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Joint United Nations Programme on HIV/AIDS  
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**Advancing Care, Treatment and Support for  
People Living with HIV/AIDS:  
Updating Guideline 6 of the  
*HIV/AIDS and Human Rights: International Guidelines***

**Report of the  
Third International Consultation on HIV/AIDS and Human Rights**

**Geneva, 25-26 July 2002**

**Organized jointly by the  
The Joint United Nations Programme on HIV/AIDS,  
and  
The Office of the United Nations High Commissioner for Human Rights**

**25 July 2002**

**WELCOME AND INTRODUCTORY REMARKS**

The Hon. Justice Kirby called the meeting to order, and invited the participants to briefly introduce themselves and the nature of their work and experience. He then invited representatives from the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the Office of the UN High Commissioner for Human Rights (OHCHR), as joint conveners of the consultation, to make some opening remarks.

Ms. Fahlen welcomed and thanked participants for their attendance, on behalf of Dr. Peter Piot, Executive Director of UNAIDS. She reiterated the commitment of UNAIDS to increasing access to care, treatment and support worldwide for people living with HIV/AIDS, and the urgent need for additional efforts in this area as the epidemic continues to grow. UNAIDS is pleased to collaborate again with OHCHR in continuing to ensure the International Guidelines remain relevant and effective. She thanked Ms. Maluwa, Law and Human Rights Adviser, UNAIDS for the work on this project, and Mr. Elliott of the Canadian HIV/AIDS Legal Network for his work in preparing the background paper and draft text of a revised Guideline for the discussion.

Justice Kirby identified a number of significant developments that had occurred since the International Guidelines were elaborated in 1996 in relation to access to treatment, care and support for people living with HIV/AIDS. He highlighted in particular the development of new medicines that were just coming into use in 1996 and the very significant reductions in prices of medicines that have been secured in recent years.

Ms. Stefanie Grant stressed the importance of human rights as the basis of a response to the global health crisis of HIV/AIDS, and the need for human rights guidance to States in this area. The UN High Commissioner for Human Rights, Ms. Mary Robinson, is very pleased to have the opportunity to collaborate again with Dr. Piot and UNAIDS in bringing the Guidelines up to date in the area of access to care, support and treatment. Ms. Grant thanked Ms. Oldring of the OHCHR for her work on this project, and Mr. Elliott for preparing the background materials for the expert consultation.

Mr. Elliott had been commissioned by UNAIDS and OHCHR to prepare a background document to inform the expert consultation, as well as a draft revised text of Guideline 6 and accompanying sub-paragraphs for discussion at the consultation. He presented an overview of the background document, including several basic premises to be discussed by participants as a basis for proceeding with updating the Guideline, as well as key developments in international law and policy in the areas of human rights, health, trade and labour that were of potential relevance to the issue of access to care, treatment and support. He presented the proposed revised text of Guideline 6 and accompanying sub-paragraphs, explaining the source and rationale for the proposed revisions. He explained

that it was proposed that, upon revision, the background paper be published by UNAIDS and OHCHR as a reference document.

It was agreed that participants would devote time to discussing the sections of the draft background document, to provide feedback to the author, UNAIDS and OHCHR that would be taken into account in finalizing the document following the consultation. Based on that discussion, participants would then focus on providing input on the draft text for revisions to Guideline 6 and accompanying sub-paragraphs, so that a final text could be agreed for at least some portion of this.

## **GENERAL DISCUSSION OF THE BACKGROUND DOCUMENT AND BASIC PREMISES**

Mr. Heywood agreed the background paper should be published as an explanatory document that situates the updating of Guideline 6, and proposed that the expert meeting recommend this to UNAIDS and OHCHR. Mr. Heywood felt that the document needed to better situate its discussion in the realities of the current HIV/AIDS epidemic; this should happen at the outset of the document, be done in a fashion that strongly conveys the urgency of the crisis. He highlighted that the key developments since 1996 include the massive growth in the epidemic, the developments in treatments, and huge disparity in mobilization of resources as between responding to the global HIV/AIDS crisis and other state "priorities" (e.g., the "war on terrorism"). Mr. Heywood described the AIDS epidemic as creating a crisis of human rights, and that this should be reflected in the meeting and the document. "Soft" law has failed utterly to have an impact on the lives of the most vulnerable people in world, as witnessed by 3 million deaths a year from AIDS, and this should be acknowledged up-front. Furthermore, the AIDS epidemic shows the centrality of the right to health in a way not seen before because the modern world has not seen a similar health crisis; the HIV/AIDS epidemic shows starkly how all other human rights are dependent on health rights. Finally, the recent International AIDS Conference in Barcelona saw the willingness of UNAIDS, the World Health Organization (WHO) and others to set hard targets (including for treatment access), and the document should look at how human rights will assist in achieving these targets. The paper should highlight the UN General Assembly's Declaration of Commitment (and its targets, including those which are imminent in 2003) more prominently in the introduction.

Justice Kirby suggested that the changing medical dynamic of HIV/AIDS should be reflected at the outset of the document, including by noting that new anti-retroviral drugs have become available (in wealthier countries) since 1996. In addition, another premise should be stated explicitly, namely that internationally-recognized human rights are universal and their application, at least in matters essential to human life and dignity, does not depend on considerations of nationality or residence. He suggested the right to access treatment, care and support should also be tied to the human right to life.

