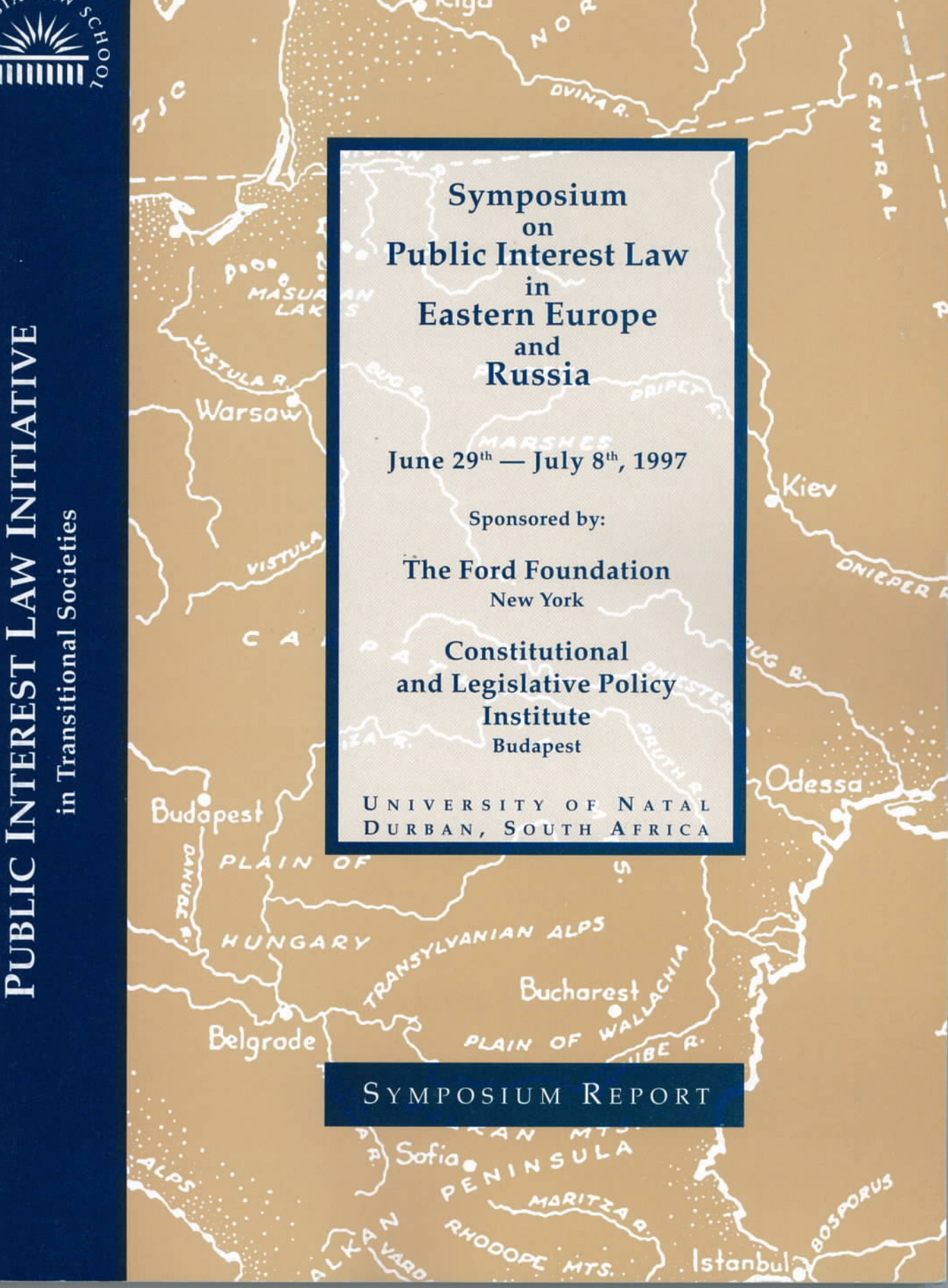

PUBLIC INTEREST LAW INITIATIVE

in Transitional Societies

Symposium on Public Interest Law in Eastern Europe and Russia

June 29th — July 8th, 1997

Sponsored by:

The Ford Foundation
New York

Constitutional and Legislative Policy Institute
Budapest

UNIVERSITY OF NATAL
DURBAN, SOUTH AFRICA

SYMPOSIUM REPORT

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Now known as  PILnet The Global Network for Public Interest Law

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Acknowledgments

This report is the result of a collaborative effort involving many of the participants in the Durban Symposium on Public Interest Law in Eastern Europe and Russia. Rapporteurs from among the participants prepared the narratives for each of the sessions, as indicated in the text.

The University of Natal hosted the symposium, which was sponsored by the Ford Foundation (FF) and the Constitutional and Legislative Policy Institute (COLPI) affiliated with the Open Society Institute (OSI). A steering committee provided substantive guidance in shaping the meeting's goals and agenda. Its members included: Judit Fridli (Hungary), Deborah Harding (OSI), Stephen Holmes (COLPI), Jan Hrubala (Slovakia), David McQuoid-Mason (South Africa), Urszula Nowakowska (Poland), Marek Nowicki (Poland), Martin Palous (Czech Republic), Dimitrina Petrova (Bulgaria), Edwin Rekosh (FF consultant), Andrzej Rzeplinski (Poland), Joseph Schull (FF) and Renate Weber (Romania).

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The Public Interest Law Initiative in Transitional Societies at Columbia Law School undertook the preparation and distribution of the report, and it was edited by the Public Interest Law Initiative's Director, Edwin Rekosh. Program Coordinator Erika Solyom assisted in the design and production of the report, and consultants Tom Bass and Karin Kunstler Goldman provided layout and editorial assistance. Christopher Berzins, a graphic designer, provided the artwork for the cover. Candid photos are by Mircea Toma.

The University of Natal and the Public Interest Law Initiative are grateful to the Ford Foundation and to the Constitutional and Legislative Policy Institute for their financial support of the Durban Symposium, and for their continuing commitment to the development of the public interest law field.

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Preface

From June 29 to July 8, 1997, the Ford Foundation and the Constitutional and Legislative Policy Institute of the Open Society Institute sponsored a Symposium on Public Interest Law in Eastern Europe and Russia held at the University of Natal in Durban, South Africa. Participating in the symposium were leaders of Eastern European and Russian non-governmental organizations (NGOs) from fields such as human rights, women's rights and environmental advocacy as well as educators, lawyers and journalists. Experts and donor representatives from South Africa, North and South America and Western Europe were also present. The Durban Symposium was a follow-up to a symposium held the previous summer in Oxford, England, and about one third of the more than seventy participants in Durban had also attended the Oxford meeting.

The objectives of the symposium were:

- to provide an opportunity for the exchange of experience and knowledge across national, professional and sectoral borders;
- to deepen understanding and sharpen effectiveness with respect to specific public interest law activities; and
- to expose Eastern Europeans and Russians engaged in public interest law activities to the rich experience of the South African public interest law field.

The meeting was part of ongoing programs of the Ford Foundation and the Constitutional and Legislative Policy Institute in support of public interest law in post-communist societies. The meeting was also seen by its sponsors as an occasion to shape future funding agendas in the public interest law field in response to needs and priorities articulated by its practitioners.

The Durban Symposium consisted of morning plenary sessions devoted to general public interest law topics, with the participants breaking out into smaller groups for afternoon workshops on specific public interest law activities. Workshops were devoted to three themes: education, advocacy and litigation, with individual workshops focusing on street law and public education, clinical legal education, public interest lobbying, strategic litigation of police abuse cases, international advocacy, strategies for addressing domestic violence, environmental litigation and standing to sue, and internet advocacy.

What is Public Interest Law?

Beginning with the Oxford meeting in the summer of 1996, participants in the public interest law symposia have experimented with using the term "public interest law" to define their shared values and tactics. Without presuming to define what public interest law might come to represent

in Eastern Europe and Russia, the following statement was distributed at the Oxford meeting in order to provide a framework for discussion:

> Defining public interest law is a difficult undertaking. In fact, it may be easier to define what public interest law is not. Public interest law is not a field of law in the traditional sense. It is not public law; it is not administrative law; it is not criminal law; it is not civil law. At the same time, it covers all of these fields.
>
> For the purposes of this meeting, we are not using public interest law to refer to a specific field of law. Rather, we are using the term to refer to a way of *working with* the law and an attitude *towards* the law. Furthermore, bringing selected legal cases in the courts is one important public interest law strategy, but it is not the only one. Public interest law work could also include law reform, legal education, legal literacy training and legal services. Moreover, it is a field that is not reserved to lawyers: public interest law often involves lobbying, research, public education and other activities which do not necessarily require technical expertise.
>
> We do not have a more precise definition than this in mind. Indeed, the meaning of a term such as "public interest law" is inevitably influenced by the legal and political culture of any given society in which it is used. This is because the concept of "public interest" is grounded in philosophical and cultural understandings about law and society.
>
> The fact that public interest law is an amorphous term is not a disadvantage. We are using the term in recognition that there is something shared by Central and Eastern European organizations working in human rights, women's rights, environmental advocacy, consumer protection, etc., in the way that they use the law, and in the way they *need* to use the law in order to achieve their goals. One shared view may be that the law is both a framework and a tool for change. By engaging with the law, these groups hope to make the most effective use possible of the existing legal framework and, at the same time, transform the framework itself. It is their motivation and goal in undertaking such work that might be described as promoting the "public interest."
>
> In saying this, we are not advocating a redefinition of what these groups do. Nor does it really matter if any come to describe what they do as "public interest law." What matters much more, and what comprises the main purpose of this meeting, is to encourage a fruitful exchange of experience and ideas among people who share a certain way of working with the law and a certain attitude towards the law. Defining the name we choose to give to this common project is less important.
>
> For those who nevertheless demand to have definitions, here are a few:
>
> - From the American perspective —
>
> Although the term "public interest law" was coined no more that two decades ago, it is not a new phenomenon. Public interest law is the outgrowth of diverse efforts stretching deep into American history

to secure legal representation for the powerless and disenfranchised. The legal aid movement of the 1800s, Progressive Era reformers such as Louis Brandeis, the civil liberties activism of the American Civil Liberties Union (ACLU) in the early 1900s, the watershed civil rights cases of the 1950s – these are some of the roots of public interest law. As Tulane law professor Oliver Houch observed in a recent *Yale Law Review* article:

> *These three large movements in poverty, civil liberties, and civil rights practice changed more than the law of their respective fields. As they evolved, particularly into the 1960s, these organizations changed the way lawyers approached the law. Their lawyers had clients and the clients were injured, but so also was a larger sense of justice which is as difficult to define precisely as it would be to deny. Most importantly, they did not simply seek compensation for their clients; increasingly they sought to change the law.*[1]

- From an international comparative perspective —

> The strategies and methods . . . fit into three overlapping categories of public interest law: access to justice, law reform and political empowerment. Insofar as public interest groups are concerned with access to justice, they try to expand the access of the population to legal aid or the justice system. This category focuses on the individual cases passing through the legal system. To the extent that public interest groups engage in law reform efforts, they work with the state and its agencies to try to change legal doctrine and institutions through test cases and cases that involve large numbers of people. This category constitutes advocacy from within the legal system and focuses on the rules and institutions of that system. The public interest groups who seek to achieve their goals through political empowerment regard the state as a site of struggle and takes [sic] action beyond attempting to influence the state through the use of legal advocacy. Groups in this category use public interest law to challenge the state by empowering the populace both directly and by strengthening community organizations.[2]

- From another American perspective —

> The current definition, adopted by the American Bar Association and the Council for Public Interest Law, not only includes traditional civil liberties and poverty work, but also encompasses all legal services and legal aid. The Council states that "public interest law is [an] . . . effort . . . to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in

[1] Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* (London: Westview Press 1989), p. 6. *quoting* Oliver A. Houck, "With Charity for All," 93 *Yale Law Journal* 8 (July 1984), p. 1441.

[2] NAACP Legal Defense & Education Fund, "Symposium Report," *Public Interest Law Around the World*, (New York: *Columbia Human Rights Law Review* 1992), p. 4.

recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests." This definition includes not only test case, or law reform, litigation on behalf of groups and organizations such as environmentalists and consumers, but also individual service cases for poor people. Furthermore, the definition makes no distinction as to funding source; public interest law can be financed by foundations, by the government, or by private lawyers.[3]

- From a comparative law perspective —

  Traditionally, the monopoly of the public interest representation in civil proceedings belongs to the state, be it in the civil-law or common-law system. The governmental institutions in charge of the monopoly in various legal systems resemble each other. The civil-law *Ministere public*, socialist *Prokuratura* and common-law Attorney General are all prosecutorial bodies that besides their primary function – prosecution of criminal acts – possess important powers in the pursuit of the public interest in civil proceedings. . . . The matters of public interest typically represented by the government [*ed. note: i.e., state*] differ in the common-law and civil-law system. Yet the concept of the public interest expanded equally in both systems with the social problems of our modern civilization. And in both systems, private individuals and groups also demanded the right to invoke actions and take active part in representation of new interests. With the lead of the United States, the doctrine of the state's monopoly in public interest litigation and the related doctrines of standing and cause of action have been revised.[4]

- From a comparative political science perspective —

  A constitution . . . is a framework for a debate about values . . . In the context of the debate, public interest litigationperforms three functions. First, the litigation process itself is an opportunity to air ideas and contribute to political discourse. Second, and less controversially, litigation can lead to the reinforcement of procedures which guarantee that political debate will be properly conducted and decisions taken in the light of it. Third, for legal and political commentators, attitudes to public interest litigation in a given jurisdiction provide an indicator of the relevant success of different models of politics and constitutional theories in shaping state and social institutions.[5]

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[3] Joel L. Handler, "Public Interest Law Firms in the United States," in Mauro Cappelletti and John Weisner, eds., *Access to Justice, Vol. II: Promising Institutions*, (Milan: Dott. A. Giuffre Editore 1979), p. 423.

[4] Vera Langer, "Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor," 36 *American Journal of Comparative Law* 279 (1988).

[5] David Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective," 55 *The Modern Law Review* 44, 72 (January 1992).

> Clearly, there can be no consensus at the present time on how the concept of public interest law fits into the contemporary legal and political cultures of Central and Eastern Europe. By holding this meeting, we do not intend to force "public interest law," or the activities of the participating organizations, into one box or another. Rather, we hope to use this loosely-defined term as a departure point for a vibrant discussion of future-oriented action.

Since the distribution of the above statement, the usage of "public interest law" has evolved in the region and has come to be accepted as a term that provides context to the work of those who have participated in the two symposia. An important conceptual underpinning of the term that has emerged through this process is the contrast it presents to communist-era notions of a unitary public interest assimilated into the state. One common denominator among the Durban participants was a strong belief that there is no unitary "public interest" and that "public interest" is not necessarily co-extensive with "state interest." Another common denominator was the priority placed on a law-based approach to fostering social change, through the use of diverse methodologies, such as, strategic litigation, legal services, campaigning for legislative reform, clinical legal education, and legal literacy training. The shared goal is to promote a legal environment comprised of diverse, decentralized mechanisms and actors that is conducive to the pursuit of competing notions of the public interest.

Observations Regarding the Durban Symposium

Some general conclusions can be drawn from the Durban symposium, the proceedings of which are summarized in the following pages. The meeting was intended, in part, to provide a more intensive and practical exchange on themes raised at the previous year's symposium in Oxford. The experience of participants in Durban demonstrated the utility of such practice-oriented learning opportunities, as well as the need for even more narrowly tailored efforts in the future. At the same time, the experience in Durban confirmed the value of providing practitioners with opportunities to examine the assumptions underlying their work, to assess their own impact and to place their efforts in a larger, more global context.

The meeting tackled a broad array of topics in a relatively brief period; as a result, many of the discussions were necessarily inconclusive. Nevertheless, a number of themes that emerged from individual sessions deserve emphasis:

- Access to justice is an important common point of interest among public interest law practitioners. The availability of legal representation for those who cannot afford to pay for it is grossly inadequate in the region, and there has been little attention focused on the issue thus far.

- Clinical legal education is an area of great interest both to legal educators and to NGOs in the region. Clinical legal education fills the need for providing future lawyers with practical skills, which are increasingly in demand, while also cultivating among them a public interest orientation. It also helps to fill the gap in access to justice for underrepresented individuals, groups and issues, and it provides NGOs with the opportunity to recruit and train future generations of staff lawyers.

- Street Law programs, which have also begun to develop in the region, hold the promise of helping to demystify the law, enhance awareness of public interest law issues and encourage the use of educational methods that promote critical thinking. Paralegal programs, such as those found in South Africa, are also promising means for enhancing legal literacy, especially for extremely underrepresented populations such as Roma.

- Public interest litigators in the region need to enhance their effectiveness in a number of areas, including: strategic planning and priority-setting, case identification, case management, evidence gathering, and innovative legal argumentation concerning standing issues and other procedural matters. While some obstacles to effective strategic litigation in the region derive from features of the respective legal systems, there is also growing evidence that creativity and resourceful can overcome many of them.

- Campaigning is a vital part of any public interest law strategy. Public interest law practitioners in the region would benefit from a more systematic approach to campaigning, media relations and legislative advocacy. In particular, it is important for public interest law practitioners to develop strategic planning skills with respect to campaigning and for NGOs to continue to build their relationships with journalists in order to improve media coverage of public interest law issues.

- Women's rights issues such as domestic violence require action by broad coalitions. NGOs with wider human rights mandates can make an important contribution by integrating women's rights into their work. Women's rights organizations can also enhance their effectiveness by undertaking to educate officials, journalists and others.

- International advocacy strategies in the region need to be developed further. For instance, underutilized UN mechanisms may produce worthwhile results in some cases. In addition, there is a need for greater coordination and information sharing regarding litigation before the European Court of Human Rights.

In order to advance the discussion of these and other topics, the Public Interest Law Initiative will endeavor to organize further opportunities for skills building and strategic planning. It will also produce new resources, such as a Public Interest Law Handbook, that develop and amplify some of the discussions recorded in this report.

Edwin Rekosh, Director
Public Interest Law Initiative
Columbia Law School
December 1997

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Opening Speech

The Development of the Public Interest Law Movement in South Africa

by Geoffrey Budlender[1]

For anyone interested in using law to promote justice, South Africa under apartheid did not present a promising picture.

The entire population was classified—by law—into racial groups. This classification determined political power—the majority of the population being excluded from the right to vote for or be elected to the national parliament; it determined the right to own and occupy land—the overwhelming bulk of the country's land being reserved for the white minority; it determined the right to attend school—all public schools being publicly segregated, with the government spending vastly more on each white child than on other children; it determined the right to use public amenities—unequal treatment of different groups being explicitly permitted by law; and it determined who was a South African at all—by law, some 7-8 million South Africans were denationalized and stripped of their South African citizenship on the grounds of ethnic origin.

