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RESEARCH ARTICLE

SHOULD THE TRANSMISSION OF SEXUALLY COMMUNICABLE DISEASES BE CRIMINALISED?

***Rishika Khare**

LLM Law, University of Edinburgh (2016); B.A.LL.B. (Hons.), Rajiv Gandhi National University of Law (2015)

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ABSTRACT

To address the spread of sexually communicable diseases, many jurisdictions have resorted to the criminal law approach; through specific lawmaking or by extending the protection under general criminal law. They criminalise the instances that involve inflicting harm on the victims through intercourse, where victims did not consent to the risk of transmission. This approach has often been criticised for discriminating against the vulnerable infected persons and for perpetuating their social stigma. This article assesses if the transmission of sexually communicable diseases should be criminalised. For the purpose, the article will specifically focus on the HIV and its transmission. The article discusses the factors of public health, harm and risk in transmission, non-disclosure, consent, reckless and intentional transmission, to find if transmission should be criminalised. It concludes to direct that despite criminalisation as an approach, resources of the state should focus on providing education, awareness and access to medical facilities.

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INTRODUCTION

Sexually transmitted diseases[1](that also go by the name of sexually transmitted infections[2]) are "a variety of clinical syndromes and infections caused by pathogens that can be acquired and transmitted through sexual activity"[3] weakening the public health sustainability.[4] There are more than twenty known STDs so far,[5] some of which are curable.[6] At least one of such diseases is said to have been acquired by almost half of the sexually active persons once in their lifetime.[7] The main "fear" with the discussions of these diseases is the social stigma attached to it and prejudice of "[associating] them with prostitutes or people who sleep around".[8] In the modern societies where it is "preferably acceptable" [9] to have multiple sexual relations or partners; or that recognises "diverse sexual behaviours",[10] it is necessary to ensure that sexual activities do not result into using another person or losing the respect for other person's body for sexual desires.[11]

The debate in the court of law is not about social stigma or morality, [12] these can however, be the factors affecting the question of criminalisation of transmission. The focus of courts is more on the sexual autonomy of a person; "issue of consent" and whether there is a factor of deception[13] or grievous bodily hurt involved when such transmission takes place. In the recent trends, the states have applied the criminal laws to regulate the transmission of STDs or are considering the formulation of such laws.[14] The approach of the criminal justice system for criminalising certain acts of transmission has been time as again questioned on the ground for not taking into consideration the expert evidence[15] and the risk associated with the transfer.[16] On the other hand, the others advocate for the criminalisation of "deliberate" or "intentional" transfer of the disease, and where the transfer has actually taken place.[17] This paper will review the question 'whether the transmission of sexually communicable diseases (referred to as sexually transmitted diseases or STDs for the purpose of this article) should be criminalised' and if it should be, should there be some limitations as to who should be criminalised. For the very purpose, the article will consider the factors like - scientific evidence to the risk of transmission; the harm and bodily injury associated with the transmission; the need for disclosure of having the disease; and the effects of transmission and acquiring the disease on the 'public health system'.

In this article, amongst other sexually transmitted diseases, we will be largely focussing on the transmission on Human Immunodeficiency Virus Infection[18] and transmission shall refer to sexual mode of transmission of infection (and not through other modes like blood transfer, syringe usage, etc.). The reason for this is that liability with respect to HIV transmission has been subject to quite a number of "academic commentaries" and the questions that arise frequently with it are that of recklessness or non disclosure of the disease.[19] With almost 2 million people acquiring HIV/AIDS every year (especially in the low income countries) [20], there is need to consider a way in which the criminal law should respond to this "new and hugely significant challenge to human health". [21]As compared to the other STDs like gonorrhoea and syphilis, the disease of HIV appears and has the notion attached of being fatal but evidence suggest that the risk of transfer through sexual intercourse is quite low and the transmission may not result in a "significant risk of serious bodily harm".[22] This conflict between the societal notion and evidence of risk adds to the debate of whether criminalisation is needed. The primary focus of studies has been the "consent and disclosure" for establishing liability[23] and this article is an

attempt to focus on the principle of harm, risk and public health, along with the question of disclosure, for the purpose of assessing the need to criminalise the transmission.