Ms. Dhaliwal suggested that the paper should expressly address, perhaps even as a separate premise, that the factors creating vulnerability of various individuals and populations affect their access to treatment, care and support.

## **Premises**

### **Premise #1**

Participants spent considerable time discussing the premise that care, treatment and support are inextricably linked with prevention. There was consensus on the link between the two; the discussion focused on elaborating on this premise and whether an additional premise on the issue of access to treatment, care and support independent of prevention was required.

Ms. Csete pointed out that widespread recognition that HIV prevention alone will not adequately or effectively respond to the epidemic, and that access to treatment, care and support is necessary, is a recent and welcome breakthrough in scientific consensus. It was very important that this be reflected in the paper.

Justice Kirby agreed with the importance of acknowledging the link between prevention and treatment. He also argued that the right to treatment, care and support was also a free-standing entitlement, as a moral and legal matter, separate from any utilitarian link to HIV prevention, that should be expressly recognized as well as a basic premise of the document and discussion.

Mr. Gilks stressed the importance of a premise expressly recognizing the link between prevention and treatment, and of not perpetuating a false dichotomy between prevention and care, treatment and support. He noted that, with most other diseases, a public health approach has included treatment as a form of prevention: for example, TB treatment is highly cost-effective, both because of the economic and other benefits to the person treated, but also because it reduces transmission to others. The beneficial synergy between treatment and prevention has until recently been ignored in relation to HIV/AIDS. Prevention, care, treatment and support are all integral elements of a comprehensive approach.

Justice Kirby reiterated that the paper should be clear that treatment is a right in and of itself. In highlighting the importance of treatment in assisting prevention, the paper should be careful to avoid any suggestion that treatment is only important because it assists prevention.

Ms. Gruskin pointed out that Guideline 6 is the only guideline that expressly deals with HIV prevention and so care should be taken to ensure that strong human rights guidance is given to States on this issue as well. She fully supported the assertion that access to treatment is an independent and important aspect of realizing the right to health, but also felt the paper should give more attention to care, treatment and support more broadly, and

access to medication is one part of this. She also noted that reference to the right to life should make it clear that this is in relation to the issue of access to care, treatment and support; she noted that the language of the "right to life" has been invoked inappropriately by some as an argument for coercive, restrictive policies targeting people living with HIV/AIDS and vulnerable groups in the ostensible interests of preventing transmission to those who are not infected, with resulting unjustifiable infringements of human rights.

Ms. Boulet highlighted that discussions of the right to treatment must take into account the cost of treatment. Therefore, it is important that human rights guidance for States in realizing access to care, treatment and support should address the issue of access to generic medicines and their role in reducing the cost of treatment. To this end, States should also be ensuring that they take human rights into account in trade negotiations.

Ms. Maluwa (UNAIDS) drew the attention of participants to the language of the resolutions of the Commission on Human Rights on the issue of access to medication in the context of pandemics such as HIV/AIDS (Resolutions 2001/33 and 2002/32). She noted that access to medication is "one fundamental element" for realizing the right to health, which formulation could be followed in the paper and the revised Guideline.

Ms. Watchirs supported the addition of a new first premise to the document that identified access to treatment as a right, which should be complementary to, but independent of, the important recognition of the link between prevention and treatment.

Mr. Carrasco pointed out that the paradigm of "rich" and "poor" countries often used in these discussions meant that "poor" countries often unjustifiably claimed poverty as an excuse for not acting to realize access to treatment and the right to health more broadly. He fully supported the premise that international co-operation is required, but cautioned against uncritical acceptance that so-called "poor" countries must wait for assistance in providing medicines, building infrastructure, etc., particularly since some developing country governments find resources for other very costly expenditures (e.g., unnecessary military materiel) but plead poverty when it comes to the question of health care expenditures for people living with HIV/AIDS. He also urged that the document make more reference to other rights related to the right to health, such as the right to enjoy the benefits of scientific progress in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, as well as to regional human rights instruments that provide additional bases for advancing access to care, treatment and support at some regional levels. Finally, he suggested that the background document could make greater, and more specific, reference to some of the jurisprudence advancing access to treatment as a human right, particularly from the Latin American region.

Justice Kirby suggested that perhaps the introduction could include reference to some specific developments in the jurisprudence as part of establishing the context in which this issue is being discussed.

Mr. Divan noted that access to care, treatment and support was agreed to be such a fundamental element of the response to the epidemic that perhaps it should be recommended that it be a cross-cutting theme running through the Guidelines as a whole.

Mr. Heywood felt that the document should define, at the outset, what is meant by “treatment,” pointing to the example of the recent document on HIV/AIDS treatment in resource-poor countries released by the World Health Organization. He also urged that the document clearly state at the outset that treatment *per se* is a human right, making the document more focussed and effective than simply the assertion of the inextricable link between prevention on the one hand and treatment, care and support on the other.

Justice Kirby identified that the challenge is to recognize both the right to treatment independent of prevention, and the link between prevention and treatment, without reinforcing the false and discredited prevention/treatment dichotomy.

Mr. Justice Cameron observed that, in a world where treatments exist and can be made affordably available to those in need, it is an affront to human rights to deny it to people on the basis of cost. This situation pre-dates the HIV/AIDS epidemic, but the mass scale of the epidemic highlights the vulnerability of so many and the disparity between the reality of available treatment and the lack of access for the vast majority in need.