The police had the legal power to detain individuals indefinitely without trial and in solitary confinement. During the successive states of emergency in the late 1980s, between 20,000 and 30,000 people were detained without trial. The government had the power to search without a warrant; to tap telephones; to ban meetings; to ban newspapers and other publications; to place individuals under house arrest; to ban organizations; to force communities to move from their homes; and to demolish unauthorized houses without first obtaining a court order or even giving any notice.

All of this was done under direct authority of the law, under a legal system in which the Courts were not permitted to pronounce on the validity of any statute passed by the Parliament.

Even within the context of such wide powers vested in the government, there was widespread official lawlessness. Through the efforts of the Truth and Reconciliation Commission, some of the hidden truth is now starting to emerge. The truth truly involves horrible accounts of murder, torture and brutality carried out by government officials who acted on the authority of people in very high places—and who knew that the government would do everything that it could do to protect them if there was any risk of the truth coming out. This was a system of government which was corrupt beyond financial corruption—it was corrupt in its very essence.

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[1] Director-General, Department of Land Affairs, Government of South Africa; previously an attorney in and later National Director of the Legal Resources Center.

And yet—in this hostile and unlikely environment—a paradox emerged. There was a vigorous and very active group of organizations which worked around and through the law to attempt to promote justice and democracy. In this unlikely environment, the work which they did was such that in 1995 an eminent sociologist of law, after an exhaustive analysis of "law in the struggle against apartheid," asked the question, "Did law make a difference?" and concluded "(t)he bottom line is an unambiguous yes."[2]

The purpose of my talk is to ask how this was possible, and what sorts of lessons emerged from this work. The topic of this seminar is, of course, "Public Interest Law in Eastern Europe and Russia." My knowledge of Eastern Europe and Russia is limited to what I have read and four fascinating days in the beautiful city of Prague. I will limit myself to talking about what I know something about, namely South Africa. It is for you to judge whether this has any relevance to Russia and Eastern Europe, and if so, what that relevance is.

I will not exhaust myself and you trying to define what public interest law is. I accept that it involves "diverse legal strategies and mechanisms to advocate in behalf of the public interest" as set out in the letter of invitation from the organizers. By "in behalf of public interest," I understand interests which are unrepresented or underrepresented in the political and legal process. Generally, those promoting the cause do not have a personal interest, or at least do not have a predominant personal interest, in the outcome. I will largely limit myself to issues of public interest litigation and the related question of access to legal services. Again, this is because this is the area where I have some personal experience.

Some Early Initiatives

Public interest law really took off in South Africa towards the end of the 1970s, but it did not start there. Over the years, the reported judgments of the South African courts reveal a significant number of cases that are really "public interest" cases. Many of them dealt with attempts to protect African rights against a steady erosion of the few rights which Africans had at union in 1910, an erosion which became an onslaught after the election of the National Party government in 1948.

The first substantial organization created specifically for this purpose was probably the South African Defense and Aid Fund, which was established in 1960.[3] The main legal services function of the Defense and Aid Fund was to defend people prosecuted for political crimes, but this came to be interpreted fairly broadly to include the representation of victims of apartheid in a wide range of criminal and civil litigation.

In 1966, the Defense and Aid Fund was declared an unlawful organization. The government insisted that it had no objection to the provision of defense in political trials.[4] However, its actions suggested otherwise. In 1971, the Dean of the Anglican Church in Johannesburg was prosecuted under the Terrorism Act, *inter alia* on the grounds that he had been providing funds for the defense of people charged with political offenses, and this was likely to foster the morale

[2] Richard L Able, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York: Routledge 1988), p. 533.

[3] The Defense and Aid Fund arose from the Treason Trial Defense Fund, which has been a special and dedicated fund established to fund the defense in the marathon treason trial which ran from 1956-1961.

[4] In fact, it denied that there was such a phenomenon as a political trial. Prosecutions under the "security" laws were simply another genus of criminal trial.

of people who were thinking of committing such offenses and was therefore likely to encourage hostility towards the State. He was convicted in the provincial division of the Supreme Court on this charge and others and sentenced to the statutory minimum of five years' imprisonment. He was ultimately acquitted by the Appellate Division of the Supreme Court.

After its banning, the Defense and Aid Fund in South Africa was succeeded by the International Defense and Aid Fund, based in London. It continued and expanded the work of the South Africa Fund. However, because of the political climate in South Africa and the banning of the South African Fund, it had to operate on a covert basis. It raised funds outside South Africa and then sent them to lawyers in South Africa, using as a conduit a firm of solicitors in England with a "respectable" person outside South Africa who would pose as the donor of the funds.

Before the take-off at the end of the 1970s, a number of organizations within South Africa operated in what may be broadly called the area of public interest law. Three examples will demonstrate the sort of activities which were carried on. The *Black Sash*, an organization of largely white women, ran advice offices to provide advice and information on a range of issues, focused particularly on the pass laws, which restricted the freedom of movement and residence of Africans. They became experts in the area and ran public campaigns. They provided advice on a case-by-case basis. Where a particularly important case needed to be taken to court, they tried to find a lawyer to undertake it without charging or went through the state legal aid system. The *Legal Aid Bureau*, a welfare organization, provided advice to the public on a very wide range of issues. Where the services of lawyers were needed, they enlisted the assistance of sympathetic lawyers in private practice. University students set up *legal aid clinics* at which they gave advice to members of the public in poor areas. Again, they worked with sympathetic lawyers and the state legal aid scheme.

The organizations doing this work were too few, and the resources available to them were inadequate. A common thread was the lack of lawyers available to take their cases to court where necessary. Sympathetic lawyers did the work on a case-by-case basis, when they could find the time. And so there was a further weakness: there was no legal service which was addressing the issues which they raised in a strategic and focused manner.

The New Wave

Towards the end of the 1970s a number of public interest law organizations were formed. While their methods varied, there were a number of elements which they had in common: they aimed to work on or through the law as a means of promoting social justice. They had on their staff full-time salaried lawyers devoted to this work; they wished to tackle justice issues in a strategic manner; and they believed that the courts were a potentially useful "site of struggle." They were initially funded mainly by US foundations, and in particular the Ford Foundation, which had decided to make a strategic intervention in South Africa in this area.

Over the next fifteen years, they took on a wide range of issues. These included the pass laws, forced removals and evictions, unfair labor practices, detention without trial, provisions of the "emergency" laws, forced conscription into the army, and the "homeland" policy which denationalized South Africans. Looking back, I think it is fair to say that they had more success than they might themselves have predicted. There were also very significant failures. It is difficult for a participant in this movement to give an impartial judgment on how successful they were overall. I have already mentioned the conclusion reached by Professor Abel. What can, I think, be said without fear of successful contradiction is that the public interest movement in South Africa

made a significant contribution to the movement for democracy in South Africa.[5]

Let me mention three examples of the work which was done—they give some flavor of what was involved:

- The pass laws prohibited Africans from living in the towns without a permit, unless they qualified for a statutory exemption. A permit was necessary to remain in a town for longer than 72 hours, to work in a town, to move from one job to another and to live on a family basis. The statutory exemptions gave people freedom of movement, the effective right to live in the cities on a family basis and the ability to change jobs without asking for official permission.[6] One of the exemptions was that a worker had a right of permanent residence in the towns in which he or she had worked continuously for one employer for ten years. To prevent people from obtaining these rights, the government introduced a regulation providing that no contract could be for longer than a year. When the ten years were up, they argued that the worker had not worked continuously for ten years for that employer—rather he had worked for ten consecutive periods of one year each. In the *Rikhoto* case, the highest court rejected this argument. It held that it had to look at the substance of what had happened, not the form—and anyway, the government could not by regulation take away a right granted by an Act of Parliament.

- There were widespread detentions of activists during "states of emergency," which were declared from July 1985. In the Eastern Cape, detainees were systematically tortured and assaulted. In the *Orr* case, a young government-employed district surgeon collected the evidence of torture and made an application to the Supreme Court for an interdict preventing further torture. The interdict was granted. Wide publicity followed, and the incidence of torture undoubtedly declined dramatically.

- The government created ten African "homelands," which constituted 13% of the territory of the country. Every African was allocated to one of these "homelands" according to his or her ethnic origins. When a "homeland" was declared constitutionally independent, the people who had been allocated to it were deprived of their South African citizenship. This was achieved in the case of four homelands. The fifth was to be KwaNdebele. Resistance to "independence" was brutally repressed. In the *Moutse* case, the residents of the areas of Moutse went to court to argue that the incorporation of their land into KwaNdebele was unlawful, because they were ethnically and linguistically not part of the ethnic group assigned to KwaNdebele. They succeeded in the highest court. The KwaNdebele Legislative Assembly, which had supported "independence," was composed partly of chiefs and partly of elected representatives. In fact, only a tiny number of people had voted. Women had not been permitted to participate at all in the elections, either as candidates or as

[5] I do not intend to enter here into a debate over whether they legitimized an illegitimate legal system. My views on this are expressed in my chapter "On Practicing Law" in Hugh Corder, ed., *Essays on Law and Social Practice in South Africa* (Cape Town: Juta 1988).

[6] As a result of the *Komani* case, one of the first cases undertaken by the new public interest lawyers.

> voters. In the *Machika* case, a group of women challenged the validity of the Legislative Assembly, arguing that they had been unlawfully discriminated against in the election process, because the law authorizing the creation of the Legislative Assembly did not authorize discrimination against women. They won their case. New elections were held, all those elected were opposed to "independence," and the government's plans for KwaNdebele's "independence" had to be abandoned.

There were very many other cases. The courts declared unlawful the removal of a tribe from its land; declared unlawful an attempt forcibly to move the residents of an urban township to a "homeland"; ordered the release of detainees; acquitted the leaders of the internal political resistance in two major show trials; avoided statutory provisions ousting the jurisdiction of the courts by holding that they applied only to lawful actions; ordered the reinstatement in their jobs of striking mineworkers; and so on.

Cases such as these were taken to court by the new public interest institutions on behalf of their clients, or by private lawyers who were paid from overseas funds, mainly through the International Defense and Aid Fund, for in the meanwhile IDAF had grown to be a major institution. By 1992, when it ended its overseas operations as a result of the "unbanning" of political organizations in South Africa, it was spending almost as much on legal services in South Africa as the South African government legal aid system. Most of the funding came from foreign governments. Almost all of it was paid to private practitioners in South Africa for a broad range of public interest and human rights cases.

In these and other cases, the new public interest law movement had substantial success. The success was sustained for about fifteen years, right through to the country's first democratic elections. The obvious question is: Why? How is it that in the unpromising environment that I have just described, significant and sustained successes of this support were possible?

Repression Through Law: The South African Paradox

Apartheid was a unique political system. Of course, it was unique in the way in which the country's citizens were rigidly classified into racial groups, and rights and duties distributed differently to racial groups. This was enforced through a repressive state apparatus. This is not unique. South Africa is not the only country in which a minority have exercised political power over the majority and have repressed resistance. But one of the most unusual features of the South African system was that this was all done through the law. The government could discriminate against its citizens. But first it passed a law saying that it could do so. People could be forcibly removed from their homes—but through a law. Opponents could be detained without a trial—but there had to be a law to authorize detention. If they were tortured, it was unlawful—and so there had to be an elaborate system of lies and censorship to deny that torture happened at all. Not because it was brutal, but because it was unlawful.

So the result was that discrimination and repression were mediated through the law. The reasons for this can be debated at length. They have something to do with the political culture of those who held power. Whatever the reasons, the result is that the law lends some legitimacy to the discrimination and repression. But this has its own consequence. The historian E.P. Thompson, reviewing the relationship between state absolutism and the courts of eighteenth century England, drew the following conclusion:

> The essential precondition for the effectiveness of law, in its function as ideology, is that is shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion by actually *being* just.[7]

The South Africa courts *were* in fact sometimes just. The country had a tradition of courts which were formally independent, at least at the level of the higher courts. Judges were not in the habit of receiving instructions from government on how to decide a case. In fact, most of them would have been deeply offended by an attempt to give such an instruction. The effect of this formal independence was severely limited by the fact that the judges were all white (and almost all male). They inevitably brought with them to the bench the attitudes, perceptions and assumptions of white South Africans. But the judges believed that they were independent, and acted out their belief, within the framework of the law and their assumptions about justice and the society in which they operated.

The result was that it was possible to attempt to hold the system to its promises of consistency and lawfulness. This is how the "independence" of the KwaNdebele was stopped, partly through the courts. Both of the cases I have mentioned were objectively bizarre. In the *Moutse* case, the litigants used a bizarre premise—that every South African should be compelled to become a citizen of a "country" to which he or she was assigned by law on the basis of his or her ethnic origins—to undermine their allocation of KwaNdebele—because of their ethnic origins. They held no truck with the policy, but they said if those are the rules, then you, the government, must also abide by them. In the *Machika* case, the women attacked their disenfranchisement by arguing, in the world's only country with a racially exclusive franchise, that a sexually exclusive franchise violated the equality of the law—because discrimination on the grounds of gender, unlike discrimination on the grounds of race, was not expressly authorized by a law.

South African legal activists rightly complained about the "positivism" of South African judges. By this they meant that judges had no regard to the values which were supposed to underlie the legal system and had no regard to the consequences of the manner in which they interpreted statutes but pretended that they were undertaking a purely mechanical task of finding out the intention of the law-maker.[8] But this blind adherence to a "phonographic" theory of interpretation had its positive results. In many of the successful cases brought by the public interest lawyers, laws were mechanically interpreted in a way which was plainly in conflict with the true intention of the law-maker, because the law-maker had not clearly enough expressed its intention. During the 1980s, a small group of judges emerged who *did* seek to give effect to the underlying values of a legal order—freedom and equity. They were able to find creative ways of advancing freedom through the judicial process. But most of the public interest cases were in fact heard and decided by conservative judges of the old school, who were "just doing their job."

There were limits to all of this. There is little doubt in my mind that there would have been no possibility of success if the legal attack had threatened the very foundations of the system. A technically valid attack on racial discrimination *per se*, or on the constitutional foundations of the state, would almost certainly have been rejected by the courts. That is most clearly demonstrated by the acquiescence of the courts in the government's abuses during the states of emergency.

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[7] E.P. Thompson, *Whigs and Hunters* (New York: Pantheon 1975), p. 265.

[8] The inaugural address of Professor John Dugard in 1971 was a path-breaking analysis in this regard. John Dugard, "The Judicial Process, Positivism and Civil Liberty," *South African Law Journal*, Vol. 1, No. 12, pp. 181-200 (1971).

Those cases demonstrated again what has been shown in other countries—that when courts perceive that "society" is under attack, they tend to close ranks with those in power. It is particularly striking that the reactionary position of the courts on "security" issues coincided with a more open-minded approach on racial issues.

But an obvious question arises: Why did the government not take remedial action when it lost cases in the court? Why did it not ban the new organizations, as it had banned the Defense and Aid Fund? Why did it not simply amend the laws to reverse the decisions of the courts?

The main answer is to be found in the changing political climate of the 1980s. That was a period of renewed mass resistance to apartheid, and it focused international attention on what was happening in South Africa. The first of the new wave of public interest cases was the *Komani* case, which was decided in 1980. It dealt with the pass laws and had a very large impact on making it easier for Africans to live on a family basis in the towns. For a while it was not clear whether the government would reverse the decision by legislation. The lawyers and others in the public interest movement lobbied intensively—through newspapers, through foreign diplomats and (ironically) by commissioning a study which suggested that the likely impact of the decision would be less than the government feared. Finally, the Cabinet decided not to reverse the decision. A major reason was undoubtedly local and international pressure. This was a time when economic sanctions against South Africa were growing and starting to bite. Government was keen to present a progressive face to the world, to show that it was "moving in the right direction." A new law which would be represented as taking away even further rights from Africans would undermine the government's strategy on the international front and possibly cause further internal resistance. So the government held off. I have little doubt that if the *Komani* had been decided ten years earlier, it would have been swiftly reversed by legislation. But the political context had changed.

So the conclusions I draw about why this work was possible are the following:

- The State exercised its power through the legal system.
- The judges believed that they were independent, and most acted out that belief.
- It was therefore possible to hold the system to its promises, which was the main instrument of litigation.
- The conservatism of most of the judges, adopting a "positivistic" or technicist method of interpreting the law, created the opportunity to have the laws interpreted in ways which did not favor the government.
- There were limits to this: a fundamental challenge to the system would have failed in the courts, whether or not it was technically competent.
- The cases were brought at the right time, enabling activists to use local and international pressure on the government to protect favorable decisions of the courts.
- The litigation had to be accompanied by focused lobbying, which was planned in advance of the decision of the court.

How the Public Interest Organizations Went About Their Work

As I have said, there had been public interest lawyers in South Africa before the new wave. What was different in the new wave was the number of people involved and the fact that some of them worked full-time in this area. This was, of course, only possible through the raising of funds, most of which came from outside South Africa.

Having full-time lawyers made it possible to plan the work strategically. I have mentioned the *Rikhoto* case. That case is actually described in the funding proposal which Legal Resources Center sent out in 1978, before it had even opened its doors. The case was planned well before it went to Court. A suitable client was carefully selected—Mr. Rikhoto was actually the third client selected. The case was finally decided in 1983. This sort of careful strategic planning was made possible by having people dedicated full-time to the work.

The organizations also took steps to protect themselves against government action. The Legal Resources Center established a board of trustees with the dual function of giving advice and guidance to the staff and providing protection against hostile government action. The trustees were leaders of the established legal profession and ultimately included some retired and sitting judges.[9] This was very helpful. At the height of the emergency, the presence of sitting judges on the board, protecting the Center, sufficiently upset the government that the Minister of Justice attempted to "persuade" them to resign as trustees, through the Chief Justice. When it emerged that the Annual General Meeting of the Center had been bugged by the police, three senior trustees confronted the Minister of Law and Order and the Commissioner of Police. The Center also obtained the formal approval of the organized legal profession—again, sometimes useful protection against interference with its professional work on behalf of clients.

Another lesson was the value of high-volume "routine" casework alongside the grand precedent-setting cases. Of course, the volume work and the focus work can be done by separate organizations, if they plan their strategy together. A heavy caseload was found to be useful for three reasons: to identify common problems which needed a legal solution, particularly in the area of consumer protection; to identify a suitable litigant; and to enforce decisions of the Supreme Court on the ground. The Legal Resources Center, working with the Black Sash which had an enormous caseload, handled literally hundreds of cases in the aftermath of *Komani* and took six further cases to the Supreme Court to ensure that the judgment was enforced on the ground.

