

## HUMAN RIGHTS, GENDER-BASED VIOLENCE AND HIV/AIDS

“...the relationship between HIV and human rights is profound. Vulnerability to HIV infection and to its impact feeds on violations of human rights, including discrimination against women and violations which create and sustain poverty. In turn, HIV begets human rights violations, such as further discrimination, and violence. ... As the epidemic has evolved, the lessons learned from it confirm that the protection of human rights in the context of HIV reduces suffering, saves lives, protects the public health, and provides for an effective response to HIV.”

Louise Arbour, UN High Commissioner for Human Rights, and Peter Piot, Executive Director, UNAIDS, in *International Guidelines for HIV/AIDS and Human Rights: 2006 Consolidated Version*.

“Lack of general human rights protection has accelerated the spread of infection among vulnerable groups, and increased the human rights impact of infection on individuals living with HIV/AIDS, such as eroding their dignity through stigma, and further disempowering already marginalised communities.”

Draft Recommendations on  
Integrating Human Rights into HIV/AIDS Responses in Asia-Pacific,  
*Expert Meeting on HIV/AIDS and Human Rights in Asia-Pacific*, March 2004,  
[www.un.or.th/ohchr/issues/hivaids/hivaidsmain.html](http://www.un.or.th/ohchr/issues/hivaids/hivaidsmain.html)

HIV/AIDS has been recognised not only as a global public health concern on national and international levels, but has often been phrased within the military doctrine, i.e., ‘a national security threat’, by many countries<sup>1</sup> including Mongolia, where prevention and control policies and activities are considered to have been legitimised to the extent of direct infringement upon the human rights of citizens, specifically of the marginalised, stigmatised, and silent minority communities. The inherent interrelation between the HIV/AIDS pandemic, its social and economic costs and therefore the need for the protection and guarantee of human rights in the context of HIV/AIDS has not been, however, addressed by the Government of Mongolia, owing to any of the probable reasons: lack of accountability and transparency on the part of the national HIV/AIDS machineries for public scrutiny and legitimation, lack of proactive and legislative change oriented interventions regarding the widespread HIV/AIDS related human rights abuses on the part of civil society and community groups, lack of pressure from the international community to level up the State’s human rights practices, and even perhaps the state of democracy in Mongolia, indicative of a slow progress where people are not sufficiently empowered to the extent of knowing and demanding their fundamental human and civil rights.

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<sup>1</sup> See Coyle, Jennifer (2004/2005) “The Arc of Justice: The Ethical Implications of Framing HIV/AIDS Pandemic As a National Security Threat: An Annotated Bibliography” *International Quarterly of Community Health Education*, vol. 23, no.1, and Gauri, Varun and Lieberman, Evan (2004) “AIDS and the State: The Politics of Government Responses to the Epidemic in Brazil and South Africa”, available at <http://media-cyber.law.harvard.edu/blogs/gems/politicshiv/liebermanpaper.pdf>.

As the Government of Mongolia began to frame HIV/AIDS issues within the military doctrine of a security threat, there is a reasonable apprehension that the Government may indeed continue to sanction acts that equate to human rights abuses and gender-based violence (gender-based violence is any type of violence directed against a person or a group of persons on the basis of their gender<sup>2</sup>), under the pretext of HIV transmission prevention and spread control, despite the international obligations to respect, protect and promote human rights, and furthermore, dismissing the international guidelines and recommendations of mainstreaming HIV/AIDS within the ethics of human rights.