Ms. Dhaliwal felt the document needed to be more explicit in addressing disparities in access to treatment, care and support and hence the need for specific efforts to ensure access for those most vulnerable and marginalization. She noted that while there were a number of presentations at the recent International AIDS Conference in Barcelona (July 2002) on various projects providing access to anti-retroviral (and other) treatment in developing countries, none of them were projects aimed at delivering treatment to sex workers, men who have sex with men, injection drug users, etc. Recognizing the right to treatment generally is important, but the obligation to make additional effort to address disparities in access and the underlying inequalities is just as important.

Mr. Burzynski noted that this consultation was focussed on Guideline 6, and wondered if there would be further opportunities in future to update the other Guidelines. UNAIDS and the OHCHR explained the rationale for focussing solely on Guideline 6 and the issue of access to care, treatment and support for the first set of revisions, and that they were certainly open to the possibility of future revisions, although no firm plans existed at this time and this would be the subject of future discussions between their offices. Justice Kirby noted that it was open to this consultation to recommend that additional work be done on other aspects of Guidelines in future to keep them current.

Mr. Hourcade agreed that access to treatment, care and support should be recognized in the document as an independent human right, and cautioned that general references to “comprehensive care, treatment and support” should not be allowed to weaken express recognition of the right to medications specifically.

Ms. Kisaakye agreed that access to treatment needed to be explicitly recognized as an independent right, in addition to recognizing its link to HIV prevention.

Ms. Gruskin agreed that a separate premise recognizing the right to have access to treatment, but welcomed references to *comprehensive* care, treatment and support and the recognition that medication were one fundamental component.

Mr. Gilks noted that treatment will not bankrupt countries, particularly because of developments in cost-effectiveness of anti-retrovirals, meaning it was much more feasible for many more countries to incorporate these medicines into comprehensive care strategies.

Mr. Elliott cautioned against over-stating the significance of both price reductions and the availability of treatment as “new” developments since 1996. Price reductions are both welcome and significant, but even at higher prices it was certainly within the ability of the world’s governments collectively to have afforded treatment before, particularly if this intervention has occurred earlier, before the epidemic had grown to its current scale and momentum. Treatments, including anti-retrovirals, also existed before the advent of protease inhibitors in 1996, but were not available to most people in developing countries. The document should be careful not to suggest that recognition of the human right to treatment is somehow contingent upon the price reductions and development of protease inhibitors in recent years.

Mr. Carrasco noted that there are already a number of developing countries with successful programmes providing access to treatment (including anti-retrovirals) for people living with HIV/AIDS. These should be reflected in the document as part of the context that supports the feasibility and necessity of realizing the human right to treatment.

Ms. Figueira stressed that it was dangerous to over-state the issue of costs of the medicines and agreed with the caution to avoid any suggestion that the human right to treatment was contingent upon cost-effectiveness. She also noted that the concept of “vulnerability” should not be limited just by reference to the trilogy of sex workers, men who have sex with men (MSM) and injection drug users (IDUs), noting that most people living with HIV/AIDS in need of treatments were vulnerable by virtue of poverty.

Ms. Dhaliwal agreed that, from a human rights perspective, the issue of cost-effectiveness should not be over-emphasized, but that the issue of affordability at the level of the individual was key. Even at a cost US\$250 per year, anti-retroviral therapy will remain unaffordable to many people living with HIV/AIDS.

Ms. Maluwa noted that because the concept of vulnerable groups is so open-ended and dependent upon a range of factors, there is value in making reference to the concept of “vulnerability” generally, beyond just listing specific groups. She suggested that the best articulation of the premise regarding access to treatment should be to clearly situate it

within the conceptual framework of international law, in which it is recognized that access to medication is one fundamental element of realizing the right to health.

Mr. Gilks clarified that his remarks regarding the reduction in prices for anti-retroviral in recent years were not to suggest that the right to adequate treatment was dependent upon these. Rather, he felt this was an important aspect of the current context of the discussion, because what has changed for governments is the expense of providing access to treatment. Price reductions are very significant, not because they give rise to poor people's human right to health, but because they remove or weaken the excuse by governments that realizing access to treatment is too costly.

Ms. Gruskin suggested the consultation participants needed to spell out more clearly what is meant by the concept of "progressive realization" of access to comprehensive treatment, care and support, since governments may use this language as the excuse for delaying or avoiding action aimed at realizing human rights (including the right to access to treatment). She also argued that the references to "women, children and other vulnerable groups" (e.g., in the heading of Guideline 8) were problematic. She recommended this language be avoided in the discussion of "vulnerability" that is to be incorporated into the text under Guideline 6 (and, if possible, removed from the heading of Guideline 8 in the new text to be published). She had no objection giving express examples of vulnerable groups, but stressed the importance of making very clear that the circumstances of vulnerability vary. She also cautioned against focussing too much on the Global Fund to Fight AIDS, Tuberculosis and Malaria; she felt the paper had too much of a focus on this mechanism and that other mechanisms for financing prevention, treatment, care and support should also be included.

Mr. Elliott cautioned against treating HIV/AIDS as too separate from other diseases or health conditions in the human rights analysis, and cautioned against any suggestion that States only have position obligations when things reach the level of a crisis or a life-threatening situation. He argued that the right to enjoy the highest attainable standard of physical and mental health meant a positive obligation on States to take steps to address all diseases and conditions undermining health, not just life-threatening illnesses or serious public health crises, obviously with a recognition that full realization will take time and that appropriate priorities can and should be set.