A key issue was the link with popular movements. Political resistance to apartheid was at the heart of the work. The *Machika* case could be designed by lawyers, but it could not work unless there were women with the courage to stand up to vicious repression. You could not stop forced removals if the people bowed to the pressure and intimidation to move. Links with popular movements were best demonstrated in the area of labor law, where the emergent trade unions made skillful use of lawyers to build an entirely new labor jurisprudence and to protect themselves as they grew.

To me, this was a fundamental point. There were limits to what the lawyers on their own could achieve. Rick Abel has pointed out that:

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[9] Professor George Cooper described the Trust as a "heat-shield." George Cooper, "Public Interest Law - South African Style," *Columbia Human Rights Law Review*, Vol. 12, p. 105 (1980).

> The centrality of law in the American labor, civil rights, feminist, welfare rights, consumer, environmentalist, and gay rights movements can tempt observers to parochial and historical exaggerations of its capacity to effect social change.[10]

Here it needs to be remembered that social movements can also find lawyers very helpful in assisting them to build the movement. People doing this work need frequent help with drafting constitutions, legal advice on organizational issue and all the mundane trivia of life down to negotiating a lease for the offices.

Legal activism did not take place only in the courts. A sympathetic member of parliament could be a valuable ally in particular situations. The press had a critical role to play in influencing public opinion and in exposing the truth. The main impact of the *Orr* case was not caused by the judgment of the Court—it was caused by the publicity generated by the shocking facts and used to telling effect.

As area where the public interest lawyers could have done better was through cooperation with lawyers in private practice, who were sympathetic and willing to donate some of their time. This was demonstrated in 1979, when the government started literally hundreds of prosecutions under the Group Areas Act of people who were living illegally in the areas of Johannesburg set aside by law for whites. There was seldom a valid defense. And inventive defense based on necessity failed in the highest court in the *Werner and Adams* case. But the private profession came to the rescue. A large number of lawyers agreed to represent the accused people for free. The prosecution now found that they had to prove every element of the offense—the race of the person prosecuted, the racial demarcation of the area concerned, the residence of the accused in the area. And after conviction, there was further argument about sentencing. Simply making the prosecution do its job in every case brought the campaign of prosecutions crashing to the ground because of the time involved.[11] This was a shining example of cooperation between the public interest lawyers and the private profession. There had been a similar example in Cape Town a few years before, relating to the prosecution of people living in the Crossroads "squatter" camp. But regrettably, the examples were too few. The new public interest lawyers were so busy with their "own" work that they failed to mobilize other resources which could have multiplied the effect of what they were doing.

The lessons I learned from all of this, therefore, were the following:

- There is a need to build organizations which are sturdy and sustainable—financially, politically, structurally.
- Having full-time lawyers makes it easier to plan the work strategically. Our experience was almost exactly as summarized in the Report on last year's Symposium: the need to be proactive in case selection, to select the right client, to balance the client's interest and the public interest, to select the right defendant, to appoint an intermediary between the lawyers and the client where necessary (field-workers and para-legals played a critical role in many cases), to select the proper forum, to select the right lawyer, to maximize the impact of a single case and to celebrate partial victories.

[10] Abel, *op cit*, p. 522.

[11] The prosecution finally collapsed when in the *Govender* case, a rights-minded judge held that the question of alternative accommodation had to be considered before an order for eviction could be made.

- "Routine" casework can be very helpful in identifying important issues to litigate, finding the right client, and enforcing a court decision on the ground. Separate but linked organizations can play different roles.
- The effect of the legal work is greatly strengthened by links with popular movements and in some areas is impossible without those links. The lawyers can provide valuable organizational support to those movements.
- Effective legal activism needs to be linked with lobbying and work through the media, parliament and other institutions which can inform and change public and government behavior.
- The impact of the work of the public interest lawyers can be greatly multiplied if they cooperate with sympathetic lawyers in private practice.

Conclusion

The work of South African public interest lawyers did not end in 1994. Now they have a new challenge—to hold the new government to the promises of our new democracy, to make democracy real and to make democracy a means of sharing the resources of our country among all its people. They have powerful new tools: a constitution with a strong and extensive bill of rights; a new Constitutional Court with a firm commitment to human rights; new legal rules which give standing to those who seek to promote the public interest; and new administrative, political and legal remedies for our problems. The public interest movement has to play a creative role in building our new democracy. At least for the South Africans the lessons from the struggle against apartheid remain as valid as ever in this new context.

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Plenary Sessions

Introductory Session

Rapporteur: Mary McAuley

Moderator: Joseph Schull, The Ford Foundation
Presenters: Edwin Rekosh, The Ford Foundation
Jan Hrubala, Partners for Democratic Change
Dimitrina Petrova, European Roma Rights Center
Wiktor Osiatynski, Central European University/
The Open Society Institute

Joseph Schull began the session by reminding the participants of the aim behind the previous year's symposium, itself an experiment. The hope had been that the bringing together, under the heading public interest law, of diverse groups, all of which use law in some way to advance social goods, would throw light on their activities. The exercise had proved to be useful and had underlined both the shared commitment to democratic values and the rule of law as well as the obstacles facing those attempting to realize such values. It was also decided at Oxford to hold a second symposium with a core of the previous participants, together with newcomers, to move on from the more conceptual issues discussed at the first symposium to address more practical concerns. Another important objective was to introduce the experience of South Africa, a country in transition, yet having a rich public interest law tradition.

Edwin Rekosh emphasized that the main aim of the meeting was to create a forum for intensive exchange among the East European and Russian participants; exposure to the South African experience was to be an added bonus. The purpose of the symposium was not to train but rather to brainstorm together, with the aim of applying creative thought to problem solving, with an emphasis on practical strategies. The overlapping themes for the meeting would be education, advocacy and litigation.

Jan Hrubala drew from his own experience. During his previous profession as a judge he was responsible as a representative of the state for solving problems; now, as a private lawyer, he was interested in alternative methods of dispute resolution and in campaigning. He had left the judiciary in order to try to push it in a reformist direction, to persuade others that many issues that come before the courts need not, while other problems that never reach the courts should have their advocates. At first his fellow judges looked askance at his activities, but he found that attitudes were gradually changing, and he was especially hopeful that it would be possible to attract students to this kind of work.

Dimitrina Petrova advanced a number of propositions and counter propositions. (1) She asked whether public interest law does or does not provide a common framework. She suggested that one could distinguish a minimalist position and a maximalist position. The minimalist position is that public interest law refers to the activities of those who work through or around law but for whom law itself is not enough (a kind of self-transcendence of lawyers). The maximalist position is that there exists a shared mega-strategy based on common values from which we derive actual strategies, and advance together as a movement. Both positions, she argued, were mistaken: the minimalist position is inadequate – it is too open to abuse in an anti-liberal direction. And the maximalist position is based on a false assumption, that we share common values, which is not true; we speak common words – and that seems sufficient for us to meet and discuss. (2) We are part of a community, but we are isolated groups. Maybe, she argued, there are as many as 3,000 vaguely defined "public interest lawyers" in Eastern Europe, but lawyers are very territorial, limited by their national legal systems and not given to participating in communities. (3) The Oxford experience had underlined the value of networking and of using e-mail connections but simultaneously reinforced a sense of what she called "performative contradiction": the pressure of daily, internal decision-making dictated by the urgent needs of legal action versus the need to make sense of one's activities in a larger historical context or analytic framework.

Wiktor Osiatynski referred to the shock he had experienced upon attending the Oxford symposium. The issue that had occupied him, prior to Oxford, was the need to establish what is missing from legal systems that prevents the use of law as an instrument of change. At Oxford he became aware that, despite all the inadequacies of the systems, a vast array of activities were taking place, from the use of administrative procedures to litigation, that were aiding change. More important than *which* instruments were being used was the fact that instruments *were* being used. He then addressed the question of what could be learned from the South African experience, dwelling first on differences and then on similarities (of which there were fewer), and emphasized that the key difference was the absence of a legal culture in Eastern Europe. A crucial task, he continued, was the creation of a legal state and that would require more than public interest activities. Among the obstacles he cited were the interests of state officials themselves, and values (including the perception of law as protection but not as an instrument for change), but, he suggested, these obstacles could diminish quite rapidly. The aim should be to move from a moralistic culture to a legal culture: from principles to rules, and from a position of viewing law only as a means of defending and protecting rights (that of the human rights activist) to one of seeing law as a way of influencing public policy. All those working in NGOs today should be aware that for many it has become a good "business," offering a livelihood and personal opportunities. He concluded by stressing the importance of legal empowerment through education and paralegal activities to empower groups to act on their own behalf.

Discussion

Some participants disagreed with Petrova's claim that the group shared no common values, arguing in favor of a shared commitment to civil and political rights or a commitment to the concept of public space. The questions of defining the public interest and the role of public interest law were raised: for instance, was it in the public interest to strengthen defendants' rights at a time of rampant criminality? The goal, one participant responded, was to ensure that legal procedures were observed; another response was to define the public interest as that which furthered the advance of a legal culture. Other points raised included the use of law for political purposes in countries undergoing transition and the troublesome question of speaking, from

within one value system, on behalf of peoples who may hold a different value system (which does not include support for the rule of law).

Participants during a plenary session.

Management of Public Interest Law Organizations

Rapporteur: Joseph Schull

Moderator: Alice Brown, Ford Foundation
Speakers: Mzo Mdladla, Legal Resources Center
JP Purshotam, Legal Resources Center
Marek Nowicki, Helsinki Foundation for Human Rights
Barry Steinhardt, ACLU

The first plenary session addressed a variety of issues related to the management of public interest law organizations, including case selection and client group focus, professional development of staff, relations with government and funding.

Mzo Mdladla described the work of the Legal Resources Centre (LRC), which was founded in 1979. The LRC's focus has been primarily on impact litigation, and its client base is primarily the poor, landless and homeless. Indeed, for many in South Africa, "public interest law" is understood as "poor man's law" in view of the need to address the legacy of exclusion and socio-economic injustice inherited from the apartheid regime. The LRC's substantive focus is on land, housing and development issues: numerous cases seek to help the homeless gain access to land or the dispossessed to regain access to land from which they were evicted (*e.g.*, the *Cato Manor* case in Durban). With the transition to democracy and the passage of a new constitution which provides greater protection for socio-economic rights, the LRC has also recently undertaken constitutional litigation.

The LRC operates through a network of regional offices, each of which functions autonomously and addresses issues of greatest local relevance. For instance, in Natal province, which has been wracked by political unrest, the LRC office works on access to justice with an emphasis on police work. The LRC also has an advice office program, which encourages communities to form their own advice centers, with the LRC providing back-up and training, and taking cases emanating from the centers.

Mdladla stated that the selection of staff is a key management issue for LRC. A priority is to recruit individuals who share the values of the organization. A strong emphasis is placed upon staff development and training, and every staff member must be enabled to make a contribution to the organization. This has become a particular priority since most of the former senior staff members have left to take positions in government. Yet, Mdladla added, the LRC's attention to staff development has meant that this transition has made the organization stronger, not weaker.

Mdladla also emphasized the importance of collaboration with grassroots organizations in order to ensure the full impact of cases that are successfully litigated.

JP Purshotam added several comments about the funding base of the LRC. The organization does not charge fees, but recent changes in legislation have enabled it to recover its costs in cases it litigates.

Marek Nowicki noted that there were numerous similarities between South Africa and Eastern Europe in terms of the problems faced by public interest law organizations. Financial support

is a key issue for Eastern European NGOs, and many groups are now considering the advisability of seeking government support for their work. Nowicki stated that he believes this would be a mistake. Public interest law groups' main goal is to protect individual rights against the state, which would create a major potential conflict of interest if public funding were accepted. Nowicki concurred with Mdladla on the need for selectivity in developing the focus of legal assistance and litigation programs. Many Eastern European NGOs try to assist everyone, which constrains their effectiveness in the face of limited resources. Staff development is another issue that needs increased attention. Eastern European NGOs often believe that they do not have enough time or resources to invest in staff development and training. Yet, Nowicki pointed out, victims of human rights abuses require professional assistance, which must be developed.

Barry Steinhardt described the work of the ACLU, which is 77-years-old, has 300,000 members, 300 staff (including 100 lawyers) and 60 offices around the United States. Its annual budget is $35 million. This makes it a small group for a national membership organization in the US context, and most of its state offices have only one or two staff members and no staff lawyers.

A key issue for a public interest law organization, said Steinhardt, is what kind of legal service provider it seeks to be. In the United States, two models have emerged: that of the high-volume legal service provider, which provides assistance in a large number of cases within a given area of the law, or the law reform organization, which takes a relatively small number of cases affecting large numbers of people and/or with precedential significance for the law. The ACLU is within the second of these models and focuses on strategic impact litigation.

Like NGOs in Eastern Europe and South Africa, US NGOs also must be cautious about preserving their non-partisanship. The ACLU does not accept government funds, with the exception of the Civil Rights Attorneys' Fees Act, which provides for the recovery of attorneys fees when one sues the state or federal government. The ACLU also relies on membership fees and private funding.

NGOs which face a large inflow of people seeking legal advice must develop techniques for dealing adequately with these requests without straining their professional resources. Steinhardt noted that it was advisable, where possible, to use volunteers and paralegals for the first contact with clients, while using lawyers for the more purely legal work for which they are trained. NGOs must also consider such questions as: would a difficult case being considered for litigation consume too much time? Does sufficient funding exist to support work on a particular case? Can the underlying issue or problem be addressed by legal means? Litigation may not be the best approach to an issue, which may call instead for legislative advocacy or public opinion formation.

Steinhardt also stressed that public interest lawyers must think creatively and have a view not only of what the law is, but also of what it should be.

In the discussion which followed, the speakers were asked to elaborate on a number of their points. With regard to the LRC's funding, **Mdladla** stated that 28% of its budget is now raised within South Africa. The LRC now has an endowment and a reserve fund, yet these have created problems with some funders, who tend to perceive the organization as wealthier than it really is.

Nowicki returned to the funding issue and stated that one needed to discuss education and litigation activities separately. Nowicki opined that the cost of most educational activities of human rights NGOs should eventually be absorbed by the government, especially local authorities. In addition, some grassroots educational activities may become self-financing. Litigation is different, however, and here, one should not seek government financing. In the future, the

Helsinki Foundation may be divided in two, with one part to receive support from local government for educational activities, and another part which will remain strictly independent of government. How will the latter be financed? This is not yet clear. Like South African public interest law groups, Eastern European NGOs remain heavily dependent on foreign donors. The Helsinki Foundation has recently begun to seek support, cautiously, from the Polish business community, and it received its first donation last year. It is viewed as less risky to accept support from multinationals based in Poland, such as IBM and Coca-Cola, and some in-kind support may be sought from firms like Price Waterhouse. But this support base remains relatively modest and will not replace foreign funding in the foreseeable future.

A discussion ensued regarding relations with government, with one participant stating that foreign donors give money without the strings that are always attached by an NGO's own government. Another participant replied that "government" money is taxpayers' money to which they have a legitimate claim. NGOs should not see government money as necessarily alien; rather, they need to claim it in order to work on behalf of the public interest which they serve.

LRC speakers were asked about salary levels within their organization. **JP Purshotam** replied that LRC has two sets of salaries, for professional and administrative staff respectively. Attorneys do not get paid the private market rate; they start at a relatively low salary that rises slightly less than inflation each year. Administrative staff get private market-level salaries and regular annual increases.

The panel for the session on Management of Public Interest Law Organizations: (L to R) Alice Brown (Ford Foundation), Barry Steinhart (ACLU), Marek Nowicki (Helsinki Foundation for Human Rights), JP Purshotam (LRC) and Mzo Mdladla (LRC).

Access to Justice / Legal Services

Rapporteur: Francoise Girard

Moderator: James Goldston, European Roma Rights Center
Resource Persons: David McQuoid-Mason, University of Natal
Yussuf Vawda, University of Durban-Westville
Karoly Bard, Constitutional and Legislative Policy Institute

David McQuoid-Mason described the situation in South Africa with respect to access to legal advice and representation**:**

1. The legal profession in South Africa is small in number, and largely white and male.

   Today in South Africa there are 10,000 lawyers for a population of 39 million (formerly thought to be 43 million). 85 percent of lawyers are white, fifteen percent are non-white (black, Indian, coloured). Fourteen percent of lawyers are women.

2. Most accused in criminal cases are never represented by a lawyer.

   In criminal cases in 1994-1995, 60 percent of the accused in regional courts (where serious crimes are prosecuted) were unrepresented. 89 percent of the accused in district courts (less serious crimes) were unrepresented.

   There were 54,416 regional court criminal cases and 2.2 million district court criminal cases recorded. Out of the 2.2 million cases recorded, about 700,000 ended up going to trial. On the other hand, in the High Court, where only very serious criminal cases are tried (very serious murders, high treason), out of 1,739 cases, 100% of the accused were represented.

3. Most sentenced prisoners go to jail without representation.

   In 1994-1995, there were 82,252 (76% of total number) unsentenced prisoners and 27,320 (24% of total number) sentenced prisoners in custody on an average day.

   About eighty-five percent of sentenced prisoners had gone to jail without having been represented, resulting in a total of about 100,000 sentenced prisoners a year going to jail without representation.

4. The challenge of finding resources to defend the accused is particularly great in the face of the crime wave now plaguing South Africa.

   The latest crime statistics for South Africa point to the following annual rates per 100,000 people:

   - murder 60
   - attempted murder 67
   - armed robbery 159
   - rape 119
   - serious assault 545

In this context, it is difficult to ask the government for resources to represent and defend those accused or convicted of crimes!

5. However, the Constitution of South Africa provides for the right of the accused or detained to legal representation — this is a duty of the state.

   Section 35 (2) of the Constitution reads as follows:

   > Everyone who is **detained, including every sentenced prisoner**, has the right (...)
   >
   > (b) to **choose**, and to **consult** with a legal practitioner, and to be informed of this right promptly;
   >
   > (c) to have a legal practitioner **assigned to the detained person by the state, at state expense**, if substantial injustice would otherwise result, and to be informed of this right promptly.

   While section 35 (3) reads:

   > Every **accused** has a right to a fair trial, which includes the right (...)
   >
   > (f) to **choose**, and **be represented** by, a legal practitioner, and to be informed of this right;
   >
   > (g) to have a legal practitioner **assigned to the accused by the state, and at state expense**, if substantial injustice would otherwise result, and to be informed of this right.

   These provisions can certainly be used in creative ways by lawyers. For example, the right to "consult" a legal practitioner could possibly be invoked to require access to legal advice hotlines.

