CENTER FOR REPRODUCTIVE RIGHTS

THE ROLE OF HUMAN RIGHTS-BASED ACCOUNTABILITY IN ELIMINATING MATERNAL MORTALITY AND MORBIDITY

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This submission responds to the Office of the U.N. High Commissioner for Human Right's request for information in preparation for its report on good or effective practices in adopting a human rights-based approach to eliminating maternal mortality and morbidity. The memo focuses on the role of accountability in adopting a human rights-based approach to eliminate preventable maternal death and disability. Part I explains the meaning and essential components of accountability and the importance of addressing maternal mortality and morbidity. Part II examines types of accountability apparatuses, including judicial, quasi-judicial and non-judicial mechanisms.

I. THE ROLE OF ACCOUNTABILITY IN A HUMAN RIGHTS-BASED APPROACH

As signatories to human rights treaties, States must respect, protect and fulfill the rights set forth therein. Human rights are not simply moral obligations but also legal commitments. Accountability is the process whereby States, as duty-bearers, demonstrate, explain and justify how they have discharged their human rights obligations to rights-holders and provide remedies and redress where they have failed.[1]

Human rights bodies clearly recognize maternal mortality and morbidity as a human rights issue.[2] In this context, State accountability for human rights violations is critical since approximately 358,000 women die annually from causes related to pregnancy and childbirth,[3] although the public health community agrees on the necessary measures to prevent these deaths.[4] The absence of accountability mechanisms for maternal deaths and disability caused by health system failures, socioeconomic disparities and discriminatory social practices is a major impediment to reducing maternal mortality and morbidity.[5] By providing a forum to assess States' compliance with their human rights obligations, accountability mechanisms translate human rights into concrete realities for individuals.[6]

Effective accountability processes must be both prospective and retrospective. Prospective aspects of accountability identify what works so it can be repeated and what does not work so it can be revised.[7] Accountability requires the establishment of accessible mechanisms for the government to explain and justify its policies and programs to rights-holders and receive their feedback. Concurrently, such mechanisms must empower citizens, particularly members of marginalized groups, to claim their rights and participate in formulating and monitoring policies that impact their lives.[8] Thus, an effective accountability system increases the transparency of State decision-making, enhances public access to information, and demands active participation from diverse stakeholders.[9] Monitoring mechanisms, while distinct from accountability, should also be implemented to ensure the collection and analysis of appropriate data to measure the State's compliance with its human rights obligations.[10]

Retrospective aspects of accountability remedy and redress the State's failures to fulfill its human rights obligations. Human rights law guarantees the right to an effective remedy,[11] which includes reform of policies or programs, introduction of legislation, or human rights trainings for government officials or others who implement relevant programs. Remedies also include traditional forms of redress such as compensation for victims of human rights violations.

II. ACCOUNTABILITY MECHANISMS FOR ENFORCING HUMAN RIGHTS

Accessible, transparent, independent and effective accountability mechanisms are fundamental to improving policies and programs to reduce preventable maternal mortality and morbidity.[12] Such mechanisms fall into three general groups (judicial, quasi-judicial and non-judicial mechanisms) and include myriad institutions and processes.

a. JUDICIAL

Judicial mechanisms enable rights-holders to bring claims before a third-party arbiter at the national, regional or international level to determine whether rights violations have occurred.[13] Through judicial review, courts can determine whether a State failed to meet its constitutional and international human rights obligations related to safe pregnancy and childbirth, compel state action to correct systemic policy failures or order remedies for victims.[14]

i. NATIONAL COURTS

In India, advocates in domestic courts have successfully drawn on constitutional and human rights law to argue that the State is not fulfilling its legal obligations to prevent maternal mortality and morbidity.[15] In the 2010 decision of *Laxmi Mandal v. Deen Dayal Hari Nager Hospital & Ors,* the Delhi High Court recognized a constitutionally-protected right to maternal healthcare and ordered compensation for rights violations experienced by two impoverished women who died during childbirth. The High Court recognized the State's failure to implement