The article has been divided into the following three sections. The second section discusses the factors that need to be considered for assessing the need to criminalise the transmissions of STDs. The section underlines on the effects of transmission on the health of an individual and the public health system and how differently the criminalisation would address them. Drawing examples from various jurisdictions, it elaborates on the elements of intentional transmission, recklessness, non disclosure and the need to obtain consent for taking the risk of transmission. The third section weighs the factors discussed in section two to assess if there is a need for addressing it through criminal law by giving arguments for and against criminalisation. The last section concludes on the note that despite the criminal law approach, strategies for preventing the spread of STDs should also focus educational, awareness and social and economic security as preventive measures.

Factors to Be Considered For Assessing the Need for Criminalisation

Any consideration for the criminalisation of STDs and for applying the criminal law to "non-disclosure, exposure or transmission" should be coupled with the scientific development and evidence to establish harm and risk involved in these activities.[24] The rational is, to apply the principles of science and criminal law "in relation to the criminalisation of HIV non-disclosure, exposure and transmission [that] can lead to outcomes that better serve both justice and public health".[25]

The Risk of Acquiring and Bodily Harm Associated with the Transmission

The application of criminal law must take into consideration the degree of risk involved in the transmission and policy considerations should be extended only to the conducts carrying 'significant risks'. [26] The recent studies suggest that "[t]he chances of becoming infected with HIV depend on what an individual does, how often, and with whom".[27] The US Institute of Medicine and National Academy of Sciences has pointed out that "the risk to the party penetrated (the 'receptive' partner) varies in sexual contact involving anal, vaginal, or oral penetration, apparently in that order".[28] An infection with HIV results into the "impairment of human body's natural immune system" making it susceptible to other diseases.[29] It takes for an HIV patients to around seven to nine years to contract AIDS, after which the "defensive forces" of the body weakens to the extent that it becomes almost impossible to resist any infection that may affect the body.[30]

Studies suggest that AIDS and HIV through advances in therapy[31] are now "manageable [conditions]".[32] And any criminal law intervention to the transmission should consider this as a premise.[33] The "permanent infliction" of a disease like HIV leads people to believe the danger associated with unprotected sex.[34] However, the statistics from the "U.S. Center's for Disease Control and Prevention and the United States National Highway Traffic Safety Administration" indicate the risk of dying from having contracted HIV is extremely low.[35] The Canadian study[36], based on scientific evidences, on the risk also concludes that the risk of HIV transmission is low via intercourse which further diminishes to negligibly low with the use of a condom. [37] Some jurisdictions, where a person infects the other with STD infection, HIV in particular, equate it with attempted homicide or attempted manslaughter or grievous bodily injury.[38] Also, some jurisdictions criminalise the intercourse that involved risk of transmission even when the transmission has not actually taken place.[39] The abovementioned studies show that firstly, it is the possibility of acquiring HIV through sexual transmission is very low and secondly, in case it is contracted, the condition is "manageable" with the medical advancements available.[40] Relying on consent rather than scientific evidence of a "severe harm" the "likelihood" of occurrence of which is so low is uncalled-for. [41] Many criminal courts have taken a narrow approach on prosecution of transmission, considering that only a "small risk of occurrence" is sufficient to call for conviction.[42] Examples can be drawn by a judgement in a Canadian case where the judge relied on the expert evidence and ordered for acquittal observing that – "HIV infection is now a chronic, manageable condition and that, as the severity of the possible harm decreases, the higher the risk of harm must be in order to warrant criminal prosecution".[43] The criminal law approach to the HIV transmission criminalisation sets to "send a clear message" that it will regulate sexual intercourse involving one of the partners as a HIV positive person.[44] Public health experts and the human rights activists have strongly opposed this on the grounds that transmission also takes place in consensual sexual "stable" relationships and not all instances are reckless transmission to call for a criminal law response.[45] Thus, not every person acquiring HIV through sexual transmission should be seen as a victim, and invoking of protection under criminal law may be needed in isolated instances.