Ms. Csete agreed, but also felt that the paper and Guideline can legitimately focus on HIV/AIDS as a health crisis like no other, without suggesting an invalid and unnecessary restriction in interpreting of international human rights law. Mr. Heywood agreed, noting that the further, serial effects of HIV/AIDS beyond the infection of the individual could also be identified as added elements of the severity of the epidemic. Ms. Gruskin noted that the backlash against so-called "HIV exceptionalism" is another strategic reason for not necessarily isolating HIV for distinct analysis under international law, and agreed it was important to situate the right to access to HIV/AIDS treatment, care and support within the larger context of the right to health generally. She also reiterated that it was important to incorporate the human rights to the benefits of scientific progress and to non-discrimination.

Mr. Morka agreed that additional premise should be added to the document expressly recognizing the right to treatment, independent of its link to prevention. He also noted that, in the Nigerian context, for example, poverty is the most critical factor defining vulnerability and access to treatment.

Ms. Kisaakye agreed that access to care, treatment, and support encompasses more than anti-retrovirals, and agreed that arguments based on access to treatment as a human right should not be based on cost.

Ms. Figueira agreed with the suggestion that the concept of “progressive realization” required some further discussion, and that this expressly articulate that, in the case of life-threatening situations, cost is not an acceptable excuse for denying access to treatment.

With respect to the concept of “progressive realization”, Mr. Elliott noted that one starting point would be General Comments No. 3 and No. 14, on the nature of States’ obligations under the ICESCR and on the right to health, respectively. He highlighted some of the following elements identified by the Committee on Economic, Social and Cultural Rights: (1) the obligation of States to move as expeditiously and effectively as possible toward full realization of the right; (2) any deliberately retrogressive measures require careful consideration and full justification by reference to totality of Covenant rights, and in context of full use of maximum available resources; (3) the “minimum core obligation” of States is to ensure satisfaction of, at the very least, minimum essential levels of each of the rights recognized in the Covenant, including “essential primary health care”; (4) States must seek resources internationally if national resources truly inadequate, to satisfy, as priority, those minimum obligations, and there is a corresponding obligation on States to provide international assistance and cooperation.

Mr. Heywood noted that, at least in theory, the rights to dignity and to life are not subject to progressive realization, so in the case of life-threatening conditions, the excuse of progressive realization is weaker or unavailable to governments.

Ms. Csete suggested the right to life recognized in the International Covenant on Civil and Political Rights should be included in the discussion, and that the consultation should consider whether denial of HIV/AIDS treatment could ever amount to the “arbitrary deprivation of life.” For example, she noted that Human Rights Watch had incorporated such a suggestion into its formal letter to the President of South Africa regarding his government’s stance denying access for HIV-positive pregnant women to nevirapine to prevent mother-to-child transmission of HIV.

Ms. Boulet reminded the consultation that one of the reasons generic anti-retroviral drugs for HIV/AIDS are produced today in some countries is because this is a holdover from the situation prior to the introduction of the TRIPS Agreement. However, as the requirements of the TRIPS Agreement bind an ever increasing number of countries in coming years, this will no longer be the case, and the possibilities for production of generic anti-retrovirals (including new medicines) will be more limited.

Ms. Gruskin noted that when right to life was first articulated in the International Covenant on Civil and Political Rights, it was formulated as the absolute right to not have life arbitrarily taken away from you; however, the recognition that the right to life might impose positive, as opposed to negative, obligations on States has led to the concept of progressive realization being introduced, even in relation to this right (for example, in relation to a state's obligation to reduce infant mortality). She noted in this regard the language of the Human Rights Committee's General Comment No. 6 on the right to life as stated in the International Covenant on Civil and Political Rights.

Mr. Jürgens agreed that the reduction in costs of providing treatment is an important part of the background context for this document, but the right to treatment does not hinge on it.

Ms. Oldring also supported the previous comments cautioning against any suggestion that the existence of a human right to treatment, as part of the right to health, is dependent upon its cost. She also suggested that, in developing and updating the content of Guideline 6 further, the focus should be primarily on States' legal obligations, with reference in particular to the work of the Commission on Human Rights and the Committee on Economic, Social and Cultural Rights.

Ms. Maluwa noted that General Comment No. 14 of the Committee on Economic, Social and Cultural Rights does expressly address the issue of affordability of health goods and facilities, as one key element of accessibility. She also noted the Committee's statement that affordability requires that any payment be based on the principle of equity (i.e., tied to ability to pay).

Ms. Watchirs stressed that the document and Guidelines must also note the benefit that treatment for people living with HIV/AIDS also helps reduce discrimination based on HIV status or other grounds associated with HIV/AIDS, by reducing at least some visible signs of the disease for some proportion of people and by countering some of the fear and stigma surrounding HIV/AIDS that give rise to discrimination.

Mr. Burzynski suggested that the background document and Guidelines should contain stronger language and more discussion of donor countries' obligations of international assistance and co-operation in responding to the global HIV/AIDS epidemic and in increasing access to treatment in developing countries.