various programs to reduce maternal and infant mortality.[16] It ordered the State to financially compensate the women's families[17] and specifically directed the State to remedy deficiencies in and improve monitoring of public health programs.[18]

ii. REGIONAL HUMAN RIGHTS COURTS

Regional human rights courts, such as the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights and the European Court of Human Rights, are another forum for addressing pregnancy-related rights violations. These mechanisms are empowered to issue legally-binding rulings and advisory opinions on the interpretation of relevant treaties.[19] For example, in the 2009 case of *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Court of Human Rights found human rights violations where the absence of special measures to protect pregnant women contributed to the pregnancy-related deaths of indigenous women.[20] The Court rebuked Paraguay's failure to implement policies to train skilled birth attendants, provide pregnancy-related care, and document cases of maternal mortality.[21] It ordered the State to establish immediate measures to provide healthcare for pregnant women[22] and directed it to conduct a study with the participation of community members and experts, to identify means for adapting maternal care to community needs.[23] In crafting this remedy, the Court mandated broad stakeholder participation in developing policies to combat maternal death.

b. QUASI-JUDICIAL

i. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIS)

Quasi-judicial bodies, including NHRIs, health tribunals and U.N. Treaty Monitoring Bodies (TMBs), are also important accountability mechanisms.[24] NHRIs are independent governmental bodies that advance and defend human rights.[25] Therefore, they have an important role in ensuring government accountability for maternal health. NHRIs often have the authority to conduct inquiries into human rights violations, issue reports and make recommendations to the government.[26] For example, in 2010, the Kenya National Commission on Human Rights initiated a public inquiry on Pumwani Maternity Hospital, Kenya's largest referral maternity hospital, which notoriously detains women unable to pay medical fees in inhumane conditions.[27]

Significantly, NHRIs must have the authority to enforce their recommendations to effectively realize change and remedy health violations without relying on the volition of politicians with ulterior interests.[28] Furthermore, by creating an alternative channel to lodge complaints, NHRIs may alleviate economic and geographic barriers that prevent the utilization of judicial mechanisms.[29]

ii. HEALTH COUNCILS/TRIBUNALS

Likewise, Health Councils, Patient's Rights Tribunals and Healthcare Commissions are autonomous quasi-judicial accountability bodies, which are generally established pursuant to legislation and can incorporate civil society input in policy creation and implementation.[30] Health Councils may function as independent, democratically-elected bodies with the authority to approve health plan budgets and/or act as a complaint mechanism.[31] Specifically, the creation of an independent Maternal Health Ombudsperson can provide oversight of the maternal health system and a mechanism to facilitate dialogue among different actors involved in maternal healthcare. The Ombudsperson can also promote access to the judicial system as a method of increasing accountability, among other functions.[32]

Patient's Rights Tribunals or Healthcare Commissions handle complaints about the healthcare system, services or employees.[33] These quasi-judicial mechanisms may also issue binding resolutions that compel changes within the health sector, conduct investigations into particular facets of the health system and formulate recommendations for implementation by policymakers.[34] In the United Kingdom, following a national review of maternity services conducted by the Healthcare Commission, which revealed troubling variations in the quality of care throughout the country, in 2008, the Healthcare Commission collaborated with stakeholders, such as women and clinicians, to establish performance benchmarks for providing maternity services.[35]

iii. U.N. TREATY MONITORING BODIES

Furthermore, U.N. TMBs have developed a vast jurisprudence regarding State obligations to provide quality maternal care.[36] The case of *Alyne da Silva Pimentel v. Brazil*, which the Center for Reproductive Rights and a Brazilian non-governmental organization filed before the Committee on the Elimination of Discrimination against Women (CEDAW Committee)[37] on behalf of a woman who suffered a preventable maternal death, demonstrates the utility of TMBs in holding States accountable for preventing maternal mortality and morbidity.[38] The applicants allege that Brazil's failure to provide appropriate maternal healthcare violates several of its international legal obligations. The petition entreated the CEDAW Committee to direct Brazil to prioritize maternal mortality reduction, including by training providers, establishing and enforcing protocols, and improving care in vulnerable communities. This case is the first individual communication on maternal mortality filed before a U.N. TMB and is still pending.