The issue of involuntary testing without the pre- and post-test counselling for MSM and gay male community and sex workers, arbitrary detentions and interrogations of, and even violence against, the LGBT community by police and intelligence need to be addressed within the context of ending the gender-based violence in Mongolia with the view of enforcement of the international norms and the guidelines adopted by international bodies, such as the *International Guidelines on HIV/AIDS and Human Rights* developed by the Office of the UN High Commissioner for Human Rights and Joint UN Programme on HIV/AIDS that explicitly urge governments, non-governmental organisations and the UN system “to operationalise their commitment to protect human rights in the response to HIV”<sup>3</sup>. Furthermore, these issues have not been explored in depth, nor widely documented, with the exception of various inquiries regarding the status of Mongolian LGBT people’s rights and the persecution they face in Mongolia (6 inquiries between late 2004 and late 2007 from US immigration lawyers and agencies, one inquiry from the Australian Refugee Tribunal in August 2006 and one inquiry from the Government of Canada in November 2006) I received in my capacity as the founder and coordinator of [www.mongoldyke.org.mn](http://www.mongoldyke.org.mn).

This brief draft paper attempts to broadly map out the various human rights violations that are taking place in Mongolia as a direct consequence of HIV/AIDS-related policies, and attempts to suggest legal measures that need to be taken to end the state-sanctioned violation of

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2 Gender based violence (GBV) includes, but is not limited to, violence against women (VAW), and covers violence against sexuality minorities, as well as violence against sex workers. The forced testing for HIV the gay male and MSM community are subjected to can also be defined as to be included in GBV. Gender is understood as the social relationships that shape our understandings, norms and behaviours regarding femininity and masculinity, the cultural conditioning of what is expected of women and men in a given society, and in that sense, GBV could be defined as dealing in sum total with the various elements of the patriarchal ideology: the heteronorm-based violence against LGBT people, the notion of controlling ‘others’ such as sex workers whose economic independence, sexual freedom and untamed sexuality are viewed as threatening to the male-centred social structure, and therefore criminalised in order to uphold family values and morality.

3 Office of the UN High Commissioner for Human Rights and Joint UN Programme on HIV/AIDS (2006) *International Guidelines for HIV/AIDS and Human Rights: 2006 Consolidated Version*, OHCHR and UNAIDS: Geneva, p. 7.

human rights of the minorities and to provide for effective mechanisms for protection of the rights of the affected social and sexuality minorities.

### The impact of HIV/AIDS on marginalised communities in Mongolia

Twenty-five years after the initial discovery of the virus and the host of diseases associated with it, the globally accumulated knowledge and response to the disease has undergone a drastic evolution, moving away from the initial ignorant rhetoric of 'homosexual plague' to the protection of human rights and non-discrimination, since it is a disease that is non-discriminatory in its nature. However, as more people test seropositive, the Government has implicitly and explicitly begun to implement practices that have been long abandoned in other countries, such as directing their mandatory testing to the communities at risk – the gay male and MSM community, sex workers and injecting drug (ID) users – sanctioning close surveillance of the MSM and LGBT by the police and intelligence. The very fact that in other areas except HIV/AIDS related activities<sup>4</sup> the Government of Mongolia does not recognise the existence of LGBT citizenry indicates that there is a huge gap between the LGBT rights advocacy aimed at breaking the silence on the one hand and stopping the state-sanctioned violence against this community<sup>5</sup> on the other. The Government's response could indeed be viewed as a reversal back into the 'Dark Ages of the HIV Panic', despite the currently available knowledge and experience of other countries. It is undoubted that at this stage the HIV transmission in Mongolia is more or less localised, i.e., confined to certain communities, predominantly identified to be the MSM and gay male community, however there is no guarantee that in a number of years the transmission will not become generalised, spreading to the entire population given other the overwhelming statistics of sexually transmitted illnesses among the general population. The generalisation of transmission is merely a question of time, until and unless the Government practice and ideology surrounding the present national HIV/AIDS discourse is transformed to adopt an ethical and human rights-based approach.

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<sup>4</sup> The Ministry of Health has recently passed a Resolution operative within the public health care of non-discrimination based on sexual orientation and serostatus. A quiet reassessment of the mental disorder classification has also taken place within the health care sector, culminating in the decision to exclude homosexuality from mental disorder list, a development that has taken place nearly twenty years after the homosexual/immoral gratification of carnal desires had been decriminalised in 1986.