Ms. Fahlen highlighted the need for transparency and accountability on the part of political leaders in realizing access to treatment. For example, African political leaders have committed themselves, through such instruments as the Abuja Declaration in April 2001, to specific measures to address the HIV/AIDS epidemic, but how will and can they be held accountable for following through on these statements. Similarly, holding leaders accountable for following through on the commitments made in the UN General Assembly's Declaration of Commitment on HIV/AIDS in June 2001 will be critical to achieving access to treatment, care and support. Realizing access to treatment, and the

right to health more broadly, is part of good governance. Furthermore, access to HIV/AIDS treatment, as part of the right to health, is a global public good, not just a benefit to people living with HIV/AIDS. This means the international response should be based on an approach different from the traditional “aid” approach, particularly in response to assertions by developing countries that they “cannot afford” treatment. We need to avoid a simplistic approach to “aid” and its “recipients”; rather, we need to recognize, and reflect in policy, that the synergy between the individual’s right to access treatment and the overall public health are aimed at promoting overall the global public good. This means moving away from the traditional, “charity” paradigm of giving aid to aid recipients. Finally, the distinction should be drawn between affordability of medicines to States and the cost to the consumer because these will have to be different to realize access to treatment. Similarly, global differential pricing of medicines should be part of the international response.

Up to this stage, the discussion had started from the examination of the first draft premise and had incorporated some broader points about the nature of the Guidelines, the purpose of the exercise, and what was important to reflect in the final revised Guideline 6 and the background document on the issue of access to treatment, care and support. Participants returned to a more focussed discussion of the other, remaining premises.

## **Premise #2**

Mr. Heywood agreed generally with the content of the other premises in the draft background paper, although he had some specific minor comments to make in regard to some of them.

Ms. Gruskin viewed the UN General Assembly’s Declaration of Commitment on HIV/AIDS as a highly political document representing the lowest possible common denominator, and was concerned that it not be the basis for the premise, or the text more generally, particularly in sections detailing developments in the realm of international human rights, as it is not a human rights instrument. She also noted that references to framework documents of the Global Fund to Fight AIDS, Tuberculosis and Malaria were references to documents of the moment, which might date the background paper. She suggested that reference be made to other documents such as the Global Strategy Framework developed by UNAIDS.

There was consensus that the second draft premise, namely that access to treatment, care and support are fundamental aspects of the right to health, was important and should be included in the document.

### **Premise #3**

With respect to the third draft premise, Mr. Heywood suggested some greater caution in wording the statement that numerous factors need to be addressed in order to realize access to treatment, care and support. He agreed with the sentiment and the principle behind the premise. However, it may not be fully accurate: in some situations, arguments about the lack of infrastructure are misdirected and access to medicines can be achieved immediately. In addition, unless carefully worded, such a statement will be misused by some governments as constituting support for their inaction on making medicines accessible, with the claim that all such factors must be fully addressed before medicines such as anti-retrovirals can be made accessible. He suggested the document should state that access to medicines could be achieved immediately, but that the other factors must be addressed to ensure sustainability of access. Finally, he was concerned about the statement that “treatment is little or no benefit” if other conditions are not also met; while he agreed that States were obligated to address those other factors affecting secure, sustainable access, experience has demonstrated that anti-retroviral drugs can be safely and effectively delivered in settings of great poverty with little in the way of expensive infrastructure.

Ms. Dhaliwal recommended this premise be written with the future development of new therapies in mind; these are on the horizon and the document should account for these future developments. She also suggested adding another premise expressly addressing the issue of vulnerability and the access of vulnerable populations to treatment, care and support.

Ms. Gruskin noted that gender inequalities, differences between those living in rural and urban areas, and other vulnerabilities are factors which need to be addressed in order to realize equal access to treatment for all. Ms. Figueira agreed that addressing factors underlying vulnerability is necessary for realizing access to medication

Ms. Csete suggested this premise should include an explicit statement States’ obligations to take steps to realize access to treatment, or the various elements of the right to health more generally, are not dependent upon waiting for debt relief, or the creation of infrastructures, or economic development more broadly.

### **Identifying "norms" in international law to guide States**

Participants then engaged in a discussion of the extent to which the Guidelines should be strictly limited to those propositions already clearly established in international law, as well as the extent to which the Guidelines, in providing guidance to States, should also provide direction based on human rights norms, principles and standards even if that direction had not been clearly recognized in international law at this stage but constitutes a reasonable extension or application of those norms, principles and standards. Where standards or obligations had already been expressly recognized in formal instruments (e.g., treaties) or where authoritative bodies had provided clear direction already, that could be applied to the HIV/AIDS context (e.g., the analyses of expert treaty bodies), participants felt it was clear that such direction should be reflected in the Guidelines. The more difficult area was that of customary international law norms.

Ms. Gruskin suggested that reference should be had to various leading texts on the definition of customary international law for greater clarity in the background document. She noted, for example, that the consistent declaratory pronouncements of states in the context of UN General Assembly sessions may at times rise to the level of evidence of customary international law.

Mr. Morka observed that in a country like Nigeria, the Guidelines are the closest approximation of a constitution on human rights issues related to HIV/AIDS, although they constitute soft law.

Justice Kirby cautioned that the background document (and the Guidelines document itself) should not overstate the basis in international law for the recommendations made; caution in this area was advisable, particularly in the light of the often uncertain nature of the boundaries of customary international law.