   Moreover, section 34 of the Constitution guarantees the right of access to courts in any dispute. This provision has been used to attack short time limitations (prescriptive periods) for suing the state. Could it be used to require that the state provide legal aid to those in need in civil cases?

6. The Legal Aid system in South Africa leaves large numbers without access to legal representation.

   The current Legal Aid system in South Africa dates back to 1969, when the Legal Aid Act was adopted to calm the international uproar over the 1966 government ban of the Defense Fund. The Act created a Legal Aid Board charged with deciding which persons could receive state-funded legal representation. Funding for representation is "means tested" for ordinary cases. No means test is applied for constitutional cases. The Legal Aid Act was, however, never implemented very vigorously, and adequate resources were never provided.

   In 1995-1996, the Legal Aid Board granted representation in 108,285 cases, of which 83,606 were criminal cases (77%), and 24,679 were civil cases (22%). (*N.b.,* of the civil cases, 12,021 were divorce cases, 1,954 were labor matters, and 10,704 were other civil matters.)

   Of all cases granted, 74% were to blacks, 16% to coloured, 8% to whites and 1% to Indians. Percentages by population groups were therefore more or less in line with the demographic composition of South Africa.

7. Several types of Legal Aid systems co-exist in South Africa

   a. Judicare system

      This is similar to the British system. In Judicare, cases are assigned by the state to a private lawyer. The system is expensive, and the lawyer assigned the cases do not always have the required expertise in the appropriate field of law.

      In 1995-1996, of all cases assigned through Judicare, 43,618 were criminal cases (64%) and 11,981 were civil cases (26%). The average cost to the state per case was R942 (approx. US $235). The total cost to the state was R69.4 million (approx. US $17.3 million, or 76% of the total budget for Legal Aid).

   b. Public Defender system

      There are in total 10 public defenders paid by the state in South Africa. In 1994-95, they dealt with 2,808 cases. The average cost per case was only 40% of the cost of Judicare.

   c. Law Clinics system

      There are about 21 Legal Aid Board Law Clinics throughout South Africa, each with a lawyer supervising about 10 clerks/law students, for a total of about 210 staff available to advice or represent clients. In 1995-96, the Law Clinics handled and completed 24,513 criminal cases and 12,997 civil cases, for a total of 37,510. The average cost per case was R433 (approx. US $108).

      In addition, there are 21 University Law Clinics providing a more general service. Each Clinic is run by a lawyer, who supervises about 20 university law students.

8. The budget of the Legal Aid Board has grown exponentially over the last few years.

   The budget of the Legal Aid Board has gone from R9 million in 1987-88 to R182.4 million in 1995-96. Of the R182.4 million spent in 1995-96, "ordinary" legal aid took up R66.4 million, and "constitutional" legal aid R116 million.

Yussuf Vawda spoke in more detail about University Law Clinics:

Clinics were first set up in universities in the 1970s with a dual purpose: to train law students and to provide legal advice to those most in need of it.

University Law Clinics aim to fill in some of the gaps in the government-funded system of legal aid. They therefore apply a means test that is much more generous than that of the Legal Aid Board.

Typically, the clinics offer advice on a broad range of issues (criminal, human rights, housing, labor, consumer law...). The needs vary depending on the location of the clinic (urban vs. rural, etc.). Only a few clinics have become specialized (battered women, criminal, labor disputes) because the generalist model is preferable for training students.

All clinics have developed programs of outreach to the communities outside the universities because many people cannot afford to or are unable to travel to universities to seek legal advice.

In particular, satellite clinics have been set up in some communities. This is done jointly with community-based organizations, to avoid being perceived as outsiders. Clinics are increasingly becoming proactive, and once they identify an issue, they will now develop a program to tackle it in a systematic way.

Each clinic has a full-time legal practitioner, but most of the work is done by a combination of law students, administrative staff and paralegals.

Law Clinics survive on very small budgets. They receive some funding from the universities, from the legal profession (through interest collected on the trust accounts of lawyers) and from some foundations. They are currently lobbying the government for funding.

Karoly Bard presented some of the trends in access to justice in Eastern Europe:

He noted that access to justice does not only mean access to legal professionals as with the law clinics, but it can also be achieved through a simplification of legal rules so that they may be understood and used by anyone.

Unfortunately, the opposite trend can be observed in Hungary. Ironically, under communism, the law was, in spite of its many other flaws, fairly simple, accessible and characterized by a lack of formalities. The public was largely hostile to the legal profession and did not rely on lawyers. This was facilitated by the fact that the Criminal Code allowed any adult relative of an accused to represent that person in court. Hungary is now moving towards a more complex legal environment (a fourth layer of courts is about to be added, new exclusionary rules for evidence are being adopted, etc.). On the other hand, a project to create a small claims court is now under consideration.

As for legal representation through free legal assistance, it is a fact that, whether in Russia or Hungary, most accused never even meet their officially-appointed lawyers, as a result both of very low fees paid to the lawyers for each case and of the low ethical standards of the profession.

Paradoxically, proposals to improve the situation are often opposed by the profession. Lawyers are hostile to paralegals, and, in Hungary, they currently oppose the establishment of a Legal Aid Service, claiming that in a post-communist country, a legal aid service run and funded by the state would not be credible.

In many of these instances, the Constitution should be used to challenge the situation. For example, the Hungarian Constitution could be used to attack provisions in the law on officially-appointed lawyers which grant fees to the lawyers only for attendance at the trial, when most of the work is usually done before the trial. Decisions of the European Court stating that "members states have a duty to ensure that the defense of an accused is effective" could also be relied upon.

Discussion

McQuoid-Mason deplored the Legal Aid Board's culture of unimaginativeness. Why can't it fund paralegals, for example, or alternative conflict resolution methods? Hopefully, the Legal Forum to be convened by the Ministry of Justice would soon be issuing guidelines on these questions.

The issue of what is a "legal practitioner" under the South African Constitution was discussed. The opinion was voiced that it probably referred to someone authorized under legislation (such

as the Attorneys and Advocates Acts) to represent clients in court. These provisions would then have to be amended to allow paralegals or others to represent an accused in court.

Justice Pius Langa of the South African Constitutional Court addressed the issue of using customary law and chiefs' courts to facilitate access to justice. He outlined some of the tensions between the Bill of Rights and customary law, particularly with respect to gender issues and inheritance. Since customary law is only valid insofar as it conforms to the Bill of Rights, its use becomes somewhat delicate. McQuoid-Mason also pointed out that many traditional chiefs were in fact coopted by the apartheid regime, and that not all of them are legitimate. Nevertheless, traditional methods such as mediation and conflict resolution are proving quite useful at resolving issues in many communities. This is why Street Law programs have emphasized these techniques.

The image and role of the South African police were discussed. In South Africa, only 20 percent of police stations are located in black areas, and police were traditionally concerned with "control" and political issues rather than solving crime. Blacks have therefore been affected by serious crime much more than whites and for a much longer time. The recent upsurge in fear of crime among whites has to be understood in that context.

It was generally agreed that the strategy for improving access to justice should be holistic: through small claims courts, mediation, legal clinics, public defenders, street law programs, etc. A number of diverse approaches must be used together.

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David McQuoid-Mason addresses the plenary.

Developing New Institutions

Rapporteur:	Nikolai Gughinski
Moderator:	David McQuoid-Mason, University of Natal
Resource Persons:	Selby Baqwa, Public Protector
	Karthy Govender, Human Rights Commission
	Phumele Ntombela-Nzimande, Gender Commission
	N.R. Madhava Menon, National Law School of India

Selby Baqwa, South Africa's Public Protector, led off the session:

1. Why Do We Need a Public Protector?

   For the last 40 years the institution of Ombudsman, which originated in Sweden, spread very quickly at a pace which cannot be compared to the expansion of the great religions of the world. This is so because governments recognized that no matter how well they were disposed to the protection of human rights, the administration and state bureaucracy always tend to violate the rights of individuals. Therefore, democratic governments sought means to make the bureaucracy accountable and responsible for its actions.

2. The South African Experience.

   The discretionary power of the administration is constantly increasing. Power has latent danger because the state has a monopoly on the lawful use of force and other functions related to the application of power. The individual is far less powerful and knowledgeable than the state.

   The legal basis for the establishment of the institution of Public Protector was Chapter IX of the Constitution of South Africa. According to this provision the Public Protector is appointed by the Parliament.

3. Procedures of the Public Protector.

   The procedures followed by the Public Protector are very informal. There are no standardized rules or formal procedures. Every individual who believes that her/his rights were infringed has the right to turn directly to the Public Protector.

4. Powers of the Public Protector.

   The Pubic Protector is meant to investigate independently allegations of human rights abuses. For this purpose it has been granted relatively large powers – to issue subpoenas, to request searches, to interrogate, etc.

   The Public Protector submits reports to the Parliament every six months. To date, the Public Protector has received about 4,000 complaints from individuals (for the period since the fall of 1995).

Karthy Govender, described the Human Rights Commission, of which he is a member.

1. Purpose of the Human Rights Commission.

The purpose of the Human Rights Commission is to promote and protect human rights. This is a very large mandate and differs from other similar institutions, such as the Canadian Human Rights Commission, which has a much narrower mandate (limited to the right to equality).

2. Structure and Priorities.

The Human Rights Commission is comprised of 11 members appointed for a term of 7 years each. The members are approved by the Parliament and appointed by the President. So far the Human Rights Commission has two offices – one in Johannesburg and one in Cape Town.

The Human Rights Commission places a great emphasis on the promotional part of its work. It focuses on monitoring legislation which is being currently discussed and drafted in the Parliament. The Commission also monitors how the government enforces constitutionally guaranteed rights. For example, the Commission monitors the right of access to housing, which is guaranteed by the new Constitution. The Commission receives reports regarding housing from various governmental agencies, and it follows how the government works toward the realization of this right.

The Human Rights Commission is concerned with the whole range of rights which are guaranteed by the Constitution – political and civil, social and economic.

3. Individual Complaint Procedure.

Any individual who claims that her/his human rights have been violated can submit a complaint to the Human Rights Commission. The Commission is divided into chambers that consider the applications. If the chamber decides that the case should be rejected, the full commission has to approve that decision. If the subject matter of a complaint falls outside the scope of its mandate, then it refers the complainant to another institution. If the chamber accepts the complaint, then it proceeds to the investigation of the allegations. In this process, the Commission usually initiates a negotiation with the relevant governmental agencies in order to reach settlement of the dispute and to obtain a remedy for the violation. If the negotiation effort fails, the Commission drafts a report on the merits of the case. When the report concludes that there was a violation, the Commission may go to the court to obtain an enforcement order for its decision. The Commission may subpoena witnesses, conduct searches, conduct interviews, etc.

4. Litigation Powers of the Human Rights Commission.

The Human Rights Commission may litigate a case involving a human rights violation upon the request of the victim, thus serving as the victim's legal representative, or on its own initiative, without being authorized by an individual victim. There have been a number of cases to date in which the Commission has litigated against governmental agencies and bodies.

Phumele Ntombela-Nzimande described the work of the Gender Commission, of which she is a member:

1. Legal Framework and Structure.

The legal framework for the operation of the Commission is provided by three acts: a) the gender equality clause in the new Constitution of South Africa; b) The Women's Charter for

Effective Equality adopted by Parliament in 1994 and c) the Gender Equality Act of 1996 which established the Commission.

The Commission has 12 members who are appointed by the President after being selected and approved by the Parliament.

2. Powers and Activities of the Gender Commission.

   The Gender Commission conducts the following activities:

   - disseminating of public education and information;
   - evaluating legislation adopted by the legislature;
   - investigating allegations of lack of gender equality; and
   - monitoring the situation of the rights of women.

3. Priorities of the Gender Commission.

   The Commission has determined that it should devote priority to those women who are on the periphery of society and are most disadvantaged.

4. Challenges Faced by the Commission.

   In effect, there is no gender policy in the country. Therefore, the Commission sees its role as a leader and moderator of the debate about the gender policy of South Africa. The monitoring of women's rights has never been done before, and a principal challenge to the Commission is to invent this activity. The Commission is also confronted by questions such as how to maximize its impact. Which are the issues and problems on which it should focus? What are the standards?

   The overall goal of the Commission is to set up a legal framework which will ensure that women in South Africa will never again be repressed and that they will have equal access to resources and opportunities.

N.R. Madhava Menon, of the National Law School of India, gave a brief description of the large variety of clinical programs and other innovative educational initiatives that have been developed at his law school.

Discussion

The panelists were asked to share the greatest problems which they faced in their work. **Govender** replied that the greatest problem is not so much the race and gender of the commissioners but their geographic representation. It turns out that most of the Human Rights Commissioners come from three provinces even though the Commission is supposed to cover the whole variety of constituencies. To do any less would risk losing the support and confidence of the people. In addition, in some instances customary law is an obstacle to promoting generally accepted human rights standards. **Ntombela-Nzimande** added that the election in 1994 of the new government created very high expectations among the South African people, and the state institutions are not always able to meet all of these expectations. In addition, maintaining independence is a serious problem. The Gender Commission is not really independent of the government, and in

the meantime people complain about "another structure which is doing nothing!"

The panelists were also asked what their relations with NGOs were like. **Baqwa** asserted that his office relies on meaningful cooperation with NGOs. He said that NGOs were his office's "eyes and ears" on the ground. **Govender** stated that the Human Rights Commission places a priority on its relationship with NGOs. The Commission has created a special sub-committee on NGOs in the belief that strengthening the development of NGOs will guarantee the preservation of democracy in the country.

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Project Presentations

Rapporteur: Alice Miller

Moderator: Edwin Rekosh, The Ford Foundation
Presenters: Judit Fridli, Hungarian Civil Liberties Union
James Goldston, European Roma Rights Center

Edwin Rekosh introduced this session as an opportunity for conference participants to hear a sampling of current projects and initiatives.

Workshop on Data Protection and Freedom of Information

Judit Fridli of the Hungarian Civil Liberties Union (HCLU) described a workshop inspired by the 1996 Oxford symposium. The Workshop on Data Protection and Freedom of Information was organized by the HCLU in May 1997 in Budapest and brought together activists from former Soviet bloc countries and the West. It addressed two closely related problems which the organizers had identified as necessary conditions to democracy: (1) protection of personal data, such as medical and sexual history data, as essential to the creation of protected zones of privacy for individuals; and (2) access to information collected by the government on matters of public interest, as necessary to the effective political participation of citizens. What follows arose out of the discussions of the workshop, which are reflected in two books, *Data Protection and Freedom of Information* and the *Agenda and Supplementary Materials of the Workshop on Data Protection and Freedom of Information*, both available from the HCLU.

Fridli noted that there were strong reasons for addressing these concerns with specific provisions in national laws, including radical shifts in techniques for collecting such information, the inter-relationship of government, industry and religion and the multiple contractual relationships in places where personal data was collected. In regard to personal data, various EU countries have sophisticated laws that are in general agreement on the need to protect sensitive personal data, with some countries focusing on the contextual use of the data, others on the content itself. EU Directive 95/46/EC set a basic standard. Fridli noted that Hungary passed a law in 1992 on Freedom of Information and Data Protection, and that a Data Protection Ombudsman has been established as a public officer responsive to public opinion. This position has political weight in its recommendations but no binding legal force.

On the issue of freedom of information, Fridli noted that the concept of *glasnost* (freedom of expression) arose throughout the former Soviet bloc states without the concomitant concept of freedom of access to government information. The constraints on freedom of information were particularly apparent in the use of government classification of information with respect to national security concerns. The use of national security restrictions should however be limited to demonstrable claims of: (a) legitimate national security concerns; (b) that the restrictions on information are proportionate to the aim; and (c) that the restriction is based in law. In practice, these principles are often violated.

While Hungary has enacted data protection and freedom of information laws, most post-communist states do not as yet have such laws. Fridli noted the goals of public interest advocacy programs might include campaigning to enact such laws (especially regarding protection of sensitive personal data or freedom to gain access to environmental or budgetary information) or

campaigning to create public positions to respond to these kinds of information and data issues. She recommended using the EU directive as a basic standard, as well as referring to the 1981 Recommendation of the Council of Ministers of the Council of Europe. In response to questions, Fridli clarified that Hungary has specialized provisions in the law addressing data protection within the context of national security services, including a law on lustration. Participants mentioned problems raised by the practice of governments in restricting information on the basis of lists composed of broadly-worded catagories.

Litigation Project on Discrimination Against Roma

Jim Goldston of the European Roma Rights Center spoke next about the principles underlying a project currently under discussion concerning litigation in the area of discrimination against Roma. He began by focusing on why using the European system of human rights protection was relevant to participants, noting that Strasbourg decisions could have real domestic impact. He cited important past cases defining torture (*UK v. Ireland*), setting out positive obligations of states to protect fundamental rights, even against abuses by non-state actors, as well as a recent decision that linked effective investigation with the right to an effective remedy. He noted the tension between the end-of-the-road, appellate function of the Strasbourg court with the need for timely and local remedies, as well as the difficulties posed by a precedent-based system sitting on top of legal systems not based on precedent. However, he argued that now is a good time for Eastern European activists to consider European Court-based strategies, as the Court is relatively progressive, the media is interested and legislators could be pushed now to conform to the European Court standards.

Next, Goldston turned to the particular obstacles facing an unpopular minority, such as Roma, in enforcing their rights – since passing legislation, for example, requires majority support. He turned to the litigation-related experience of the civil rights movement of African-Americans in the US as a useful parallel to the situation of the Roma: its leadership arose from those facing abuse; it built alliances; and it used litigation along with activist campaigning. The civil rights litigation strategy was devised carefully to first attack the most egregious and vulnerable practices, and deepened to cover other abuses over time. He also noted that while victories were important, litigation strategies also served to "make visible the invisible." He suggested some criteria for selecting dramatic, public and winnable cases: clear mistreatment (children in educational or other institutions); clear facts of violence (perpetrators known, authorities do not act); clear discrimination on the face of the law or a practice demonstrably motivated by race (criteria for special schools, pretrial detentions, etc.); or when the law is neutral but the practice is grossly discriminatory (such as a 1969 French law that requires 3 years permanent residence for voter registration).

In the discussion that followed, participants brought up the timeliness of pressing human rights issues now, as the Council of Europe is evaluating Eastern European countries for membership. There was also discussion of examples of Eastern European countries that hypocritically invoked the need to change certain practices to conform to Council of Europe standards but ignored others, as in a recent Hungarian border guard case. Other participants spoke of the need to coordinate human rights activities, especially as Roma were discriminated against in all Eastern European countries. In the discussion of how to make an article 14 (discrimination) claim before the European Court, the accessory nature of the discrimination claim was stressed – it must be linked to an underlying violation. The non-discrimination and equal protection of the law protections of the International Covenant on Civil and Political Rights (ICCPR) were noted as broader

than article 14. Finally, the importance of viewing litigation strategies as part of a broader advocacy picture was stressed, both in regard to empowering the grassroots communities themselves and because many techniques from the West used to fight discrimination would not transfer easily.