c. NON-JUDICIAL

i. HUMAN RIGHTS IMPACT ASSESSMENTS (HRIAS)

Additionally, non-judicial mechanisms, which support policy planning and review, ensure accountability in the maternal care context. Specifically, HRIAs allow policymakers to consider

the potential human rights impacts of policies before their implementation and subsequently minimize or prevent any harmful impacts. HRIAs further increase accountability by obliging States to create action plans to avoid human rights violations, which civil society can monitor during policy implementation.[39]

ii. MATERNAL DEATH REVIEWS

Maternal death reviews, which are community and/or facility based, systematically examine the incidence and prevalence of maternal mortality and morbidity, thereby enabling health professionals to review the treatment provided and identify ineffective medical practices.[40] Community-based maternal death reviews can establish the cause of death and illuminate any personal, familial and/or community factors contributing to the death. Generally, in such reviews trained field-workers interview family members and others who can help to identify factors leading to the death.[41] This community level discussion can facilitate the introduction of measures to prevent maternal deaths and disability.[42] Facility-based reviews are "qualitative, in-depth investigations of the causes of, and circumstances surrounding, maternal deaths which occur in healthcare facilities."[43]

Implementation of maternal death reviews affect policy change and improvement in the quality of maternal health services. They also serve as a baseline to measure progress in reducing maternal deaths and disability. However, in order to increase accountability, an independent body with authority to oversee State action and to verify the implementation of recommendations, must review the data to ensure the provision of objective, non-biased analysis and recommendations to policymakers.[44]

iii. POLITICAL AND LEGISLATIVE PROCESSES

Political and legislative processes are essential non-judicial mechanisms to hold governments accountable to implement safe pregnancy and childbirth laws and policies. However, the effectiveness of political processes varies among countries, depending upon the political structure, the strength of political parties and the level of popular participation in free and fair electoral processes.[45] Civil society's ability to hold political actors accountable may be greater in countries with well-developed and transparent political and legislative systems.

One legislative process to enhance accountability is the creation of Parliamentary Committees, which can evaluate and investigate proposed policy or legislation, and determine budgetary allocations.[46] They also engage civil society by relying on relevant reports or testimony from outside parties to inform their analysis. In 2001, an Inquiry Commission established by the Brazilian National Congress published a report on the incidence of maternal mortality. The report resulted from hearings and public debates with civil society individuals and organizations

and contained recommendations for government agencies on improving women's access to quality maternal healthcare services and strengthening accountability systems.[47]

Political and legislative processes are most effective when States utilize them jointly. Specifically, legislative measures must accompany a State's political commitment to reducing preventable maternal death and disability.[48] For example, in 2002, Mali enacted a law on reproductive health, which recognizes that one aim of reproductive healthcare is to reduce maternal mortality and morbidity.[49] Furthermore, it ensures the women's rights healthcare during pregnancy and childbirth.[50]

III. CONCLUSION

Human rights-based accountability mechanisms are necessary to effectively reduce preventable maternal deaths and disability. These mechanisms support the development of effective policies to ensure safe pregnancy and childbirth and assist States in respecting, protecting and fulfilling human rights obligations. There is a wide variety of accountability mechanisms that States can look to in identifying best practices for eliminating preventable maternal mortality and morbidity. Thus, in its report on good or effective practices in adopting a human rights-based approach to eliminating maternal mortality and morbidity, the Office of the U.N. High Commissioner for Human Rights should recommend that States establish accessible, effective, independent and transparent accountability mechanisms at the national level, which can lead to the constant improvement of existing programs and policies and that will ensure redress and reparations when pregnancy-related violations occur. Furthermore, the report should encourage States to enhance existing accountability mechanisms established at the regional and international levels and to examine the need for the establishment of new mechanisms, which play a crucial role in articulating and clarifying human rights standards and obligations in the context of maternal health.

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[1] *See* HELEN POTTS, UNIVERSITY OF ESSEX HUMAN RIGHTS CENTRE, ACCOUNTABILITY AND THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH 13 (2008).