Mr. Elliott suggested greater clarity regarding the term "norms" might be helpful. In the background document, the term was intended to encompass more than simply those propositions that are clearly identifiable as legal obligations on States or others under international law. It was intended to also include "soft law" propositions that enjoy broad support as statements of what States (and others) should do from the perspective of respecting, protecting and fulfilling human rights, be it in the form of declarations or similar documents adopted or endorsed by States, the views of treaty bodies and experts, and similar sources.

Mr. Elliott also cautioned against allowing the lowest common denominator to drive the contents of the human rights guidance to States to be provided in the Guidelines. Such an approach would also mean that no reliance could be placed upon an instrument such as the International Covenant on Economic, Social and Cultural Rights, as not all States have ratified or signed this treaty. The background document could not get into too many specifics as to what norms did or did not have the status of binding obligations under conventional or customary international law on which States. The provisions of the International Covenant on Economic, Social and Cultural Rights are already binding

obligations on the over 140 States that have ratified it, but for other countries who have not, the question of whether these norms govern their conduct is more open-ended. A general guidance document such as the Guidelines, as well as the background paper, could not provide a (time-limited) analysis of which norms have which status in relation to which States.

Justice Kirby agreed, but felt that the point was simply that the document needed to be clearer in how it presents international norms. In some cases, they may have crystallized into binding treaty or customary legal obligations; in other cases, it will be more accurate to describe a norm as emerging in international law.

Justice Cameron stated that there is a persuasive case to be made for access to treatment, care and support, based on the scale of the epidemic, the feasibility of treatment, and the vulnerability of groups and individuals affected. Therefore, he did not feel it was necessary to push the envelope of international law to make the case, and supported the approach advocated by Justice Kirby.

Justice Kirby suggested that the revised text of Guideline 6 and its accompanying subparagraphs, which are statements as to what States “should” do, can certainly go beyond what is clearly and indisputably part of international law in some respects. The question was how far the background document, which supports the revised text of the Guideline 6, should go.

Mr. Heywood suggested that the recommendations in the background paper could be tied to both existing and “emerging norms” of international law, rather than asserting that all of the conclusions and propositions in the background document are already clearly established in international law. As such, the document not only helps make the case for the content of the revised Guideline 6, but also contributes to the emergence of these international norms over time. Justice Kirby agreed with this approach, suggesting the statements in the background should be clearer, where necessary, as to what “is” currently international law and which norms are “emerging” norms. Ms. Maluwa agreed that it would be wiser not to suggest that every point reflects the current state of international law; rather, the document should clarify where international law currently stands, the directions in which it appears to be moving, and, assuming the document will be reviewed and endorsed by the consultation participants once revised, the directions in which participants think it should be going.

Participants agreed with this general approach. Mr. Elliott indicated the background document would be revised accordingly.

Ms. Grant welcomed this approach and agreed with the earlier suggestion that the background paper, once revised, should be published by the OHCHR and UNAIDS (with the logos of both) as a consultant’s paper prepared for the purpose of updating Guideline 6 of the International Guidelines. Mr. Heywood welcomed the support of UNAIDS and the OHCHR in publishing the revised background document, but urged that this be done

in a fashion that will preserve the value of having it endorsed by consensus by an expert consultation process.

#### **Premise #4**

Ms. Csete suggested that the references to States' duties of international co-operation and assistance should be strengthened, including by referencing clearly established legal obligations in international law, such as the provisions in Article 2 of the International Covenant on Economic, Social and Cultural Rights. States' duties of international co-operation should be interpreted to preclude States from using bilateral policies or regional agreements to undermine rules agreed to in a multilateral forum.

#### **Key points**

A number of key points emerged from this first portion of the discussion regarding the paper generally and the premises in particular:

- The discussion of the recent developments and current context in the introduction and perhaps the premises should be strengthened and expanded. In particular, developments such as the following should be noted:
  - the massive growth in and scale of the epidemic;
  - new evidence of the feasibility of providing treatment, including anti-retrovirals, in resource-poor settings;
  - breakthroughs in scientific/public health thinking regarding the link between prevention and treatment;
  - the commitments by WHO and others to meet specific targets regarding access to treatment; and
  - the cost reductions in medicines as important in removing or weakening excuses for state inaction on realizing access to treatment, but clearly indicating that while such reductions are obviously relevant to realizing the right to access treatment, this does not mean that States' obligations to progressively realize access is contingent upon such developments.
- The paper should state, as its first premise, that access to treatment *per se* is part of the human right to health, and should also note that access to treatment reduces HIV/AIDS-related discrimination and supports the right to dignity. The second premise should identify the links between prevention and treatment, care and support.
- The background document should examine the issue of “progressive realization”, and what this means for States' obligations, in greater detail.

- It is important that the background document preserve references to prevention, particularly since the Guidelines need improvement in this area. It is also important to ensure the document, although taking access to medicines as one primary focus, maintain references where appropriate to comprehensive treatment, care and support, without diluting references to specific, concrete measures regarding access to medicines that States should take.
- The background document needs to strengthen the discussion regarding vulnerable groups, including gay men and other men who have sex with men, injecting drug users, sex workers, prisoners, migrants, etc. The document must be clear that the factors affecting “vulnerability” of individuals and groups vary, and that any list of specific groups identified as vulnerable is not a closed list, but rather an open one. Perhaps another premise should be added that expressly discusses the need for States to undertake additional efforts to address the factors underlying “vulnerability” and the access of vulnerable groups to treatment, care and support.
- The background document could discuss in greater detail the regional human rights instruments relevant to the issue of access to treatment, care and support, as well as other developments of particular significance to specific regions of the developing world (e.g., Abuja Declaration, NEPAD, etc). Reference should also be made to documents such as the Global Strategy Framework on HIV/AIDS, as well as to additional developments within international bodies such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Bank, etc. which are relevant to access to treatment.
- The background document should be clearer in indicating what propositions are existing norms of international law, which are emerging norms, and which are desirable from the point of view of securing universal respect for, and observance, of human rights.