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Workshops

Street Law and Public Education

Rapporteurs: Tanya Smith and Alexey Korotaev

Facilitator: David McQuoid-Mason, University of Natal
Resource Persons: Jan Hrubala, Partners for Democratic Change
Mawethu Mosery, Democracy For All
Monika Platek, Polish Association of Legal Education

The workshop included short presentations on the activities of the participants in the area of public education. Programs in Slovakia (especially regarding legal literacy publications), Russia and Ukraine were briefly discussed. Most attention, however, was concentrated on Street Law programs which have become well developed in South Africa and Poland.

1. Legal Literacy Publications

Jan Hrubala made a presentation about his public education work in Slovakia. His project involved the preparation and dissemination of a series of booklets on the following subjects:

- What to do if you meet the police
- Consumer rights
- Labour conflicts
- Conflict resolution
- Participation in public life (petitions, complaints, etc.)

The booklets provide basic legal information in an easy to digest format. 30,000 copies were published, which is a large print run for Slovakia. They were distributed in courts, schools, consumer organizations, NGOs and through local (municipal) governments and through mass media.

2. Street Law: Training of Law Student Instructors

Street Law as a program involving law students in the teaching of law to the general public on the community level was originally developed in the United States and has been popularized by Street Law, Inc., based in Washington, D.C. Street Law programs for law school students have

been most elaborately adapted in South Africa, but a similar effort has been undertaken in Poland.

One principal idea behind Street Law is to teach law students some of the practical aspects of the law, not just the theory. Another objective is to provide public education about the law to as wide an audience as possible – including school children, prisoners, etc. – using law students as instructors.

In South Africa, a number of basic texts were written, in part inspired by Street Law books published in the United States. The texts cover subjects corresponding to where there is the most need for legal literacy. In South Africa, the first text concerned the court system. A second volume covered criminal procedures, and subsequent texts covered consumer law and family law.

Street Law teaching programs are carried out throughout South Africa by students in law schools where there is substantial interest in and commitment to the principle of disseminating legal information on the community level. The methodology includes not just training law students in the subject matter they will be teaching but also training them in the communication skills they will need to teach others. The Polish experience has been that students benefit from the communication skills in their future work as lawyers as well as for the immediate need.

Street law programs also have other pedagogic advantages, including changing law students' stereotypes and established patterns of understanding and reasoning and providing stimulating opportunities to exercise analytic abilities.

Perhaps the most important part of a Street Law curriculum is the mock trial, which is a role-playing exercise simulating a trial. It has immense educational value for the school children who participate, as well as the law students who teach them. (Law students learn how to supervise mock trial exercises by participating in a simulated trial themselves.)

The workshop participants took part in a mock trial created by **Monika Platek**, based on an actual Polish case. One hour was devoted to preparation of the mock trial, and about forty minutes were devoted to its execution. All present participated with sincere enthusiasm and interest. After the exercise, workshop participants discussed the experience.

Some participants pointed out that there were some holes in the proceedings, and an opinion was voiced that a badly prepared mock trial could do more harm than good. The response was that there is no guarantee that simulated trials will be executed perfectly every time, and that in this particular instance, there wasn't enough time to prepare properly. Furthermore, the point was made that even an imperfect mock trial stimulates interest, participation and imagination. Also, an important element of the experience is the discussion following the mock trial, which can draw attention to the strong points and weak points of the exercise and highlight the ways in which real life situations might differ. Finally, the imperfect results help to demonstrate to the law students that there are instances in which they must say "I don't know," instead of pretending to be omniscient, thus stimulating a more interactive discussion.

In sum, there are a number of promising potential results from the implementation of Street Law or legal literacy programs in Eastern Europe and Russia:

- **For the general public** – such programs can help increase public awareness of the law, citizens' rights and due process – using publications, mass

media and other means. Also, the adult population can be educated through school-based programs for children, indirectly reaching parents and directly affecting the knowledge and understanding of future generations.

- **For special groups** – such as prisoners or minorities, such programs can be effective, but need to be adjusted to the needs and perspectives of the target population. Street law programs involve experiential learning techniques, and they must therefore take into account the experiences of the target group.
- **For school children** – such programs can "demystify the law." They also promote critical thinking and change stereotypes based on established patterns of understanding and reasoning. Finally, they introduce a new participatory model of school instruction, which can be applicable to all subjects.
- **For teachers** – such programs not only provide teachers with new knowledge but demonstrate a new model for instruction, re-orienting them to another kind of in-class, in-school behavior. The approach is democratic and participatory, rather than authoritarian or didactic. It provides a positive example of achieving result-oriented educational objectives. While the attitudes of teachers in Eastern Europe and Russia present an extraordinary challenge to implementing this style of education, Street Law programs offer a promising opportunity to begin changing the general rules of behavior and the structure of classroom relations.

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The mock trial during the Workshop on Street Law and Public Education with Grazyna Kopinska (playing the prosecutor) questioning Jana Kviecinska (playing the defendant police officer) while Jan Hrabula holds up a sign reading: "Free the policeman! Let the police make order!"

Clinical Legal Education

Rapporteurs: Tanya Smith and Alexey Korotaev

Facilitator: David McQuoid-Mason, University of Natal
Resource Persons: Asha Ramgobin, University of Natal Legal Clinic
Yussuf Vawda, University of Durban-Westville Legal Clinic

At the beginning of the first day's session, **David McQuoid-Mason** gave a brief introduction on the development of Clinical Legal Education programs in South Africa. The first program began in 1973, but it was not until 1978 that it was finally recognized by the university. It was important for the university to recognize this course as an official one, allowing participating students to receive academic credit. Today there are 21 clinics in South Africa, and together, they have formed an association of law clinics. (All other participants in the workshop also briefly exchanged their experiences regarding law clinics.)

Workshop participants agreed on the importance of having a clinical course offered for academic credit in the law curriculum. Such a program should be started with an introductory course on legal aid followed by tutorial and consultation sessions on the students' individual cases.

Based on the South African experience, it is important to contact community organizations in order to identify the priority topics for the clinic. (For Asha Ramgobin's clinic, the topics were land restitution, police brutality and gender issues.) It is also important to construct clinics so they are focused on several concrete legal issues.

Andrzej Rzeplinski described the Polish model of apprenticeship (which is in some ways similar to external clinics). It was the feeling of most workshop participants that clinics housed inside the law schools are more effective and educational. Participants in the workshop voiced the concern that it is hard for the University to supervise law students in an external clinic and even more difficult to control what students are learning. Some commented that this can be partially alleviated by having an NGO or other liaison involved in the establishing of an external clinic. The group arrived at the conclusion that there are many forms of clinics and various subcategories of each. Those interested in establishing a law clinic should come up with the model which best suits their own conditions given such factors as: the priority legal topics, curriculum flexibility, legislative framework, etc.

Several workshop participants emphasized the educational purposes of clinics: they develop problem-solving and legal reasoning skills in law students, which have been especially lacking from legal education in Eastern Europe. They also expose future lawyers to the appropriate social role of the legal profession. Clinical experiences are usually memorable for law students.

At least some Eastern European countries provide the advantage that law students can represent a client in civil cases (and in certain exceptional circumstances in criminal cases as well). This yields more flexibility in the structure of law clinics, which may therefore require only one practicing lawyer/supervisor to assist students in preparing cases for courts.

There was a brief discussion of the benefits provided by law clinics. Some of the objectives

mentioned were:

- to teach professional ethics;
- to encourage critical thinking about the law;
- to expose prospective lawyers to societal needs; and
- to provide access to justice for a larger segment of society.

Workshop participants agreed that the primary goals in establishing law clinics were access to justice and legal education reform.

There followed a discussion of what tactics might lead Eastern European universities to accept the idea of introducing clinical legal education. A number of participants discussed experiences indicating that not many universities are enthusiastic about clinical legal education. Generally, law school deans have permitted the establishment of legal clinics under the condition that they would not create any "problems" for the administration or the educational process. Moreover, no funds are allocated to the new law clinics. Law faculty supervisors present another set of problems because they must agree to allocate a substantial amount of their time in order to supervise a clinical course. Dealing with these issues requires a well-designed strategy. NGOs might negotiate a deal with universities to run external clinics, but, for an in-house clinic, there needs to be a law faculty member who is willing to run it. (The students present few problems; they are usually quite interested in participating, at least because they can obtain valuable professional practical training, which is otherwise missing from their curriculum.)

Another issue that needs to be solved is how to find clients for the clinic. Solutions include meeting with community representatives and members of target groups, advertising, working with journalists and by "word of mouth" based on successful case-work.

One participant raised the question of who is responsible for the case, the student or tutor? The response was that the supervisor (law professor or practicing lawyer) is ultimately responsible for any legal case. For that reason, proper management of clinics is essential. A discussion followed about the essential elements of management. Those mentioned included:

- strategic planning;
- training of staff;
- finance and budget issues (how to raise funds, questions relating to fee payment for clinical advice);
- teaching methods (simulations, case studies);
- curriculum development;
- case identification (focusing on limited topics but making referrals to others when possible for non-qualifying cases);
- student participation (how to allocate time among course priorities: instruction, case preparation and consultations);
- confidentiality;

- public relations;
- relations with NGOs and their role in case work (examples of active NGO involvement in South Africa include the Legal Resource Center and community centers);
- evaluation of clinics; and
- case management (to keep files in such a form that they are accessible to others, in-take memos, registration forms, etc).

Another discussion concerned which teaching techniques need to be used in a legal clinic and which skills they develop. Techniques/skills mentioned included:

- interviewing techniques;
- communication (listening);
- critical thinking;
- gender sensitivity/cultural sensitivity;
- case studies;
- organizational skills;
- flexibility;
- negotiation and mediation skills;
- counseling skills (counseling skills are sometimes needed in order to get to a client's legal questions); and
- legal writing.

Before adjourning, the group performed several exercises in paraphrasing, active listening, case-analysis, and verbal and non-verbal communications. There was also a video demonstration.

Campaigning and Lobbying

Rapporteurs: John Bonine and Sandor Fulop

Facilitators: Maureen Burke and David Cohen, Advocacy Institute
Resource Person: Zane Dangor, Development Resource Centre
Ina Zoon, Tolerance
Judit Fridli, Hungarian Civil Liberties Union

On the first day, the facilitators indicated that the purpose of the workshop was to deepen understanding and systematize knowledge the participants already have. Advocacy, as defined by the facilitators, is much broader than just lobbying. It also includes media advocacy, coalition work, creative use of information and grassroots organizing. The first day of the workshop focused on strategic planning; the second day focused on lobbying.

After the participants introduced themselves and discussed their expectations for the session, David Cohen set out a conceptual framework for advocacy. Some of the concepts that were discussed include:

- **Advocacy Equals Campaigning** – Advocacy is an active process, putting a series of demands into a system. The idea is to ask something of someone else, some other institution, which has the power to make the relevant decision.

- **Changing Public Policy** – Advocacy means changing public policy – not in an abstract way – but in a way that requires action. Advocacy requires:

    - having a base of support;
    - using that base to persuade others;
    - overcoming opposition.

- **Mindset** – You have to have a certain mindset to do this work. You must be analytical, aware of your opposition but also have a sense of possibility. You must know how to motivate your base of support, how to listen to the base of support, how to let that base's real voice emerge and be heard.

- **Multiple Arenas** – Different campaigns take place in different arenas. Sometimes you use litigation to open up the political process; sometimes you use mass mobilization or civil disobedience.

- **Life Cycle** – Not everything starts at the beginning. Sometimes you deal with an issue at various and different stages. You have to think about what stage you are in. If in a very early stage, you may need to do some nurturing (like a nurturing parent). At a later, "adolescent" stage, you may want to experiment. In the "adulthood" phase, in which policy has been settled but not enforced, you would adopt yet another approach. You can use different methods at different stages. In the early stages, you usually have to do a lot of work to create your own documentation and help people learn how to help themselves. In later stages, such systems are already set up.

One example is the campaign for abortion rights for women. That issue has gone all the way through its cycle over a period of 30 years; it is probably in "adulthood" now. Campaigners are using dramatically different strategies now than they were at the beginning.

Another example is the campaign for gay rights. Three years ago, legislation to eliminate job discrimination against gays would have been laughed off any legislative floor, but now the situation is very different.

One participant suggested that "completion is death," and we should acknowledge that some issues confronted by society need not have "one right answer." Another participant noted that some issues actually go backwards.

- **Help from Others** – Campaigners often consider how to work with unlikely allies. In the US, a remarkable step took place when pro-choice and pro-life forces began to work together on issues like prenatal care and early childhood education.
- **Knowing the System** – This is where professionalism comes in, in knowing how the formal processes work and knowing the information produced by and for those processes – and also knowing how to make all of the above understandable to one's constituency.
- **Summary** – Recognizing the value of argument and debate in society – and recognizing that argument is necessary to legitimize policy choices, including your own viewpoint – is vital to any campaign.

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Ina Zoon then presented a case study on legislative change in the Czech Republic, focusing on the campaign to change the citizenship law in order to eliminate the requirement that an applicant for citizenship have a clean criminal record and a burdensome proof of residency. When the Czech Republic emerged from Czechoslovakia in 1993, the passing of the law had a disproportionate impact on the Roma community, because most Roma had Slovak origins for historic reasons.

Ina and her colleagues wanted to change the law, but after looking for allies in government, parliament and the general public, it became clear that due to the unpopularity of Roma as a social group, the most effective means of campaigning would be to rely on international pressure. They studied the structure, membership and agendas of each relevant international organization, and they identified the individuals in each organization who might be interested in that particular issue.

Next, they had to determine what kind of information would be most useful to international organizations and how to obtain it. They did an analysis of the law and the legal framework, so that international experts would understand the legal context. More importantly, Ina and her colleagues could not say that the system was discriminatory on its face, so they had to identify cases of actual discrimination. In the Czech Republic, the Roma organizations were not organized enough to provide them with the necessary documentation. They had to organize a network of Roma at the community level, then gather information about individual cases to create a database. After eight months, they documented more than 5,000 cases. In the end, they used only the most persuasive cases, which had been checked and double-checked.

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The facilitators then presented a framework for strategic planning. The framework is intended to uncover areas where an organization or campaign needs to be strengthened. It involves asking some hard questions, leading to hard choices but ultimately leading to improvement.

A mnemonic device was described: **A-C-T-O-N**, which stands for:

- Advantages
- Challenges (soft spots, weaknesses)
- Threats
- Opportunities
- Next Steps

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Zane Dangor made a presentation about a framework used by his organization in South Africa to aid in strategic planning. Sometimes advocacy groups get stuck by going headlong into an issue without analyzing the forces ahead of time. He described what he called a stakeholder/force-field analysis:

- Who supports your issue strongly? How important/influential are they?
- Who supports your issue only nominally (weakly)? How important/influential are they?
- Who opposes your issue strongly?
- Who opposes your issue weakly?
- Who is influential but silent, whom you can work on to get them involved (support)?

For those who support us strongly and who are influential, our activities must be devoted to "consolidating" their support, to keep them there.

For those who are very important to the issue, but support us moderately, we have to plan activities to move them toward stronger support. We need to answer questions like who is going to commit to doing things, what will they do and when?

For those who support us weakly, we need to decide whether we spend a lot of time moving them to strong support, or will it be more effective to concentrate on those who provide us with moderate support?

We also need to decide how much time to spend neutralizing our opponents, and how much time to spend mobilizing our supporters.

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Participants then broke into small groups to discuss campaigning for "human rights of Roma." One group discussed internal aspects of the public interest sector in Eastern Europe, its advantages and challenges. The other group discussed the external environment, its threats and opportunities.

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The second day of the workshop focused on lobbying, defined as the effort to achieve a policy change through legislation. There were two main topics of discussion: what is lobbying and how to do it.

I. What is lobbying?

A. The essence of lobbying.

Lobbying can best be understood by considering the actors and the flow of information. The actors are: the legislator, the lobbyist and his/her constituency. The flow of information can have two directions: (1) from the legislator, and (2) to the legislator.

1. The flow of information from the legislators: in this direction, the information serves the interest of a social group. (However, it is sometimes questionable whether the members of the group: need the information, are aware they need it, are actively seeking it, or are willing to pay or otherwise contribute in return for it.)

   In any event, the lobbyist collects information (which is sometimes available in ready-made packages) and provides it to his or her constituency. The lobbyist's role with respect to the information can range from simply transmitting the information, to demystifying the information (as well as the framework for the information), to performing a coordinating role, to building a coalition to promote or oppose a new piece of legislation. The lobbyist's activities with respect to the information can be (from the least to most intensive): simply sitting in the Parliament, making comments on proposed legislation, arguing for or against particular legislative measures, educating the MPs, preparing new drafts of law.

2. The flow of information to the legislators: in this direction, the information serves the interest of the decision-makers. The needs of the legislators range from the need for a specific piece of information, to a need for feedback in order to gauge public opinion, to a need for support in particular circumstances, such as when there is a legislative stalemate.

B. Additional elements of the definition.

1. Lobbying can also refer to the creation of a good working relationship with decision-makers. This element, however, is not always present. There are less friendly tools of lobbying, too, including mass media campaigning for or against a particular piece of legislation, "making politicians squirm" through the threat of negative publicity, letter-writing campaigns, demonstrations, etc.

2. Lobbying may have a negative connotation. Sometimes lobbying is considered corruption through financial rewards, campaign contributions and favors such as writing a speech for a politician. This is especially true in the case of those lobbying for private interests as opposed to the so-called public interest lobbyists. (This differentiation might be a simple psychological reaction: we are faced with a disturbing notion, we feel ambivalent about it, so we resolve the problem by distinguishing two parts of the whole: one part gets the good attributes, the other part gets the bad ones.)

C. There are a number of practices that demonstrate the limitations of the definition as set out above. For instance:

1. There is always a shadowy part of any decision-making system (*e.g*, influencing legislative schedules or setting the agenda, special tricks of informal influence).
2. In some cases, we interfere in the process earlier than the phase in which legislation is being considered by the Parliament.
3. In some cases, we have a broader intention in lobbying than just affecting a particular piece of legislation. For example, lobbying might be undertaken in order to promote general sympathy toward a minority group.
4. There is a category of "hidden lobbying" in which non-lobbyist "experts" involved in the drafting of legislation assert their ideology, values or interests.