[2] For a review and analysis of the international human rights framework on maternal mortality, morbidity and human rights *see* Center for Reproductive Rights, *Bringing Rights to Bear: Preventing Maternal Mortality and Ensuring Safe Pregnancy* (2008), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_Maternal%20Mortality_10.08.pdf [hereinafter *Bringing Rights to Bear*]. In 2009, the U.N. Human Rights Council adopted a ground-breaking resolution recognizing maternal mortality and morbidity as a human rights issue. Human Rights Council Res. 11/8, Preventable Maternal Mortality and Morbidity and Human Rights, 11th Sess., June 2-18, 2009, U.N. Doc. A/HRC/11/L.16/REV.1 (June 17, 2009), *available at* http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_11_8.pdf. Additionally, several regional human rights bodies have adopted resolutions recognizing preventable maternal mortality as a human rights issue and calling on states to incorporate human rights-based approaches into efforts to promote maternal health. *See European Parliament, Resolution on maternal mortality ahead of the U.N. High-level Event, 25 September – Review of the Millennium Development Goals* (2008), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B6-2008-0395&language=EN; *see also*

African Commission on Human and Peoples' Rights, ACHPR/Res. 135 (XXXXIIII), Resolution on Maternal Mortality in Africa (Sept. 2008), *available at* http://www.achpr.org/english/resolutions/resolution135_en.htm; *see also Access to Maternal Health Services from a Human Rights Perspective*, Inter-Am. Comm'n on H.R., OEA/Ser.L/V/II., doc. 69 (2010), *available at* http://cidh.org/women/SaludMaterna10Eng/MaternalHealth2010.pdf.

[3] WORLD HEALTH ORGANIZATION (WHO) ET AL., TRENDS IN MATERNAL MORTALITY: 1990 TO 2008 1 (2010), *available at* http://whqlibdoc.who.int/publications/2010/9789241500265_eng.pdf.

[4] These interventions include skilled birth attendance, emergency obstetric care, referral networks and family planning services. *See* Alicia Ely Yamin, *Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health*, 10 HEALTH & HUM. RTS. 1, 9 (2008), *available at* http://www.hhrjournal.org/index.php/hhr/issue/view/2.

[5] *See* CENTER FOR REPRODUCTIVE RIGHTS, MATERNAL MORTALITY IN INDIA: USING INTERNATIONAL AND CONSTITUTIONAL LAW TO PROMOTE ACCOUNTABILITY AND CHANGE 9 (2008), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_br_maternal_mortality_in_india_2009.pdf [hereinafter MATERNAL MORTALITY IN INDIA].

[6] *See* POTTS, *supra* note 1, at 13.

[7] *See id*. at 13-14.

[8] *Id*. For more on participation and human rights, *see* HELEN POTTS, UNIVERSITY OF ESSEX HUMAN RIGHTS CENTRE, PARTICIPATION AND THE RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF HEALTH (2008), *available at* http://www.essex.ac.uk/human_rights_centre/research/rth/docs/Participation.pdf.

[9] POTTS, *supra* note1, at 13; Yamin, *supra* note 4, at 2.

[10] POTTS, *supra* note 1, at 14.

[11] *See, e.g.*, Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation 21: Equality in marriage and family relations*, (13th Sess., 1994), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies Vol. II, at 337, para. 21, U.N. Doc. HRI/GEN/1/Rev.9 (2008); Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health*, (22nd Sess., 2000), para. 59, U.N. Doc. E/C.12/2000/4 (2000); Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add/13 (2004).

[12] POTTS, *supra* note 1, at 17.

[13] *Id*.

[14] *Id*. at 18; *see also* INTERNATIONAL COMMISSION OF JURISTS, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY 6 (2008).

[15] The Center for Reproductive Rights has partnered with the Human Rights Law Network (HRLN), an Indian NGO, to develop a litigation strategy around maternal mortality and morbidity in India. For more information *see* MATERNAL MORTALITY IN INDIA, *supra* note 5; *see also* Human Rights Law Network, *PILS & Cases*, http://www.hrln.org/hrln/index.php?option=com_content&view=category&layout=blog&id=109&Itemid=197 (last visited Mar. 18, 2011).