## **EXISTING ASPECTS OF GUIDELINES**

Mr. Elliott briefly highlighted, as summarized in the background document, other relevant elements of the existing text in the Guidelines, their sub-paragraphs and the accompanying extended commentary in the booklet published by UNAIDS and the OHCHR. Participants agreed these were the relevant portions and did not feel the need for any further discussion of these.

## **KEY DEVELOPMENTS IN INTERNATIONAL LAW AND POLICY**

The participants discussed several sections of the background paper summarizing and analyzing key developments in international law and/or policy relevant to the issue of access to treatment, care and support that had occurred since the Guidelines were first elaborated in 1996. Some areas provoked more discussion than other sections.

### **International economic law**

The participants were joined by Mr. Simon Walker (Human Rights Officer) and Mr. Tiyanjana Maluwa (Legal Adviser), both of the Office of the High Commissioner for Human Rights, who brought valuable expertise on the issue of international economic law to the discussion. Particular attention was focussed on the significance of the recent developments within the World Trade Organization (WTO) regarding the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”).

The Chair asked Mr. Walker and Mr. Maluwa for their observations regarding the draft background document's treatment of the Declaration on the TRIPS Agreement and Public Health, adopted in November 2001 by the Fourth Ministerial Conference of the World Trade Organization. Mr. Walker did not agree with the suggestion in the draft document that the Declaration could be considered part of customary international law, in part because it was so recent that it would not be possible to point to any reasonably consistent pattern of practice by States indicating that it reflected widely-accepted norms seen as legally binding.

Mr. Elliott agreed with this point, but argued that the Declaration was nonetheless now a norm of WTO law, in that it has some legal effect as a matter of international law for WTO Member countries. He pointed out that it is well established (in existing jurisprudence from the WTO's Dispute Settlement Body, in the *Vienna Convention on the Law of Treaties*, and now in the Doha Declaration itself) that the TRIPS Agreement is to be interpreted following the customary international law rules of treaty interpretation. The *Vienna Convention on the Law of Treaties* codifies those rules. That Convention provides that States must implement their treaty obligations in good faith. It must therefore be assumed that all WTO Members, in acceding to WTO treaties, are acting in good faith and do not intend to thereby abrogate their human rights treaty obligations; WTO treaties must be read accordingly. Finally, the *Vienna Convention on the Law of Treaties* provides that any subsequent agreement between the parties to a treaty regarding its interpretation “shall” be taken into account in interpreting the treaty. The Declaration adopted by consensus in Doha, following strenuous negotiations at the WTO Ministerial Conference, must be considered an agreement between the parties; it expressly states that the TRIPS Agreement is to be “interpreted” and implemented in a manner supportive of Member States' right to protect public health and, in particular, to promote access to medicines for all. Failure by a WTO dispute panel or the Appellate Body to follow this interpretive direction would constitute a reviewable error of law.

Mr. Maluwa also pointed out that the unanimous agreement of WTO Members to the Declaration could be seen as “subsequent practice” in the application of the treaty establishing agreement of parties regarding its interpretation, which the Vienna Convention on the Law of Treaties states is another element that shall be taken into account in interpreting a treaty.

Mr. Walker agreed that the Declaration would need to be taken into account in adjudicating a dispute under the TRIPS Agreement. He also stressed the importance of not overstating intellectual property rights as human rights. They are instrumental rights, not fundamental human rights. The human right recognized in international law is to the protection of the moral and material interests resulting from any scientific, literary or artistic production one authors, not to a specific regime or form of intellectual property rights as set out in domestic legal systems or in an international treaty such as the TRIPS Agreement. The position of the Office of the High Commissioner for Human Rights is that the TRIPS Agreement contains flexibilities that can be used to protect public health, which flexibilities should be read in the light of States’ human rights obligations.

Justice Kirby asked about the implications of the Declaration for complaints against WTO Members for measures alleged to limit or infringe exclusive patent rights in breach of their obligations under the TRIPS Agreement, such as the recent dispute between the United States of America and Brazil. Mr. Walker expressed the view that the Declaration would bolster a State's defense of measures such as those adopted by Brazil as being in compliance with the TRIPS Agreement.

Ms. Watchirs agreed with that assessed, but noted that once concern was the monopoly held by the WTO dispute settlement system, at least to date, on the interpretation of the TRIPS Agreement, which has been less than receptive to integrating human rights considerations of States in interpreting the agreement.

Ms. Gruskin noted that the provisions of the TRIPS Agreement dealing with compulsory licensing refer to both “national emergency” and “other circumstances of extreme urgency”. She asked whether there was any different threshold for State action or restrictions on State action created by these two phrases. Mr. Walker and Mr. Elliott agreed there was not a different threshold applicable to these two different phrases.