II. How is lobbying done?

A. Professionalism vs. amateurism.

1. There is an "Eastern European Disease": a few individuals wind up doing everything.
2. **Marek Nowicki** provided the group with a resonant metaphor: "We need to choose whether we want to be small dogs barking all the time, with no one paying attention, or big dogs who do not bark often but are noticed."

B. Working from inside the system vs. working from the outside.

From the lobbyists' perspective:

1. Seek political balance in the cooperative relationships you form; otherwise you will be suspected of being partisan.
2. Try to avoid the "destructive alliance" (*e.g*, forming a one-time alliance with an extremist right wing party might promote your cause in one particular case, but it would also hurt you for a long time).
3. Determine whether to be value driven or instrumental. The first approach is comfortable but rigid. The second approach is flexible and sometimes may be more effective. Public interest lobbyists often rely on a hybrid of the two.
4. Determine whether to be flexible about potential allies or follow a rigid "friends are friends, enemies are enemies" approach.

From the governmental perspective: they may want to make you part of the system. It is more convenient and less threatening to government officials for them to have a friendly and familiar NGO representative to keep contact with, even if the NGO is sometimes a strong opponent.

C. Techniques, tricks, tactics.

1. Get to know the system. Get to know the relevant people.

2. The best time to start lobbying is the pre-election period.

3. Internet communication can be extremely useful. (But it cannot completely replace the personal flow of information.)

4. It is always important to evaluate the results of your lobbying.

Litigation Strategies: Police Abuse

Rapporteurs: Monica Macovei and Jim Goldston

Facilitator: Borislav Petranov, Interights
Resource Persons: Yonko Grozev, Bulgarian Helsinki Committee
Peter Jordi, Legal Clinic, University of Witwatersrand
JP Purshotam, Legal Resources Centre
Andrzej Rzeplinski, Helsinki Foundation for Human Rights

I. Hypothetical case: The discussion was based on a fact pattern from the fictional country of Eastia. A somewhat condensed version of the hypothetical follows:

On October 31, 1996, a demonstration was held in front of one of the main government buildings in Eastia by protesters demanding that the corruption of high officials be investigated and that more attention be given to social problems created by recent economic reforms. The mayor had authorized the demonstration, provided it ended by 9 p.m. that night. Four days after the demonstration, A, B, C, D and E (university students and Eastian citizens) and Kamal and Hassan (Lebanese nationals in Eastia on an educational exchange program) visited the Legal Advice office of the Eastian Human Rights Association ("HRA") and reported the following:

At about 11 p.m. on the night of the demonstration, they were walking back from a party along one of the streets leading to the government building. Nine uniformed policeman (who were wearing headgear and bullet-proof jackets which concealed their identification numbers) came running toward them, thinking the seven students had taken part in the demonstration which had lasted beyond the time limit imposed by the Mayor. The students hesitated, then began to run from the police, but stopped when the police warned they would shoot. The police officers approached the students and began to hit them on the heads, shoulders and arms with truncheons, while swearing and calling the two Arab students "olive eyes." Since none of the students could produce identification papers, they were all arrested and taken to the 6th precinct to verify their identities. The police officers did not identify themselves or advise the students of their rights.

At the police station, most of the students were handcuffed to one of the radiator tubes in the corridor, while D and E (both women) were taken to a cell in the basement. At about 3 a.m., a group of agitated police officers rushed into the station, making loud remarks about "lazy, spoiled bastards not respecting what their parents had built in the last 50 years." Two of the officers slapped A while the others roared with laughter. During the night, five masked policemen came into the basement cell, made sexual remarks about D and tried to touch her breasts, and, when she moved back, one policeman seized her and banged her head against the wall.

The detainees had no access to food, water or toilets during the night; they were not permitted to make any phone calls and were not examined by a doctor. All but Hassan were released without charges at 9 a.m. Hassan was detained until 3 p.m. the next day. He was questioned about drug-related offences and subjected to verbal abuse, including being called a "dirty Arab."

Both A and D obtained documentation of their medical conditions.

The police version was that the injuries of A and D were caused by slipping and falling, and no charges were brought against the police officers after a preliminary investigation concluded that no unlawful activity had taken place. The Eastian students initiated civil proceedings (Hassan and Kamal refrained from joining the lawsuit fearing reprisals), but since no wrongdoing had been found in the criminal investigation, no compensation was awarded.

In another case, F's daughter reported to the HRA that F had been chased by the police and collapsed and that the police had kicked him in the chest. The police took F, who had had slight arythmia but no serious heart disease, to the hospital, but he was dead on arrival. The police claim that the protesters attacked them, that it was impossible to identify who struggled with F and that F's severe heart disease resulted in a fatal heart attack caused by the chase itself. The Prosecution found no evidence of a crime.

The president of HRA faxed reports of these and other incidents to the UN, asking for its intervention, especially in light of information that additional forces were being brought in and that they were prepared to use violence. Many individuals contacted the UN High Commissioner on Human Rights in Geneva directly. In Eastia, the Interior Minister instituted a ban on travel by people involved in the demonstration without any further details or any list of individuals affected. Two HRA employees were prevented from traveling and the telephone and Internet communications of HRA were blocked.

Two years earlier, the European Committee for the Prevention of Torture had reported that "persons deprived of their liberty by the police in Eastia run a considerable risk of ill-treatment." During the past three years, 17 people died while in Eastian police custody.

HRA submitted an application to the European Commission on Human rights on behalf of A, C, D and E. Two months later, the former opposition came into power, and the applications were communicated to the new government. C, an opposition activist slated for a position in the new government, withdrew his application.

HRA has two lawyers and many of its cooperating lawyers fear that handling these cases would jeopardize their criminal defense work. In addition to the above cases, HRA has information concerning 57 well-substantiated cases relating to the events of October 31, 1996.

Eastia is a party to the European Convention on Human Rights and the European Convention for the Prevention of Torture. It is also a party to the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of Racial Discrimination (CERD), the UN Convention Against Torture (CAT), and to their individual petition procedures, and party to the Convention on the Elimination of Discrimination against Women (CEDAW). Eastia is a member of the United Nations Commission on Human Rights. It has applied for a major loan from the World Bank to upgrade its transportation infrastructure and communications network and has been pursuing an active diplomatic campaign to join NATO and the European Union.

II. Issues identified. The workshop began with an identification of issues raised in the hypothetical, including:

A. Whether detention for an identity check is justifiable or constitutes "unlawful arrest?" Who bears the burden of proof in such cases? Either the police have to justify the detention or the detainee has to show the unlawfulness of the arrest.

B. Assault while in police custody; mistreatment; sexual assault.

C. Inhuman and degrading treatment in police custody: keeping someone without food and drink for a night.

D. The right to a doctor. The failure to provide medical assistance while in police custody violates the right to see a doctor. A lack of doctors' independence interferes with that right. In Eastern Europe, there has been an informal complicity between police and prosecutors on one hand and "friendly" doctors on the other hand.

E. The right to a lawyer. The right pertains from the moment when the decision to arrest is made. Among other consequences, the right to a lawyer decreases the chance of police brutality. The right includes regular and confidential communications between lawyers and clients; these aspects of the right might have been compromised by the wiretapping and cutting of the telephone line of an NGO working for victims of police abuse.

F. The right to announce the arrest to the family or other persons. As with the right to a lawyer, one consequence is to reduce the chance of police abuse or torture.

G. Travel restrictions based on grounds of national security; they may only be ordered by the court and only when there is a risk of flight.

Rights D, E and F are of extreme importance for preventing abuse, and, according to international human rights treaties, they must be observed from the moment of arrest.

III. Domestic litigation strategy. A discussion of strategic questions followed, including:

A. Factors to be considered in selecting cases for a domestic litigation agenda:

1. The likelihood of success at the national level;
2. The relevant international jurisprudence;
3. The prospects for success internationally. (Become involved in cases which you are likely to lose in national courts in order to get to Strasbourg faster if the European case law indicates a good chance of success at the European Court.);
4. The amount of damages;
5. The strength of the evidence;
6. The possibilities for a class action-type claim.

B. Definitional questions.

Torture is defined by international law in a manner roughly equivalent to definitions found in the domestic litigation of many of the countries under discussion. It is most likely to occur in the first stages of investigations, where the investigators are trying to elicit a confession. A discussion ensued about punishing police officers for torture; one participant mentioned that in Hungary, the police are not suspended if convicted of torture under criminal law.

Prevention of torture was also discussed. Means for doing so include: ensuring the existence of adequate legal protections for the right to an independent doctor, right to a lawyer, right to be brought before a judge and NGO access to lock-ups to guarantee that such legal protections are observed.

C. Considerations raised by the hypothetical case.

1. Sources of information for identifying cases:

    a. letters/calls from victims;

    b. defense lawyers;

    c. journalists; and

    d. NGO monitoring activities.

2. Choice of remedies: criminal, civil, administrative. The consensus of the workshop was that civil remedies were the most effective means for litigating police abuse cases.

    Arguments in favor of civil remedies include:

    a. The victim's lawyer is free to organize and conduct the trial.

    b. The client benefits from compensation for damages.

    c. The rate of prosecution is low; therefore, criminal remedies are less likely to be successful.

    d. The standard of proof is easier to meet in civil cases.

    Deficiencies of civil actions include:

    a. Court costs can be high.

    b. Criminal remedies arguably have a greater deterrent effect.

    c. Evidence is theoretically gathered more quickly in criminal cases, although the practice often differs.

    Obstacles to civil actions include:

    a. The lawyer has no special access to the scene of a tort.

    b. Lawyers in Eastern Europe tend to be passive and may be reluctant to investigate thoroughly on their own.

    c. There is a procedural obstacle in most Eastern European countries under a rule that generally suspends civil actions while awaiting the results of any criminal proceedings. The rule, however, is open to interpretation. The best course of action would be to bring as many cases as possible to the Supreme Court, arguing for an independent civil action.

    The type of action to be taken must be decided by the client together with a lawyer and/or NGO.

3. Evidence and burden of proof. Lawyers act differently in the adversarial and inquisitorial systems. In the latter system, lawyers tend to be more passive.

However, lawyers must try to gather evidence without the assistance of the court (otherwise, there is a risk of losing the evidence). The kinds of evidence that lawyers should gather include:

a. Medical or forensic examination and certificates;

b. Photographs;

c. Lists of persons in detention, in order to prove your client was there and to identify witnesses to his injuries (if not provided by the police, ask the court to get this information).

4. Use of international law in domestic proceedings. International law and comparative law can be extremely useful. Besides the UN and the regional treaties, the law and case law of other countries (mainly the judgments of the Supreme Courts and Constitutional Courts) might be successfully used.

5. Financial questions. Financing litigation is an issue raised in cases where there is a three-way relationship: client, lawyer and NGO. One solution is to establish two contractual relationships in such cases: the NGO donates money to the client; the client uses that money to pay the lawyer.

6. A number of preventive measures regarding police abuse were suggested:

a. civilian complaints review board (US example);

b. affirmative action in recruiting police (South African example);

c. increasing the damages sought in civil actions (seek punitive damages);

d. using a greater number of alternate claims in any complaint;

e. on the spot visits to police stations by NGOs (Polish example);

f. lobbying for better paid prosecutors; and

g. NGO monitoring of the police (seek out complaints on specific police officers, then ask for their dismissal).

7. With regard to wiretapping cases, a number of issues were discussed:

a. What should be the standard of evidence for issuing a wiretap warrant?

b. Who issues the warrant (prosecutor or judge)?

c. What are the appropriate limitations on the subject and target of a wiretap?

d. What time limitations are appropriate?

e. To whom should complaints about a warrant or an unlawful wiretapping be addressed?

f. What kind of civil damages are appropriate for an illegal wiretap?

D. Establishing priorities and thematic focus for NGO legal defense programs. Criteria for case selection were discussed, including:

1. Cases related to the NGO's other programs.
2. Cases intended to challenge a particular legal area (law reform).
3. Cases in which the chance of success at the international level is high.
4. Cases which affect certain rights, such as: freedom from torture, freedom from inhuman and degrading treatment or punishment; right to a fair trial; privacy rights; freedom of expression.
5. Cases which affect certain groups, such as refugees and medical patients.

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International Advocacy

Rapporteur: Yonko Grosev

Facilitator: Borislav Petranov, Interights
Resource Persons: Alice Miller, International Human Rights Law Group
Tanya Smith, UN Centre for Human Rights

The discussion in the workshop on international advocacy was based on two hypothetical cases. The first case involved a fact pattern from the fictional country of Eastia, which had also been used in the workshop on police abuse litigation strategies (see page 41).

Drawing from the discussion in the workshop on police abuse, participants identified the following issues from the Eastia fact pattern:

- death from beating by police officers;
- mistreatment on the street and in the police station;
- sexual assualt;
- tapping of the telephones of NGOs dealing with the case;
- ban on foreign travel on the basis of an unpublished decree which allows travel restrictions based on "national security;"
- inadequacy of investigation;
- no information provided to the suspect regarding rights;
- no access to a doctor;
- no access to a lawyer;
- conditions in police station: no food, no access to toilets; and
- all domestic remedies have failed.

There was also a second hypothetical case involving a fact pattern in Russia, which follows:

Zaza Kabadze, a citizen of Georgia, has lived in Moscow, Russia for three years with his Russian wife Tatiana and their daughter Nana. Zaza has a business in Moscow printing books and other publications. Occasionally, he has had trouble receiving payments for orders. In one such recent case, Lidia Voskresova ordered 200,000 brochures but was unable to pay for them after they had been delivered.

Zaza and his business partner, Ruslan Akhbadov from Chechnya, went to Lidia's home to collect the unpaid bill. Zaza and Ruslan came and spoke with Lidia for two hours about the bill but with no results. So they left. The militia came to Zaza's apartment later, claiming that Zaza and Ruslan had held Lidia hostage in her home for two hours. Zaza and Ruslan have not been heard from for five days. Zaza's wife has repeatedly gone to the militia station where her husband was detained. She was finally told that both men had been transferred to a jail hospital due to injuries they had sustained during a fall. Zaza's wife hires a lawyer, who learns that Zaza has broken ribs and internal injuries. Ruslan reportedly has more severe injuries. Zaza tells the lawyer that they have

been severely beaten. Ruslan has no lawyer and is appararently unconscious in the jail hospital. The militia said that Zaza fell out of a fifth floor window trying to escape, and Ruslan jumped from the eighth floor. Neither man has been charged or formally arrested. Under Russian law, no appeal to a judge for unfair arrest is possible until formal charges are filed. Under a Russian Presidential decree, a person may be held without charge for up to 30 days. Zaza's wife calls you, at a Moscow NGO, asking for help to ascertain the whereabouts and condition of her husband and Ruslan, and to have them released. She is concerned that his life is in danger and that Zaza and Ruslan are being mistreated due to their non-Russian ethnicity. What will you do?

Russia is a member of the following UN treaties: the United Nations Charter, the International Covenant on Civil and Political Rights and the Optional Protocol on individual communications, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its individual complaint procedure, the International Convention on the Elimination of All Forms of Racial Discrimination and the individual complaint procedure, the Convention on the Rights of the Child and the Convention of the Elimination of All Forms of Discrimination agaist Women. Russia is a member of the Council of Europe but has not yet ratified the European Convention on Human Rights.

Issues identified included:

- Under Russian law it is permissible to detain a person up to 30 days without the involvement of a judicial body. No appeal is possible during this period.
- There was possible discrimination against foreigners of Caucasian origin. Such discrimination is widespread in Russia.

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Borislav Petranov began the discussion by exploring the advantages and disadvantages of taking cases to international bodies. He presented two examples illustrating the effectiveness of international litigation from a public interest perspective:

1. The Bulgarian reaction to the first judgment against it in the European Court of Human Rights.

   The Bulgarian government did not react favorably in the Lukanov case, in which the European Court found a violation of Article 5 (unlawful arrest of Lukanov – the former communist Prime Minister of Bulgaria – who was detained on the grounds of a criminal offense which did not exist at the time he was said to have committed it). The reaction of the Bulgarian government was to assert that the European Court had exceeded its competence. Many voices in Bulgarian society asked that the compensation not be paid. Finally, though, Bulgaria paid the judgment following a decision by the Council of Europe's Council of Ministers.

   Despite the negative reaction to the decision in Bulgaria, there were some positive results:

   - The authorities are more concerned now about the length of detention.
   - There was a substantial increase of interest in the Strasbourg procedure in Bulgaria after the Lukanov case.

2. The Hungarian reaction to a Human Rights Committee decision on conditions of detention.

   The UN Human Rights Committee decided a case against Hungary involving conditions of detention. The Hungarian government did not take the decision very seriously because it did not require any legislative changes.

There are alternatives to litigation in the European system. For example, sometimes the government might take measures before the final resolution of a case when it is clear they will not succeed in their arguments. This can result in a friendly settlement.

There are also reporting mechanisms which can be useful. For example, the Council of Europe's Committee for the Prevention on Torture or Punishment (CPT) issues reports on particular country situations. This can be an important campaigning tool, although it accomplishes little in and of itself. For example, in Bulgaria, after a CPT report was published, the press paid little attention to it, and it did not affect public opinion. But once NGOs are prepared to make use of such reports, they will become much more effective.

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Before addressing the issues raised in the hypothetical fact pattern, **Tanya Smith** provided a basic overview of the UN system, which is comprised of two parts: (1) treaty-based bodies; and (2) charter-based bodies. The workshop discussion focused on the treaty-based bodies. There are six major bodies, which follow two main procedures:

1. The states report periodically to the relevant committees for each human rights treaty. NGOs can send information to these committees so that facts raised by the NGOs will be addressed during the report of the respective state. (It is not necessary to go there; it is enough to send information by mail.)

2. There are individual complaint procedures for three of the six treaty bodies – the Human Rights Committee (established by the ICCPR), the Committee against Torture (CAT) and the Committee for the Elimination of Racial Discrimination (CERD). Complaints are permitted only for the states which have acceded to the individual complaint procedure. The Committee first makes a determination of admissibility of the complaint and then looks into whether or not there is a violation.

NOTE - Each of the treaty-based committees may take interim measures. For example, in one case execution of the death penalty was suspended until the committee considered the case. In only two or three cases have states refused to respect these interim measures.

Tanya Smith also discussed a number of non-treaty mechanisms within the UN that might be used in the Russian hypothetical. The Human Rights Commission, for instance, is a political body, but it has a confidential procedure – the 1503 procedure – that it can use to react to a consistent pattern of gross human rights violations. The procedure has a political character; for example, the situation in Chechnya has never been subjected to the procedure. Its utility is limited because there is no specific remedy provided. Nonetheless it can be helpful in drawing attention to a human rights problem.