Effects of Transmission and Criminalisation on Public Health System

The questions to be considered for assessing effects of HIV transmission on the public health system is that can the right to privacy or sexual autonomy of one individual be weighed against the need to protect the society from the spread of HIV? Will the protection of one affect the others? [46] There are very few studies to analyse the effect of criminalisation of HIV transmission on public health. [47] The studies discussed by Catherine *et al*. [48] consist on interviews by psychiatrists, questionnaires and studying criminal prosecution in the jurisdictions of UK and US.[49] The results show that in the US people thought that criminalisation would bring change in the behaviour of the people and will increase the condom usage and disclosure of infection. On the other hand, in the UK, almost half of the persons admitted that it would not affect in the way of disclosure to the new sexual partners.[50] The common factor was that criminalisation was only considered necessary for specific cases of rape or deception and that the messages of "shared responsibility between sexual partners" and "safer sex" should be reinforced.[51]

The difference in responses in the UK and the US can be attributed to their different cultural histories regarding the "public health imperatives, legal interventions and the epidemiology of HIV".[52] on the similar lines the conclusion of the studies cannot be applied and generalised for all other jurisdictions because of the social and cultural differences. Though public health response to the prevention of

transmission is based on regulated behaviour in an "enabling environment" it can engage in different affected communities to acknowledge that infected and non infected persons can have intercourse and "that this is not innately problematic given the positive value of human sexual expression".[53] This can ensure that criminal prosecution does not prove to be counterproductive preventing the "adversarial relationship between the aggressor and victim and does not see the "sexual relations in terms of endangerment".[54] One of the effects on public health system will be that if the criminalisation is based on knowledge on of the "infectious status" of the person transmitting the infection, it may discourage people from getting screened to know their status.[55]

The issue has "ramification beyond the criminal law" and is a subject of "wider consideration" that needs to be addressed through "social and public health policy".[56] In cases of prevention of transmission, social policies and economic security are needed to protect women, children and other vulnerable people who can develop the "capacity to negotiate safer sex and to protect themselves from predatory sexual partners".[57] Thus, the resources of criminal law formulation and implementation should be directed to making such policies to have a "beneficial impact" on prevention of HIV transmission.[58]

Non-disclosure, Intentional and Reckless Transmission

Having considered the risk of sexual transmission and its harm on the public health system and on the health of an individual, it is now necessary to look at the elements of non-disclosure, intention and recklessness involved in the transmission; and how the aspect of informed consent from sexual partner, if at all, would lead to shared responsibility between the sexual partners. The reason is that the criminal policy addressing the criminalisation of transmission (in many jurisdictions) [59] considers the harm or risk involved in conjunction with the factors of non-disclosure, intention and recklessness. In this section we will focus our discussion on the legal positions of various countries to answer whether criminalisation is necessary and justified (in certain cases).

Intentional Transmission, Non disclosure and Obtaining Consent

In the matters of transmission of STDs, placing a person on the risk of acquiring the disease through non disclosure is associated with violating a person's sexual autonomy. [60] This is because the autonomy, in sexual matters, entails in itself the right to make informed choices with regards to the health risks involved in the intercourse.[61] the case of R v. Dica distinguished between consenting to sexual intercourse from consenting to risk the transmission of disease. The element of consenting to face the risk of transmission always has to include disclosure.[62] The Supreme Court of Canada in 2012 ruled that if the viral count of a person is low and he or she is also using a condom, there is no need for a disclosure.[63] However, the general position, in Canada[64] and England, [65] requires for disclosure of the risk involved in intercourse.[66]

The case for non-disclosure was considered in the 1989 case of R v. Clarence[67], where the husband had infected the wife with gonorrhoea by having sexual intercourse with her.[68] The husband had not disclosed his condition to the wife and she had consented to the intercourse, only because she was unaware of his condition.[69] The husband was not convicted because of the consensual sexual intercourse and absence of physical force for inflicting grievous bodily harm.[70] This case was influenced by the medical prejudice of the time where "doctors barely recognised it as a serious disease for women" as it was considered that women pass it to men without suffering for themselves;[71] also it was backed by the marital exemption of rape propagated by Hale, that a husband cannot rape his wife.[72] The social and medical prejudice against women in this case cannot be applied to the modern society and has been overruled in the case of Dica [73] and the position on actual and grievous bodily harm changed in the later decisions. [74] Dica has established that any person recklessly transmitting a disease in a consensual intercourse without disclosing that he or she was infected [75] can be convicted for inflicting grievous bodily harm even without actually using physical force. [76] The conviction as per the established practice, in cases of non disclosure, takes place only if the transmission actually occurs. [77]Though some jurisdiction may proceed under the criminal law even when the transmission has not occurred but the risk for it was involved. [78] This approach taken by the Finland appears to be narrower in comparison to that of Canada which calls for disclosures but establishes legal duty for the same only when there is "realistic possibility of transmission". [79]