<sup>5</sup> For more information on the LGBT people in Mongolia, see N. Anaraa (2006) "Life Denied: LGBT Human Rights in the Context of Mongolia's Democratisation and Development" in *Human Rights Quarterly*, issue 03, Mongolian National Human Rights Commission: Ulaanbaatar, pp. 80-97 (in Mongolian) To read the English version, please email the author at anaraanyamdorj@hotmail.com.

With the Government rhetoric gaining force, the LGBT community feels more insecure, victimised and marginalised within the broader society due to the linkage of homosexuals and/or homosexuality to the disease, which on the level of prevention and control of prevalence objective will not be effective as people will be even less willing to disclose their sexual orientation, and furthermore, to undergo testing voluntarily. The issues of identity politics and gay rights in this setting become more wrought by the mainstream heteronormative rhetoric that directly and indirectly threatens the very life of the community and individual out community members.

The HIV/AIDS response in the gay male and MSM communities has been reactive rather than proactive, with only two community-based organisations working in the area of prevention and peer-to-peer education, with no vision of building effective advocacy on behalf of the gay male and MSM communities to uphold human rights in order to avoid the state-sanctioned victimisation in regard to HIV/AIDS. Many MSM and gay male community members are reported to be unwilling to access the services and information these organisations offer, indicating that the community members do not feel completely confident in the confidentiality and non-disclosure of their personal details and other sensitive information by these organisations. With these widespread sentiments in the gay male and MSM communities, effective community outreach aimed at preventing a higher rate of HIV transmissions becomes doubtful in the long term, until and unless the organisations themselves adopt the confidentiality and non-disclosure policies not only on the level of articulation, but also on the level of operationalising their commitment to human rights which serves as a basis for their activities in the first place.

Another feature of the HIV/AIDS impact on the LGBT community that has not been explored is gender-based violence and the consequent exposure to HIV. Since LGBT people are perceived as not conforming to the set notions of gender identities for women and men, many LGBT people face gender-based violence and become victims of hate crimes<sup>6</sup>, including sexual violence. In South Africa, a great number of lesbians have been identified to be HIV positive as a direct result of homophobic hate crimes and sexual violence they are subjected to by men

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<sup>6</sup> The concept of a hate crime could be illustrated by the following definition: "Hate crimes are crimes in which the perpetrator is motivated by a characteristic of the victim that identifies the victim as a member of a group toward which the perpetrator feels some animosity. Because perpetrators are motivated to act against an individual or her/his property, in whole or in part, because of a real or perceived membership of a group, hate crimes communicate a message to wider group or community: hate crimes symbolise a unique form of aggression, as the violence constitutes a threat of more violence to members of minority groups" OSCE Office of Democratic Institutions and Human Rights (2005) *Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation and National Initiatives*, OSCE/ODIHR: Warsaw, pp. 10-11.

because of their sexual orientation<sup>7</sup>, despite the fact that South Africa is one of the first countries to explicitly guarantee non-discrimination on the basis of sexual orientation in its post-apartheid Constitution. Such a state of matters might well be occurring in Mongolia, or at least there is a huge potential for it; however, no statistics are available about the HIV+ lesbian and bisexual women in Mongolia.

Because the community members are prevented from a meaningful interaction with and participation in the Government programming and policymaking in regard to HIV/AIDS due to the secondary victimisation and stigmatisation they face from the state agencies, and because the LGBT community has been traditionally silent and to a great degree excluded as a citizenry from the mainstream social discourse, the breaking down of the barriers of silence and victimisation in order to effectuate the prevention and control of HIV transmission will require to be guaranteed by not only the existing broad legislations and regulations about non-discrimination, but also by the creation of new laws and legislations guaranteeing human rights and dignity to LGBT people, such as a hate crime legislation, an amendment to the Constitution to include non-discrimination on the basis of sexual orientation and other legal amendments to existing laws and statutes.