Another means of asserting political pressure for the curbing of human rights violations is to lobby the Human Rights Commission to appoint a Special Rapporteur to examine the human rights situation of a particular country. The Rapporteur can go to the country and visit particular sites. The Special Rapporteur on Torture will also visit specific countries if he receives information indicating that there is a pattern of torture. He wrote an extremely critical report, for instance, on Russia. It was not reprinted in the newspapers, but the press reported on the findings. Although it is always hard to tell the degree to which such a report has a direct influence on actions by the government, there is usually some effect.

In general, when writing to a Special Rapporteur, it is advisable to include concrete recommendations in addition to the facts. The Rapporteurs are not experts on the countries they cover; often they will take a recommendation directly from a letter and put it into their report.

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Participants discussed strategic questions regarding the Russian hypothetical case. Steps in the strategic analysis included:

1. Look where the case is in the legal system. Are domestic remedies exhausted? Yes, because there is no remedy under Russian law in this case.

2. What are the possible avenues for international advocacy?

    a. European Court of Human Rights? No, because the European Convention on Human Rights is not yet in force for Russia.

    b. UN system? Yes, in fact a UN interim procedure could be used to request the Human Rights Commission to ask for the suspension of the detention in order to prevent further torture on the grounds that there is no domestic procedure to make such a request.

    The advantage of the UN interim procedure is that it will provide time to pursue other strategies. It is also a fast procedure, since there is no need to show that domestic remedies have been exhausted. It does, of course, depend on the state's good will. In one instance, for example, Canada – which usually respects such requests – declined to comply in a case involving extradition. One participant suggested that the intervention of the UN Special Rapporteur on Torture can also result in bringing a stop to specific instances of torture.

    The United Nations has a hotline in Geneva that NGOs can use to fax information about a human rights violation in progress, such as torture, disappearance or other emergency situation. The fax number is (41 22) 917 0092. Cases sent in by fax will be submitted to the relevant thematic Rapporteur.

    Participants discussed the relative advantages and disadvantages of the UN and Council of Europe systems. In any individual case, a choice must be made because a UN body will not decide on a case that is pending before the European Court. (This is NOT true, however, with respect to the work of the UN Special Rapporteurs, such as the emergency procedure described above.) The main advantage of UN bodies is that they reach decisions faster than the European Court of Human Rights. A decision might be made within two years, as opposed to the five or six years that must be anticipated with the European Court of Human Rights. The main disadvantage of the UN bodies is that their decisions are not binding; whereas, the states that have accepted the jurisdiction of the European Court of Human Rights have also agreed to enforce its judgments. Finally, with some issues, it may be that a better result will be achieved with one system rather than the other because of differences in the development of the human rights jurisprudence of each system.

3. If you are submitting the case to a UN body, how do you determine which one to pursue? In the Russian hypothetical, for instance, should the case be submitted to the Human Rights Committee (HRC), the Committee against Torture (CAT), or the Committee for the Elimination of Racial Discrimination (CERD)? (There is a tendency at the UN to favor the developing of a unitary jurisprudence, and the committees would not appreciate the splitting of claims from a single case to different bodies.)

CERD can be ruled out because the discrimination claim in the Russian hypothetical was weak and hard to substantiate. In order to make a final determination of which committee to turn to, it is important to know more about the responsiveness of each committee, who are the members, who are the staff, and other logistical questions, such as which language would be best for the drafting of a petition. A number of international NGOs, such as Amnesty International or the International Human Rights Law Group, monitor the work of the different UN bodies, and can be relied on for practical information regarding tactics.

There are a number of objectives in pursuing international litigation:

- obtain remedies for the victims;
- stop a violation;
- contribute to law reform if the case is illustrative of a bigger problem;
- select a case where the issues are of such a nature that it will stimulate public debate on the relationship between national and international remedies.

Note on Confidentiality Issue

Regarding interim measures at the UN, the confidentiality rules which normally pertain to UN procedures do not apply. For instance, an NGO may organize a press conference to say that they sent a fax to a UN Special Rapporteur. If you want to publicize your case as a petitioner you may do that. On the other hand, however, it may not be strategically wise to announce what you are trying to do at the international level if you are not sure you will be successful. A victim's family member may call the UN staff in Geneva, who will tell him or her whether action has been taken or not, without providing further details.

Regarding the European Commission on Human Rights, the confidentiality requirement refers to the substance of the case and not to the fact of whether or not the case was admitted.

Despite confidentiality requirements, a continuing challenge for NGOs is to adopt creative and inventive practices to stimulate public debate regarding cases that have been brought to international bodies. Moreover, the reports made by UN Special Rapporteurs can be used by NGOs to promote a campaigning agenda.

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Women's Rights: Violence Against Women

Rapporteur: Monika Platek

Facilitators: Alice Miller, International Human Rights Law Group
Urszula Nowakowska, Women's Right Center

Resource persons: JoAnne Fedler, Tshwaranang Legal Advocacy Center to End Violence Against Women;
Anshu Padayachee, Advice Desk For Abused Women
Marina Pisklakova, Crisis Center for Women - ANNA

Alice Miller began the workshop by providing a conceptual framework, including a presentation on human rights treaty law — highlighting those aspects that have an empowering effect by demanding that women's rights be respected, protected and fulfilled. Miller also pointed out the relevance of the UN Convention on the Elimination of Racial Discrimination, which holds states accountable not only for what happens in public but also in private life.

In the discussion that followed, some of the participants voiced frustration because, they argued, treaty texts help little if at all when women face actual violence at home, in the street or at work. Some pointed out that the actual language of those declarations and treaties is in fact disempowering. Women's lives are often led in total seclusion; often they remain illiterate; and for too many of them all those words about rights and dignity are useless at the practical level.

Others in the group responded by distinguishing the goal of dealing with the actual results of violence against women from the goal of preventing the violence. In terms of prevention, they argued, the language of international treaties has great power. That language is targeted at officials, and in official circles it works well, to the extent that women activists know it and know how to use it. It is also important to use the language of human rights when asking for legal protection and when educating society about gender equality.

Participants also pointed out that there are ways to translate treaty language about respect and equal rights into terms that everyone can understand. Instead of using abstract terms, it can help to talk about the rights to shelter, work, running water, freedom from beating, etc.

The participants discussed to what extent one can be effective when talking about empathy, equality and respect while addressing authority, and they came to the conclusion that it is generally more effective to argue how much it costs to abridge the rights protected by treaties. An argument such as: "If you do not stop the violence, your business will suffer" unfortunately seems to work better than: "It is against the law and human dignity to beat up women." It is necessary to translate the language of human rights into terms that will be understood in and reflect the reality of rural area and remote places. In South Africa, for instance, one has to address the tribal leaders, and in doing so, one must take into account the binding customs, even if they are far from declaring the equal status of men and women. Effectiveness demands not so much sacrificing the value of equality but rather casting the value of equality in terms that are compatible with the conditions present in a particular country or tribe.

Participants also acknowledged that it can be quite helpful to talk to women about human rights. They know what problems they have, but they often do not know that other women have the

same problems. Knowledge that others suffer as well highlights the need for action. As a result, it is important to spread information in order to break the silence, suggesting that violence does not exist. Means for spreading information include collecting stories, statistics, case studies and other information and providing it to the press. Case studies are often more effective than long theoretical discussions. At the same time, it is important to present cases in a way that does not harm the victim, while still retaining the powerful impact of the story. Another side effect to avoid is the immoral element of "trading" on women's stories. One means of avoiding these negative aspects is to either use pseudonyms or create one composite story based on several real ones.

JoAnne Fedler took the floor to present her experience in creating a center acting against violence against women. With the help of the Ford Foundation, she and her co-workers had the opportunity to observe the work of similar organizations in different parts of the world, and they set up their center to deal with specific cases of violence against women. They soon realized that their work is not very efficient. They were facing a "Mount Everest" of cases. Moreover, it was difficult to incorporate human rights language into individual cases, proper statistics were lacking and members of NGOs faced threats from those who were against changing "tradition." They also faced the culture of indifference (if she was raped she must be indecent — decent women are not raped; if she is beaten — she must have deserved it). They felt, they were being used by the government to demonstrate that action was being taken while in fact the situation was far from bright. (For example, President Mandela had time to meet Bing Crosby and Michael Jackson but left on holiday despite an appointment arranged earlier to meet with representatives of women's organizations.) In the end, the women decided that the most effective way to tackle the problem was to represent the issue rather than individual cases.

Anshu Padayachee, from the Advice Desk for Abused Women at University of Durban – Westville, spoke next to present an example of an organization which is not sponsored by external donors. The Advice Desk must struggle for its existence based on the work of volunteers and its own resourcefulness. It is one of the oldest such organizations, already existing twelve years, and it deals mostly with individual cases of women who need help, as well as educating men about the negative effects of violence.

They do not call their organization "feminist" but rather "*ubuntu*" – which means respect – a concept they apply to the status of women. The concept fits in well with local cultural understandings, according to which a person can achieve respect for themselves only through their relations with other people. Tribal culture already dictates that multiple wives should receive equal treatment; they try to convey to tribal leaders that it is important to exclude violence altogether from relationships with their wives, rather than just ensuring that domestic violence is spread evenly among them.

They offer this training in remote villages. By adopting the words and manners of existing tribal culture they are making a great deal of progress in changing customs and practices. For example, soon after the training begins, the trainers and tribal leaders all sing and dance together, a custom that is traditionally reserved for men. In this way, they demonstrate early on that customs can be adapted and changed.

In addition to the program for tribal elders, the Advice Desk also educates judges and prosecutors. They did not approach the judges and prosecutors to offer them a "training," since such an offer would undoubtedly have been refused. Instead, the judges were asked if they would be

willing to have tea and cookies with some women who wanted the judges' advice and were interested in an exchange of opinions. Once they got to know each other, and after the Advice Desk opened an office in the court, the judges asked, at their own initiative, for training about domestic violence.

Marina Pisklakova presented the development of her organization, ANNA – the Crisis Center for Women, which is active on both fronts in Russia – working with politicians and media on one hand, and solving individual cases on the other.

Pisklakova founded the first Russian hotline for domestic violence four years ago. Domestic violence, previously declared to be nonexistent, has only recently come out from the silent shadows. The Soviet Union, as well as the Eastern European bloc as a whole, was supposed to be close to ideal in terms of family life as well as other spheres. The achievement of an ideal family life of course excluded the possibility that domestic violence could exist.

The hotline demonstrated the gap between the ideal and the real. It quickly became clear that despite public declarations to the contrary, domestic violence was an accepted part of the cultural tradition of the region.

After the Moscow hotline began its activities, the Soviet Union broke up into many pieces, and women who used to call from all over the former Soviet Union began to encounter obstacles, mostly in the form of high telephone rates. As a result, what started as a nationwide hotline became local. The change did not, however, diminish the evidence of domestic violence that continued to pour in.

The Moscow center originally served mainly as a source of support and information. In order to affect a real change, however, Pisklakova and her colleagues became engaged in political activities: exerting pressure on politicians, disseminating information to and through the media and forming an alliance with similar groups throughout the country. For example, ANNA has provided expertise on Parliamentary initiatives, including the many drafts of a new civil code. At the same time, ANNA works to increase awareness that domestic violence is a serious issue, and that it is a social problem which Russian law must address. ANNA cooperates with the more than 20 crisis centers and two shelters in Russia. The organizations share their experience and train each other.

After the presentation of the Russian experience, participants from many countries pointed out that the police tend to treat domestic violence and abuse as family business and usually refuse to intervene. A similar attitude prevails among prosecutors and often in courts as well. Participants agreed: it is therefore important to launch national educational campaigns.

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The session split into two groups. One group discussed the possibilities for different human rights-oriented NGOs to work together in order to stop violence against women; the other group discussed the most effective techniques for preventing violence against women. (It was mentioned at the beginning that violence is not exclusively reserved for women. Men and children of both sexes are also victims of violence, but the workshop dealt with women's issues because women are the most common victims of violence.)

Several techniques and tactics were mentioned, including:

- Break the silence. It is essential to provide the public with analysis and make the politicians, churches and NGOs aware of the phenomenon.
- Break the fear. Women are afraid to talk about the violence they experience, often because they are convinced it is happening only to them.
- Break the concept of "normality." People who witness violence, or who experience it, tend to believe it is normal behavior. This can be prevented only through educational activities targeting a broad range of age groups and social groups.
- Adopt the legal measures necessary to stop the violence. The law does not, in most cases, provide victims with adequate relief. It was pointed out several times during the discussion that women often want to keep their husband but without his abusive behavior. Women want the authorities to react but not to take the husband away or impose a fine on him that ultimately the household as a whole will be responsible for paying.
- Develop crisis intervention centers, a model for providing relief to those facing violence at home. They help women by providing them with a choice. As some participants mentioned, it may seem fairer to kick the abuser out of the house rather than encourage the victim to leave, but the reality is such that it is necessary to create places where victims can hide and find shelter. Crisis intervention centers try to create a pressure-free environment, to avoid mimicking the abusive atmosphere of the victim's home. The victim needs relief from all outside pressures, and she must be left to decide what she wants on her own. If the decision is to go back to the abuser, that decision must be respected even if the center staff thinks it is a bad one.
- Prepare emergency kits for use by crisis intervention centers. The kit includes practical information for what victims need to do and how they should behave in order to deal with an abuser. At the same time, centers need to train the police, prosecutors and judges about the phenomenon of domestic violence in order to effectively prevent acts of violence.
- Create support groups, which are another effective means for dealing with domestic violence. In developing such groups, it is important to involve specialists who can help with techniques for reducing stress and anxiety.
- Promote public education through schools, community-based organizations, TV and radio. Educational materials should be prepared in different languages, if that is necessary to reach the broadest possible audience.
- Lobby for the legal reforms necessary to address the deficiencies of the legal system in addressing domestic violence adequately.

- Network among women's organizations and other human rights organizations, exchange information and develop national networks for action to end domestic violence.
- Train paralegals to work in rural areas. In that way, the language of international human rights treaties as well as domestic legal mechanisms can become more accessible to the wider population.

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Environmental Litigation: Standing to Sue

Rapporteur: Jan Hrubala

Facilitators: John Bonine, University of Oregon
Svitlana Kravchenko, EcoPravo - Lviv

Svitlana Kravchenko started the workshop by announcing that the participants were the staff of an environmental public interest law firm, and that the board had just appointed a new Executive Director, **John Bonine.**

Bonine began by declaring that there would be a policy change regarding the future development of the firm. He criticized the previous firm leadership, which had established the strategic priority of liberalizing the jurisprudence on standing to sue. On the contrary, he asserted that standing should be restricted to those parties having a direct interest in any particular case. His asked the following rhetorical questions:

- What would happen if we were able to expand the concept of standing so far that anyone could sue anyone for anything? This is against the public interest because the law would no longer be an instrument of justice. Involving those who have no relationship to the matter at hand would not lead to the just resolution of conflicts.
- What is the moral authority for asserting that we as a law firm know better what other persons' interests are than they do?

Participants responded by defending the expansionist position. The arguments included:

- In order to use the law as an instrument you need to know something about the legal system, and how to use it to protect your interests. (For example, indigenous tribes in the Amazon may be suffering injustices, but they might not be familiar enough with the legal system to invoke its protection.)
- People are not necessarily aware of the harm to which they are exposed, especially in environmental matters. As a result, there is a need for persons who have the requisite scientific and legal knowledge to identify the problem and determine how to solve it.
- In some countries, the legal structure provides for the state to take on the role of protecting the public interest, but there is often a conflict of interest, especially in human rights cases, which is why civil society must take on some of the responsibility for protecting the public interest.

Following the discussion of reasons for taking an expansive approach to standing to sue, there was a presentation of a hypothetical case. The hypothetical involved an association of mothers from a small town, who were seeking the assistance of an environmental public interest law firm. The children of this group of mothers were suffering from flouros, a tooth disease, and osteoporosis, a bone disease, caused by flouride pollution of the underground water supply. A governmental commission had been established to investigate the situation. The commission found that there were three possible sources of the pollution: the activity of a nearby coal mining company, the underground storage of rocket fuel by a former military base that had been closed in 1990 or a natural phenomenon.

The participants, as staff members of the law firm, were asked what remedies they should seek. After a discussion of possible remedies, the facilitators organized a mock civil trial. Participants were divided into two teams. One team included representatives for each of the two defendants (the military base and the coal mining company), and the other team represented plaintiffs, including the association of mothers and the public interest law firm. The two facilitators and one participant acted as the tribunal.

The representative of each plaintiff argued to the court why they should be admitted to the proceeding as plaintiffs, and the representatives of each defendant argued why the plaintiffs should be excluded.

At the end of the mock trial, Kravchenko announced that the hypothetical had been based on a real case in the town of Sosnivka, Ukraine and that her NGO, EcoPravo – Lviv, had filed suit in a Ukraine court. She went on to describe some of the obstacles they had encountered and how they had achieved victory on the procedural standing issue.

Internet Advocacy

Rapporteur: Roberto Saba

Facilitator: Barry Steinhart, ACLU

The workshop was divided into three parts.

1. What is the Internet?

Barry Steinhart started by discussing the definition of the Internet which is articulated by the US Supreme Court in the decision of *Reno v. ACLU*. In that case, the Court provided a history of the development of the Internet, which is a network of networks. The Internet began as a military project which later became a civilian network used by millions of people (40 million at the time the case was brought to the Court).

Some technical features of the Internet were also discussed, such as the means of connecting to the Internet through "access providers." There is at least one access provider in every country.

Finally, there was a discussion of the different services available over the Internet (e-mail, listservs, chat groups, World Wide Web) as well as the possibility of transmitting texts, audio, graphics and video. Homepages (or web sites) are part of the World Wide Web, one of the most common technologies for making use of the Internet.

2. Demonstration of Uses

Steinhart then demonstrated the uses of the Internet, especially from the perspective of what might be fruitful for those working at NGOs. Among other things, the group experimented with the following:

- Obtaining the e-mail addresses and web site URLs of those who access a particular homepage in order to send information to them. The group saw that in the case of the ACLU, 50,000 people visit its web site every month.
- The downloading of voluminous information, providing an easy and inexpensive way to distribute materials.
- Using search engines as a research tool on the World Wide Web.
- E-mail lists as a useful way of distributing information to a previously selected group of people.
- News groups as a kind of virtual Hyde Park Corner where everybody can speak to everybody else.
- Chat groups, which provide the opportunity of real-time conversation. This technique is potentially useful for NGOs with a membership that is spread out among different cities because it allows them to hold meetings on-line. This feature will soon be improved, providing the possibility of adding video and sound to messages at very low cost.