In the established practice non-disclosure alone does not suffice the criteria for avoiding criminal liability; one has to also take consent from the sexual partner to run the risk through transmission after becoming aware of the infectious status. Consent by the sexual partner is a defence and places the duty on the defendant to disclosure the infection to the partner. [80] However, it appears here that it excludes circumstances where the victim acquired the knowledge of infection from another source and yet consented to the risk of harm through intercourse.[81] The matter was discussed in the case of R v. Konzani [82] which made clear that "victim's knowledge is assessed indirectly, through an examination of the defendant's nondisclosure" [83] In the jurisdiction of England and Wales, HIV transmission is dealt under bodily harm and therefore consent is a defence, whereby the act is "prima facie unlawful" unless the consent has been explicitly secured [84] for taking the risk. The consent obtained by the partner is for the running the risk of infection involved in sexual transmission. In the case of R v. Brown [85] the principle laid down in context of consent provided that one cannot consent to "actual bodily harm".[86] However, in the case of R v. Dica [87] court, despite agreeing on the judgement in the case of Brown, provided that a person can consent to the risk of transmission on knowing that the partner is infected. [88]

The differentiation in the cases was reached on the basis that sexual intercourse in itself is not a criminal activity and the risk involved (of transmission) is not inherent in the activity and harm may not be the necessary outcome unlike in the case of Brown involving "sadomasochism".[89] In Australia, the question of whether informed consent has to be obtained for taking the risk of transmission was answered in the case of Neil v. The Queen [90] where the judge opined that one should not be criminalised for "endangering" the partner with HIV "as long as the consent is communicated to the offender". [91]

The fact that the sexual partner has consented to face the risk of transmission should not be misused to harm the partner. Where in a relationship of trust or compassion a person agrees

to accept the risk to bodily harm through transmission, should not give the mala fide intention "to infect the victim" an excuse of informed consent. [92]Thus, the informed consent has to be subject to the intention of the infected person. Sharon draws the analogy with the case of R v. Hutchison [93] where the wife agreed to have intercourse provided the husband uses a condom. But the husband who had "sabotaged" the condom to get the wife pregnant was convicted for aggravated sexual assault. [94] Though the latter case is of sexual offence and not grievous bodily harm, it can be used to establish that though the consent has been obtained, it does not justify the intention to do the wrong. Thus the consent obtained by fraud or misused will violate the sexual integrity of the victim.

Therefore, obtaining consent from the partner for running the risk, as observed in the case of Dica, is necessary to preserve the sexual integrity, autonomy and sexual freedom [95] of the partner; and communicating the status of being infected so as to enable the partner to give free consent by making an informed choice.[96]

Reckless Transmission

In England and Wales, reckless transmission to cause bodily harm under Offences against Persons Act, 1961, [97] one needs to be "aware of the risk of causing the harm" and yet "[run] that risk". [98] Bronitt [99] has explained that this particular section does not require knowledge of being infected; only an understanding, through previous sexual engagement, that they might involve a risk, is sufficient.[100] The cases discussed in the court had involved actual knowledge of the infected status. In the case of Adaye [101] though the accused did not have exact knowledge but since doctors had warned him of the possibility of him having the disease, judge took the broader approach, as propagated by Spencer that, the criminal liability can be established even when the accused "knew it was highly likely, if not certain".[102] Therefore, the presumption is that exact knowledge is not required for reckless transmission.[103] The recklessness thus comes down to refer to the "awareness" of the risk involved, derived from the person's knowledge from the status of being infected.[104] The element of recklessness needs to be considered only when there has been consent to the risk of transmission. Therefore, "where there was consent to the risk is sometimes implicitly a criterion of recklessness".[105] On these grounds, the ruling in the case of Dica saves the public policy[106] of protecting consensual sexual relationships, but with the exception that though the consent cannot be applied to intentional transmission, it can be applied to "reckless transmissions" where the partners consent to the risk. [107] In this effect the judge in Dica has observed" … is to remove some of the outdated restrictions against the successful prosecution of those who, knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it, through consensual sexual intercourse … "[108]

