead of "Slum Clearance", there is "Slum Creation" in Delhi . As slums tended to increase ; the Court directed the departments to take appropriate action to check the growth of slums and to create an environment worth for living.

During the last few years, Judicial Activism has opened up a new dimension for the Judicial process and has given a new hope to the millions who starve for their livelihood. There is no reason why the Court should not adopt activist approach similar to Court in America , so as to provide remedial amplitude to the citizens of India.

Supreme Court has now realised its proper role in welfare state and it is using its new strategy for the development of a whole new corpus of law for effective and purposeful implementation of Public Interest Litigation. One can simply approach to the Court for the enforcement of fundamental rights by writing a letter or post card to any Judge. That particular letters based on true facts and concept will be converted to writ petition. When Court welcome Public Interest Litigation , its attempt is to endure observance of social and economic programmes frame for the benefits of havenot's and the handicapped. Public Interest Litigation has proved a boon for the common men. Public Interest Litigation has set right a number of wrongs committed by an individual or by socitey. By relaxing the scope of Public Interest Litigation, Court has brought legal aid at the doorsteps of the teeming millions of Indian ; which the executive has not been able to do despite a lot of money is being spent on new legal aid schemes operating at the central and state level. Supreme Court's pivotal role in expanding the scope of Public Interest Litigation as a counter balance to the lethargy and inefficiency of the executive is commendable.¶

Monitoring and Advocacy for Health and Human Rights

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www.cehat.org

Health and Human Rights Framework

- Health as a human right
  - ICESCR and other related covenants
  - Respect, protect and fulfill (provide)
- Right to healthcare
  - Availability, accessibility (non-discrimination, physical, economic and information), acceptability and quality (A3Q)
  - Universality and equity

Basis for Monitoring and Advocacy for H&HR

- Country's constitutional and legal position and policy framework
- Present healthcare system
  - Structure, provisions, financing and regulation
  - Access, inequities and ethics
- Social and political environment to steer change and accountability

Elements of Monitoring

- Access to information on provision and outcomes – A3Q
- Local level participatory accountability mechanisms
- Social audit
- Budget and policy analysis
- Public pressure and demands