- Campaigning through a web site. The case of the Global Internet Liberty Campaign, which was launched by the ACLU and other organizations, was used as an example. Among other things, a campaigning site can be used as a means for the mass faxing of letters to any target institution. For example, when the case *Reno v. ACLU* was being considered by the Supreme Court, the ACLU invited citizens to send faxes from the ACLU's homepage through the Internet to Janet Reno, the US Attorney General, requesting her to suspend implementation of the challenged legislation until the Supreme Court made its decision. She received about 12,000 faxes in two days and ultimately gave a positive response to the request.
- Selling and marketing NGO products (T-shirts, papers, books, etc.) on a web site.

The participants in the workshop shared their experiences regarding use of the Internet as a work tool. Some of the responses were:

- Most participants use e-mail for national or international communications.
- Some organizations have homepages on the World Wide Web and use them to distribute and publicize institutional information.
- Some use the World Wide Web or e-mail to discuss issues with their colleagues.
- A few participants said that they do not use either Internet or e-mail.
- Most of the participants expressed frustration about the difficulty they have connecting to the Internet.

3. Human Rights Issues Raised by Internet.

a. The case of *Reno v. ACLU*

The US Congress passed the Communication Decency Act about eighteen months ago. It provided that communicating indecent materials (inappropriate for children) in any manner accessible by children through Internet was considered to be a crime. This wording covered expression by many advocacy groups (in areas such as family planning, sexuality, human rights, etc.) The ACLU represented twenty different groups affected by the legislation.

The case, known as *Reno v. ACLU*, was decided recently by the Supreme Court. The Court argued that Internet had a strong democratizing aspect since it is the most powerful medium of speech, allowing common people to speak to one another at a very low cost. It compared the Internet to a virtual Hyde Park Corner. For this reason, the Court said that the Internet deserves the highest level of protection. It added that the statute was overbroad because it not only reduced the access for children but for adults as well.

b. Regulation of Internet

There followed a discussion about the difficulty national governments have in regulating the Internet, especially because the creators of the content they want to regulate often reside outside the national jurisdiction.

A discussion of the situation in a variety of countries revealed that many nations are concerned about the kind of messages that are delivered through Internet, especially when they refer to sexual topics, child pornography, political speech and national security.

c. Encryption

In connection with the problem of national security, discussion focused on the topic of encryption. Encryption provides a means of protecting the privacy of email messages by encoding them. Such technology can be especially important for the work of NGOs that deal with extremely sensitive issues such as human rights.

A fair amount of time was devoted to understanding the way in which Public Key Encryption works, followed by a discussion of the strategies that national states are developing in order to make it impossible to use encryption. It was mentioned that states create international alliances to reach their objectives, and the discussion expanded to strategies that can be carried out by NGOs internationally in order to defend themselves from this attack on freedom of expression. Participants discussed the need for building international alliances among NGOs as one effective way to do this, taking as an example the case of the Global Internet Liberty Campaign organized by the ACLU with a number of other organizations.

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Appendix II

SYMPOSIUM ON PUBLIC INTEREST LAW
IN EASTERN EUROPE AND RUSSIA

DURBAN, SOUTH AFRICA
JUNE 29 - JULY 8, 1997

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Appendix III

SYMPOSIUM ON PUBLIC INTEREST LAW
IN EASTERN EUROPE AND RUSSIA

DURBAN, SOUTH AFRICA
JUNE 29 - JULY 8, 1997

Background Readings

(Articles and other materials can be obtained by writing to: The Public Interest Law Initiative, Columbia Law School, Mail Code 3525, 435 West 116th Street, New York, NY 10027 USA tel: 212-851-1060; fax: 212-851-1064; e-mail: pili@law.columbia.edu.)

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B. James Goldston, "Project on Race Discrimination Impact Litigation in Eastern Europe"
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E. M. de Salvia, "Applications lodged against Central and Eastern European Countries with the Human Rights Protection Organs in Strasbourg," Council of Europe, 1 April 1997

F. Borislav Petranov, "The Practice and Effectiveness of Submitting *Amicus Curiae Briefs* by NGOs in Cases Before International Human Rights Treaty Bodies and Tribunals: Notes on the Example of the European Court of Human Rights," Paper presented at the Symposium on the Legal Defense of the Rights of the Roma, Budapest, 1997
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D. Excerpt on violence against women from *The Beijing Declaration and the Platform for Action: Fourth World Conference on Women, Beijing, China*, UN Dept. of Public Information, UN Doc. DPI/1766/WOM-9539642
E. Donna Sullivan, "The Public/Private Distinction in International Human Rights Law," *Women's Rights, Human Rights: International Feminist Perspectives*, Julie Peters and Andrea Wolper, eds. (New York: Routledge 1995)
F. *Declaration on the Elimination of Violence Against Women*, UN GA Res. 48/104, 20 December 1993
G. *General Recommendation No. 19: Violence Against Women*, UN Committee for the Elimination of Discrimination Against Women, 11th Session, 1992
H. Radhika Coomaraswamy, Excerpts from the *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, UN ECOSOC, Commission on Human Rights, 53rd session, UN Doc. E/CN.4/1997/47, 12 February 1997
I. Margaret Martin Barry, "A Question of Mission: Catholic Law School's Domestic Violence Clinic," *Howard Law Journal*, Vol. 38:135 (1994), 135-161

IV. Environmental Litigation: Removing Procedural Barriers (Standing, Causation, Injunctions, Cost Barriers)

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VI. Clinical Legal Education

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C. Halina Niec and Garrett Rothman, "On Starting the Jagiellonian University Legal Clinic"
D. Vera Machalova, "Description of Human Rights Activists Training Program"
E. William P. Quigley, "Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor" *Akron Law Review*, Vol. 28:3 (Spring 1995) 463-496
F. Peter Toll Hoffman, "Clinical Course Design and the Supervisory Process," *Arizona State Law Journal*, (1982:277) 277-311.
G. Selections from *Professional Training Manual 1996*, Department of Procedural and Clinical Law, University of Natal, Durban

VII. Integrating Domestic and International Strategies

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E. Excerpts from Addendum to above document (Summary of Cases Transmitted to Governments and Replies Received), UN Doc. E/CN.4/1997/7, Add. 1 of 20 December 1996
F. Excerpts from *Report of the Working Group on Arbitrary Detention to the UN Commission on Human Rights*, UN Doc. E/CN.4/1997/4, 17 December 1996

Selected Materials on the Work of the European Committee for the Prevention of Torture

VIII. The South African Constitutional Court

A. Ian Currie, "Jurisdiction in Constitutional Litigation under the 1996 Constitution," February 27, 1997

B. Foes v. Minister of Safety and Security, South African Constitutional Court, June 5, 1997 (Summary of a decision regarding a requested award of supplemental Constitutional damages in a police abuse case)

IX. The South African Truth & Reconciliation Commission

A. Tina Rosenberg, "Recovering from Apartheid," *The New Yorker,* Nov. 18, 1996, pp. 86-94

B. Priscilla B. Hayner, "Commissioning the Truth: Further Research Questions" *Third World Quarterly*, Vol 17, No. 1 (1996), pp. 19-29

C. Priscilla B. Hayner, "Reconciling Truth with Justice and Forecasting the Factors that Affect a Stable Peace," Paper presented at a conference of the Woodrow Wilson International Center

Appendix I

SYMPOSIUM ON PUBLIC INTEREST LAW
IN EASTERN EUROPE AND RUSSIA

DURBAN, SOUTH AFRICA
JUNE 29 - JULY 8, 1997

Agenda

SUNDAY, JUNE 29

Afternoon Arrival. Check in at Blue Waters Hotel or Holiday Inn Garden Court

Blue Waters Hotel
Snell Parade
Durban 4001
Kwazulu/Natal
South Africa
Tel. 27-31-3324-272
Fax. 27-31-375-817

Holiday Inn Garden Court/
North Beach
83/91 Snell Parade
Durban 4001
Kwazulu/Natal
Tel. 27-31-332-7361
Fax. 27-31-374-058

4:30 p.m. For guests at the Holiday Inn Garden Court/North Parade, shuttle departs from Holiday Inn for the Blue Waters Hotel

5:00 p.m. *Opening Lecture on the Development of the Public Interest Law Movement in South Africa*
Geoffrey Budlender, Director General, Department of Land Affairs
(at the Blue Waters Hotel)

6:30 p.m. *Opening Reception* with Guests from the Black Lawyers Association and the National Association of Democratic Lawyers

MONDAY, JUNE 30

8:30 a.m. Depart from hotels for University of Natal Conference Centre via shuttle

Innovation Centre
University of Natal
Education and Innovation Foundation Building
Francois Road, Durban
Tel. 27-31-260-1602

MONDAY, JUNE 30

9:00 a.m. Plenary: *Introductory Session*
Moderator: Joseph Schull, The Ford Foundation
Presenters: Edwin Rekosh, The Ford Foundation
Jan Hrubala, Partners for Democratic Change
Dimitrina Petrova, European Roma Rights Center
Wiktor Osiatynski, Central European University/ The Open Society Institute

11:00 a.m. Break

11:30 a.m. Plenary: *Introductory Session* (continued)

1:00 p.m. Lunch

2:00 p.m. Workshops:

Group A-1 *Education: Street Law and Public Education*
Facilitator: David McQuoid-Mason, University of Natal
Resource Persons: Jan Hrubala, Partners for Democratic Change
Mawethu Mosery, Democracy For All
Monika Platek, Polish Association of Legal Education

Group B-1 *Advocacy: Domestic Campaigning and Lobbying*
Facilitators: David Cohen, Advocacy Institute
Maureen Burke, Advocacy Institute
Resource Persons: Zane Dangor, Development Resource Centre
Judit Fridli, Hungarian Civil Liberties Union
Ina Zoon, Tolerance

Group C-1 *Litigation: Police Abuse*
Facilitator: Borislav Petranov, Interights
Resource Persons: James Goldston, European Roma Rights Center
Yonko Grozev, Bulgarian Helsinki Committee
Peter Jordi, Legal Clinic, University of Witwatersrand
JP Purshotam, Legal Resources Centre
Andrzej Rzeplinski, Helsinki Foundation for Human Rights

4:00 p.m. Break

4:30 p.m. Workshops continue

5:30 p.m. Dinner

8:15 p.m. Depart for Hotels via shuttle bus

TUESDAY, JULY 1

8:30 a.m. Depart for conference site

9:00 a.m. Plenary: *Management of Public Interest Law Organizations*
Moderator: Alice Brown, The Ford Foundation
Resource Persons: Mzo Mdladla, Legal Resources Centre
JP Purshotam, Legal Resources Centre
Barry Steinhardt, American Civil Liberties Union
Marek Nowicki, Helsinki Foundation for Human Rights

11:00 a.m. Break

11:30 a.m. Participant presentations
Moderator: Edwin Rekosh, The Ford Foundation
Presenters: Judit Fridli, Hungarian Civil Liberties Union, on a work shop on freedom of information and data protection
James Goldston, European Roma Rights Center, on a project on race discrimination impact litigation in Eastern Europe

1:00 p.m. Lunch

2:00 p.m. Workshops:

Group A-1 *Education: Street Law and Public Education*
Group B-1 *Advocacy: Domestic Campaigning and Lobbying*
Group C-1 *Public Interest Litigation*

4:00 p.m. Break

4:30 p.m. Workshops continue

6:00 p.m. Depart for Hotel

6:30 p.m. Free Time

WEDNESDAY, JULY 2

8:15 a.m. Depart for conference site via shuttle bus

9:00 a.m. Plenary: *Access to Justice/Legal Services*
Moderator: James Goldston, European Roma Rights Center
Resource Persons: Yussuf Vawda, University of Durban-Westville
David McQuoid-Mason, University of Natal
Karoly Bard, Constitutional and Legislative Policy Institute

11:00 a.m. Break

11:30 a.m. Workshop Reports from the Previous Days
Moderator: Edwin Rekosh, The Ford Foundation

1:00 p.m. Lunch

2:00 p.m. Workshops:

Group D *Women's Rights: Violence Against Women*
Facilitators: Alice Miller, International Human Rights Law Group
Urszula Nowakowska, Women's Rights Center
Resource Persons: JoAnne Fedler, Tshwaranang Legal Advocacy Centre to End Violence Against Women
Anshu Padayachee, Advice Desk for Abused Women, University of Durban-Westville
Marina Pisklakova, Crisis Center for Women - ANNA

Group E *Environmental Litigation: Removing Procedural Barriers*
Facilitators: John Bonine, University of Oregon
Svitlana Kravchenko, Eco-Pravo

Group F *Internet Advocacy*
Facilitator: Barry Steinhardt, American Civil Liberties Union

4:00 p.m. Break

4:30 p.m. Workshops continue

6:00 p.m. Panel Discussion on Contemporary Issues in South Africa
Moderator: David McQuoid-Mason, University of Natal
Panel: academics, lawyers, students and women's rights activists who reflected the diversity of South African society.

7:00 p.m. Cocktails with representatives from South African public interest law organizations and from the School for Legal Practice

7:45 p.m. Depart for hotels on shuttle buses

THURSDAY, JULY 3

8:30 a.m. Depart for conference site via shuttle bus

9:00 a.m. Plenary: *Developing New Institutions*
Moderator: David McQuoid-Mason, University of Natal
Resource Persons: Selby Baqwa, Public Protector
Karthy Govender, Human Rights Commission
Phumele Ntombela-Nzimande, Gender Commission
N.R. Madhava Menon, National Law School of India

11:00 a.m. Break

11:30 a.m. Workshop Reports from the Previous Day
Moderator: Edwin Rekosh, The Ford Foundation

1:00 p.m. Lunch

2:00 p.m. Workshops:

Group A-2 *Clinical Legal Education*
Facilitator: David McQuoid-Mason, University of Natal
Resource Persons: Asha Ramgobin, University of Natal Legal Clinic
Yussuf Vawda, University of Durban-Westville Legal Clinic

Group B/C-2 *Integration of Domestic and International Strategies*
Facilitator: Borislav Petranov, Interights
Resource Persons: Tanya Smith, United Nations Human Rights Centre
Alice Miller, International Human Rights Law Group

4:00 p.m. Break

4:30 p.m. Workshops continue

6:00 p.m. Depart for Hotels

7:00 p.m. Depart from hotels for dinner at:

Killie Campbell Africana Library & Museum
220 Marriott Road
Berea, Durban
Tel. 27-31-207-3711
Fax. 27-31-291-622

7:15 p.m. Small group tours of museum

8:00 p.m. Dinner

11:00 p.m. Buses depart for hotels

FRIDAY, JULY 4

8:30 a.m. Depart from hotels on shuttle buses for township visit

11:30 a.m. Return to hotels. Free time. Lunch on your own.

1:30 p.m. Buses from hotels for symposium sites

2:00 p.m. Workshops:

Group A-2 *Clinical Legal Education*
Group B/C-2 *Integrating Domestic and International Strategies*

4:00 p.m. Break

4:30 p.m. Workshops continue

6:00 p.m. Depart for Hotels

6:30 p.m. Free Time

7:15 p.m. Depart from Hotels on several shuttle buses for Perrins

7:30 p.m. Closing Dinner at Perrins

151 Seventh Avenue
Durban 4001
Kwazulu/Natal
Tel. 27-31-234-046 or 303-4790

SATURDAY, JULY 5

Morning	Free time
3:00 p.m.	Concluding meeting at the Blue Waters Hotel Plenary: *Conclusions/Next Steps* Moderator: Joseph Schull, The Ford Foundation
5:30 p.m.	Free time
6:30 p.m.	Depart from Hotels via shuttle bus for cultural evening at the BAT Community Arts Centre
6:45 p.m.	Orientation for Game Park Excursion, David McQuoid-Mason BAT Community Arts Centre 45 Marine Place Small Craft Harbour Victoria Embankment, Durban Tel. 27-31-332-0468 or 373-088
7:30 p.m. - 9:00 p.m.	Zulu dance troupe, township music, African singing (with dinner)

SUNDAY, JULY 6

4:00 a.m.	Depart for excursion to the Umfolozi Game Reserve and the Royal Palace of King Cetswayo of the Zulus

MONDAY, JULY 7

morning	Optional site visits in Durban:
8:00 a.m.	*Rural Paralegal Training*, led by Bongani Kumalo, Community Law Centre
9:00 a.m.	*Court Visit*, led by M.L. Pillay, University of Natal Legal Clinic *Legal Resources Center*, led by JP Purshotam *Advice Desk for Abused Women*, led by Anshu Padayachee *Democracy and Street Law Project*, led by Bheki Gumede, Democracy for All *Environmental Campaign Areas* (including townships), led by Prakashnee Govender and environmental activists
1:00 p.m.	Return to hotels

3:30 p.m.	Depart from hotels for airport
5:50/6:00 p.m.	Fly to Johannesburg
6:55/7:00 p.m.	Arrive Johannesburg, transfer to: The Parktonian Hotel 20 De Korte Str. Braamfontein 2001 Johannesburg Tel. 27-11-403-5740 Fax: 27-11-403-2401
8:30 p.m.	Dinner at the Parktonian Hotel

TUESDAY, JULY 8

7:30 a.m. - 8:00 a.m.	Group checkout from hotel
8:15 a.m.	Walk from hotel to Constitutional Court
9:00 -11:00 a.m.	Visit to the *Constitutional Court of South Africa* Meet with Justice Pius Langa and Justice Kriegler Braampark Forum II, 2nd floor 33 Hoofd Street Private Bag X32 Braamfontein 2017 Tel. 27-11-403-8094 or 8032
11:00 a.m.	Depart on shuttle bus to Rosebank Mall for individual lunches and shopping
1:15 p.m.	Shuttle bus leaves Rosebank Mall for Truth and Reconciliation Commission
12:00 p.m.	Lunch at Rosebank Mall
2:00 p.m.	Visit to the *Truth and Reconciliation Commission* Paul van Zyl, Executive Secretary Fazel Randera, Human Rights Violations Committee Barbara Watson, Reparation and Rehabilitation Committee

Sanlam Centre, 10th Floor
Cnr Jeppe & Von Welligh
Johannesburg
Tel. 27-11-333-6330

4:00 p.m. Shuttle bus returns to hotel

5:15 p.m. Shuttle buses leave for the airport for those on group flight to London

8:15 p.m. Departure of group flight to London

Appendix IV

SYMPOSIUM ON PUBLIC INTEREST LAW IN EASTERN EUROPE AND RUSSIA

DURBAN, SOUTH AFRICA JUNE 29 - JULY 8, 1997

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