The balance is often expected to be reached through criminal courts but practically the balance will be based on how individuals understand their responsibility to get tested for HIV and "how they protect themselves and others from the risk of infection".[109] As long as there has been a disclosure and informed consent has been obtained, there should be no necessity to criminalise those who 'conduct' and 'accept the conduct' of reckless transmission or reckless endangerment of transmission "associated with consensual sexual intercourse".[110] Some risks will always exist in sexual intercourse and if criminalised it would be discriminatory against HIV cases in particular.[111]

Arguments for and Against Criminalisation

Despite strong condemnation of criminalisation of HIV transmission, even lawyers and human rights activists agree that criminalisation is "inevitable" in certain cases. [112] Even though there have been a lot of debates and studies for not criminalising transmission or the negative effects of criminalisation, the international trends show that states have adopted the approach of criminalisation.[113]

Many jurisdictions now address the concerns of HIV transmission through criminal law either by enacting specific laws or through "re-interpreting" criminal laws to apply to transmission, for preventing the spread of the disease, [114] and to check offender for "deliberately or recklessly inflicting harm on another person", [115] and to protect the victim for having intercourse with a person who deceived or did not disclose about his or her status of being infected. The criminalisation, through cases like Dica and Kozani, has helped protect the sexual autonomy of persons who have the right to give free consent; or punish persons who violated the said autonomy.[116] The validations for criminalisation are, that it helps incapacitate the offender, protecting others from the risk of transmission;[117] it is a mode to demonstrate social disapproval of the act and that it will provide the offenders an opportunity of rehabilitation.[118] Considering these arguments it appears that the criminalisation of HIV transmission is appropriate and necessary; however, it is essential to consider contradictory views that may disprove the reasons for criminalisation.

The approach of law in England to classify transmission as grievous bodily harm under OAPA is problematic in many ways. The criminalisation under this category has been debated to be defining the offence of criminalisation to fit the "feasibility and desirability of the … structure of [the] offences" of either actual bodily harm or grievous bodily harm.[119] Another problem associated with criminalisation is that it diverts from the actual rationale of criminal law of "preventing the spread of the disease through the encouragement of greater responsibility in sexual behaviour"; this appears that law is "[targeting] the behaviour that risks the infection rather than the infection itself".[120] With the medical and scientific advancement indicating for a "longer and comfortable survival periods" the classification of HIVs transmission as a grievous bodily harm in itself remain questionable.[121] Also, currently, where the transmission has occurred in case of absence of consent to take the risk, the treatment, for the purpose of conviction, is same or all forms of sexual activities (example, anal or vaginal intercourse)[122], even when some activities involve very low risk of transmission.[123] The law does not differentiate between the high risk involving activities from the activities that involve very less possibility of transmission[124], disregarding the possibilities where offender was being cautious to avoid transmission. With the above questions to be considered the established practice and conviction in case of Dica, is not just limited to the feasibility of response to the issue but has "become a priority for the Crown Prosecution Service".[125] Non-disclosure, apart from the legal duty is also considered as the moral responsibility of the infected person to inform the

partner of the risk involved,[126] because the sexual freedom of the partner holds a lot of power for him or her, and no other person should be allowed to violate that.[127] However, the principle that consent to sexual intercourse is vitiated in case of non-disclosure (because upon information the consent may have been withdrawn)[128] is substandard because any form of sexual activity attaches some risk to itself. In case of a woman consenting for sexual intercourse will be reasonably believed to be expecting the risk of pregnancy and it cannot be considered the moral duty of the man to inform her of it.[129] Therefore, a woman cannot be expected "to blame her partner for this on the grounds that he did not warn her of this possibility".[130] Thus, a person using his or her sexual autonomy to consent for sexual intercourse should also be reasonably expected to use it to realize the risks involved in it. Spenser's view that 'even when a person has not diagnosed to find the status of infection, he can be prosecuted because the person "who may[131] have HIV and therefore 'should know' their status", based on their previous sexual relations', will depend on how judiciary defines this "classification"[132]. Also, the view appears to be retributive or punitive, to criminalise the transmission.[133] The debate on criminalisation of transmission, in the end, boils down to the question that 'is the behaviour governing the sexual relation between two people, simple enough to be changed by taking a punitive recourse'.