Another stigmatised community that is highly vulnerable in socio-economic and health terms is commercial sex workers. Any type of violence occurring in regard to sex workers must be deemed as gender-based violence, since the violence against sex workers is based on the notions of controlling women and their sexuality. Soliciting sex for remuneration and related activities are criminalised, leaving sex workers at the mercy of police who routinely round them up from the areas and bars where they ply their trade, and who very often demand sex or money from sex workers in return for letting them go without arrest. Once the sex workers are arrested and detained, district police cooperate with the respective district health centres and Faith and Trust NGO to force sex workers to undergo testing for sexually transmitted illnesses (STIs) and HIV, without pre- or post-test counselling<sup>8</sup>. The Faith and Trust NGO recognises that the activities of the police and the health centres constitute a grave violation of sex workers' human rights, but it is again forced to recognise the overall framework of the penal code that criminalises any activity relating to sex work, and therefore has been conducting human rights

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<sup>7</sup> From the presentation of Tony Kruger, Senior Project Officer, OUT NGO (South Africa) on July 28 at the workshop "Lesbian and Bisexual Women's Health: Common Concerns and Local Issues" during the International Conference on LGBT Human Rights, Montreal, July 26-29, 2006.

<sup>8</sup> From the conversation of Ms. Nyam-Ulzii, the Executive Director of Faith and Trust NGO that works with the female sex workers. She has been working with the sex workers on STI and HIV prevention education since 1999 as a project implementing unit of the National AIDS Foundation.

talks in relation to sex workers with the district police offices, whose only universal answer is 'we are following the law'.

In the case of sex workers, there are many layers of human rights violations that combine into a reality of life for women and men engaged in sex-for-money: social exclusion, punitive and forced health 'care', police arrests, unwanted sexual relations with members of the police force, violence from their pimps, and dire socio-economic conditions that provide no other viable options to make a living. Mongolian society views sex work as immoral and as something people do out of an informed and enlightened choice, therefore sanctioning moralistic punitive measures on sex workers, which stand contrary to the aims of preventing and lowering the incidence of HIV transmissions. The realities of sex workers and their social problems need to be brought to the public's attention in order to bring down the stigma that the so-called normal society constructs between 'us' and 'them'. The issue of legalising sex work also needs to be addressed as criminalisation of sex work victimises first and foremost sex workers, with the beneficiaries of such a legal mechanism appearing to be not the sex workers themselves, but their pimps and the police.

The injecting drug users are also another marginalised community, and despite no registered transmission incidence among the ID users, they are closely monitored and routinely made to undergo HIV testing.

#### Preconditions and strategies to implement HIV prevention, access, support and care

Having established that institutionalised gender-based violence backed by the state and legal mechanisms is taking place in Mongolia, and the incidence of human rights violations is widespread, the civil society needs to look at the possible ways of eliminating these injustices, with the view of creating the most important preconditions to implement effective broad-scale HIV prevention. The State must:

- I. Guarantee non-discrimination based on sexual orientation and serostatus.
- II. Guarantee confidentiality and non-disclosure of serostatus by the state agencies.
- III. Pass broad legislation on hate crimes and hate speech that shall guarantee some recourse in the event such criminal incidence.
- IV. Decriminalise sex work.

With these issues at hand, there is a great need to proactively engage both the Government of Mongolia as well as intergovernmental bodies and international organisations regarding the legal reform that has been advised and mandated following the second

International Consultation on HIV/AIDS and Human Rights convened by OHCHR and UNAIDS in 1996. The NGOs involved in the Consultative Meeting on Human Rights and HIV/AIDS are under no illusion that these preconditions will be implemented by the State overnight, but the promise to control and prevent HIV/AIDS by 2015 stands to be fulfilled, and the only way to move towards implementation of these preconditions is to demand accountability from the Government.