[16] For a description of the relevant government programs, *see* Laxmi Mandal *v.* Deen Dayal Harinagar Hospital & Ors (2010) 8853/2008 H.C. Del. paras. 3-9, 12-18 (Jun. 4, 2010).

[17] *Id.* paras. 51-61.

[18] *Id.* paras. 62, 64-70.

[19] *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted* Jun. 9, 1998, art. 4, A.U. Doc. CAB/LEG/665 (*entered into force* Jan. 1, 2004); Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, art. 47, 213 U.N.T.S. 222, Europ. T.S. No. 5 (*entered into force* Sept. 3, 1953); American Convention on Human Rights, *adopted* Nov. 22, 1969, art. 64, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (*entered into force* July 18, 1978).

[20] Xákmok Kásek Indigenous Community of the Enxet-Lengua People and Its Members v. Paraguay, Judgment, Inter-Am. Ct. H.R. No. 12,420 para. 232-234 (Aug. 24, 2010).

[21] *Id*. para. 233.

[22] *Id*. para. 301.

[23] *Id*. para. 303-06.

[24] POTTS, *supra* note 1, at 17.

[25] *Id.* at 18.
[26] *Id.*
[27] *See* FEDERATION OF WOMEN LAWYERS-KENYA & CENTER FOR REPRODUCTIVE RIGHTS, FAILURE TO DELIVER: VIOLATIONS OF WOMEN'S HUMAN RIGHTS IN KENYAN HEALTH FACILITIES 40 (2007), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_failuretodeliver.pdf.
[28] POTTS, *supra* note 1, at 18.
[29] PHYSICIANS FOR HUMAN RIGHTS, DEADLY DELAYS: MATERNAL MORTALITY IN PERU, A RIGHTS-BASED APPROACH TO SAFE MOTHERHOOD 118 (2007), *available at* http://physiciansforhumanrights.org/library/documents/reports/maternal-mortality-in-peru.pdf.
[30] POTTS, *supra* note 1, at 19, 22.
[31] POTTS, *supra* note 1, at 22.
[32] PHYSICIANS FOR HUMAN RIGHTS, *supra* note 61, at 131.
[33] POTTS, *supra* note 1, at 19.
[34] *Id.*
[35] *Id.* at 20.
[36] *See Bringing Rights to Bear*, *supra* note 2.
[37] The CEDAW Committee may consider individual or group communications relating to States parties to the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.
[38] *See* CENTER FOR REPRODUCTIVE RIGHTS, *Litigation Briefing Series: Alyne Da Silva Pimentel* (2009).
[39] POTTS, *supra* note 1, at 20.
[40] *Id.*
[41] WHO, BEYOND THE NUMBERS: REVIEWING MATERNAL DEATHS AND COMPLICATIONS TO MAKE PREGNANCY SAFER 14 (2004) [hereinafter BEYOND THE NUMBERS].
[42] *Id.* at 45.
[43] *Id.* at 57-59.
[44] Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, *Addendum: Mission to India*, para. 75, U.N. Doc. A/HRC/14/20/Add.2 (Apr. 15, 2010) (by Paul Hunt).
[45] POTTS, *supra* note 1, at 22.
[46] *Id.* at 21.
[47] The 2001 report on the incidence of maternal mortality by the Brazilian National Congress, *available in Portuguese at* http://www.portalmedico.org.br/biblioteca_virtual/cpi/CPIMortalidade_Matern.htm.
[48] See CENTER FOR REPRODUCTIVE RIGHTS, GAINING GROUND: A TOOL FOR ADVANCING REPRODUCTIVE LAW REFORM, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_GG_pregnancy.pdf.
[49] *Loi No 02-044 du 24 Juin 2002 Relative a la Santé de la Reproduction* [Law No. 02-044 of June 24, 2002, on Reproductive Health] (Mali).
[50] *Id.* art. 4.