The evidence of criminalisation so far have rather shown no success in HIV prevention.[134] The "public health perspective" shows that the laws have helped only a small share of persons and appears to be "[undermining] the abilities of public health officials" that work "to detect and treat STIs, to initiate HIV therapies to monitor viral load suppression, to offer HIV counselling".[135] The criminalisation objectives of "incapacitation, rehabilitation, retribution and deterrence" may not address the concerns of the public health system,[136] but may rather add to the stigma and discrimination[137] and reduced willingness to HIV/AIDS testing.[138]

Direct Coercive Measures as an Alternative to Criminalisation

Cameron and Swansan draw an analogy between the already criminalised acts and criminalising HIV, [139] observing that criminalisation will be an "oblique effort" to prevent the spread of HIV infection. They draw example from the laws criminalising prostitution, sodomy, extra-marital intercourse or drug use. They advocate that direct coercive measures, instead of the indirect coercive measures like criminalisation or "prohibition of certain types of sexual conduct", have helped reduce the spread of HIV. They argue that the measures like quarantine, isolation, mandatory testing and disclosing the status without consent etc, should be applied to the case of HIV/AIDS infections.[140]

If not the analogy, one can agree with the argument that the criminalisation of transmission of STDs has not helped prevent their spread. The existing national laws are also criticised on the grounds of being discriminatory against infected persons, lack of enforcement and perpetuating the social isolation.[141] These arguments outline well as to why a law to criminalise the transmission will not help improve the state of affairs, however, to opt for direct coercive measures instead of not criminalising the transmission, may also not be the better alternative. In this respect, it is important to consider that the persons infected with the HIV are physically and emotionally vulnerable, as they face not only "physical deliberation and death but also severe social discrimination".[142] Since HIV is not transmitted just by being in the company of the other person,[143] social isolation may not necessarily be required. Quarantine and such measures can be considered an overreaction to the fear of the disease.144 The rationale of worldwide anti-AIDS strategies has been education[145] and awareness about the transmission and in pursuance to which, many jurisdictions that earlier followed direct coercive measures have also stopped their use.[146] Not only do the HIV positive people face marginalisation and discrimination, they also are seen as people who "deliberately infect innocent victims through their immoral behaviour".[147] Unfortunately, this general public perception is the reason for HIV positive status being seen as due "punishment for criminal deviance".[148]

There cannot be a definite-one-word answer to 'should sexual transmission of STDs be criminalised'. The justification has to be evaluated in consideration with the abovementioned factors and the review suggests that criminalisation of transmission of HIV may not be the solution, except in certain circumstances, to prevent the spreading of HIV and other STDs. The circumstances in which the transmission is criminalised should only be limited to the cases involving intentional transmissions. In such cases, prosecution should be proceeded with, even if the consent was granted for taking the risk, because the mala fide intention of the offender should be "sufficiently culpable to warrant the intervention of the criminal law". [149] Therefore the usage of criminal law should be limited and "non criminal HIV preventive approach" should be given consideration.[150]

CONCLUSION

As per the 2015 statistics of the Joint Programme of United Nations on HIV/AIDS[151] nearly 36.9 million people are living with HIV in the world.[152] UNAIDS has estimated an overall 33% decreased in new "infection" which was possible through greater access to the medical treatment and "antiretroviral therapy".[153] The criminalisation of HIV transmission has done little help to improve the statistics or to affect the large numbers of people affected.[154]

The evidence of best available scientific data and medical advancement do not need the criminalisation or preventing the spread of HIV, especially when it has been argued to not help the public health system and adding on to the social stigma and discrimination for the vulnerable infected persons.[155] The resources being invested for the writing of law or for assessing the methods of criminalisation, should be diverted to provide social and economic security to persons and better access to medical treatment through "increased political commitment and smarter investments, together with more strategic programming and massive reductions in the cost of treatment"[156] However, criminalisation can be applied to limited cases involving the intent to infect the victim, harming his or her body. This should be done to put across the message that such mala fide acts are socially condemned and intolerable with respect to the sexual autonomy and bodily integrity. The primary focus of prevention and protection strategies should still be to involve education, awareness programmes and improving access to medical treatment.

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