Mr. Walker, Mr. Maluwa and Mr. Elliott agreed that it was accurate to state that the provisions in the Declaration on the TRIPS Agreement and Public Health regarding the interpretation of the TRIPS Agreement amounted to an interpretive norm in WTO law.

Mr. Divan questioned whether the discussion of the Declaration on the TRIPS Agreement and Public Health should be included in the paper, or alternatively suggested that it was appropriate to incorporate a greater degree of criticism regarding its limitations.

Ms. Maluwa suggested that it was important to reference it, pointing in particular to the fact that the UN Commission on Human Rights has referenced the Declaration in its most

recent resolution (Resolution 2002/32) on access to medication in the context of pandemics such as HIV/AIDS.

Justice Kirby suggested that the background document should more strongly highlight that WTO Member states are not exempt from their human rights obligations and must govern themselves accordingly in their negotiations, interpretation and implementation of WTO system treaties.

Ms. Kisaakye reminded participants of the earlier decision that, wherever possible, the Guidelines and the background document should always be rooted in the clearest statements possible in international law regarding States' obligations (e.g., treaties).

Ms. Fahlen pointed out that we know from experience that States' legal obligations are often not adhered to, and so we need to consider what mechanisms can be used to monitor whether such developments as the Declaration on the TRIPS Agreement and Public Health goes far enough in ensuring that the TRIPS Agreement does not hinder realization of the right to health and related rights. For example, it is important to ensure that the newly-mandated special rapporteur on the right to health monitors the impact of the TRIPS Agreement and this Declaration on realizing access to medicines and other technologies, and more generally could monitor the impact of international trade law (including on intellectual property matters) on human rights.

The rapporteur asked for input from the consultation regarding aspects of this section of the background paper beyond the status of the WTO's Declaration on the TRIPS Agreement and Public Health. There was consensus with Justice Kirby's suggestion that the introduction to this section would benefit from the addition of a short explanation about the World Trade Organization and why a treaty such as the TRIPS Agreement is an important aspect of this discussion on access to treatment, care and support.

Mr. Elliott also drew participants' attention to the impact that other instruments in international economic law (e.g., the General Agreement on Trade in Services, the Free Trade Agreement of the Americas) did or could have on access to treatment, care and support, or the progressive realization of everyone's right to health. He sought feedback as to whether the document should attempt to address those other instruments. There was consensus that the document should include some general references, but that it was not necessary, nor was it feasible, to incorporate any detailed discussion in this document.

Justice Kirby also noted that intellectual property issues could be raised with respect to other forms of therapy than existing medicines, such as the field of genomics. Again, it was important that the background document (and the Guidelines) be drafted in such a fashion as to be flexible enough to apply to possible future developments in therapies for people living with HIV/AIDS, such as gene-based therapies.

## **International Health Policy**

Ms. Gruskin suggested that resolutions of the World Health Assembly should not be referred to as international health "law", because they are not legally binding; only the *International Health Regulations* constitute international health law. There was consensus that the background document could refer to these norms using the broader term "international health policy".

With respect to developments beyond those at the World Health Assembly, Ms. Gruskin recommended incorporating reference to the work of UNAIDS in developing international health policy, and noted in particular the development of the Global Strategy Framework, including the language therein regarding care, treatment and support. She noted that the language and concepts of the Framework had, in several instances, been reflected in the Declaration of Commitment on HIV/AIDS adopted in June 2001 by the UN General Assembly. Ms. Fahlen agreed that the Global Strategy Framework was important, noting that it constitutes to the UN system. Ms. Gruskin also pointed out that the Global Strategy Framework is a stronger document than the Declaration of Commitment from a human rights perspective; for example, it expressly names vulnerable groups.

Ms. Gruskin also suggested that reference to some of the materials produced by the World Bank or other UNAIDS co-sponsoring organizations might be appropriately incorporated into this section. There was consensus with the suggestion that the sub-section in the draft background document discussing the International Labour Organization's Code of practice on HIV/AIDS and the world of work should be moved into this section on international health policy, as it provided guidance regarding health policy in the specific context of work relationships.

## **International Labour Law**

Ms. Gruskin suggested that the first introductory paragraph should include a statement regarding government responsibility to pay particular attention to the needs of those not connected to the formal employment sector.

Mr. Hourcade noted that HIV-related discrimination often still impedes access to treatment, care and support even for those who have some form of benefits through their employment status, and this should be noted in the paper. He also pointed out that in Latin America, a minority of the people living with HIV/AIDS who can access anti-retroviral medicines have obtained it through the "social security" (*seguro social*) system (which provides some health coverage for some employed workers in certain sectors, depending on the jurisdiction and legislation); most of the small number who have access obtain these medicines through the general public health system. In contrast, Mr. Divan explained that in India, the situation is the opposite – many of the small number who have access to anti-retrovirals do so because of health benefits tied to their employment.

Ms. Dhaliwal reiterated the importance of governments paying particular attention to ensuring access to treatment, care and support for those in the informal employment sector, as workers in this area do not have any health insurance coverage.

Ms. Fahlen noted that there was nothing currently in the background document addressing the issue of corporate social responsibility and the obligations of employers to provide treatment to employees. She suggested incorporating some discussion of this point.

Mr. Carrasco suggested strengthening the references in the ILO Code of practice regarding social security by adding references to international human rights law norms such as the right to social security.

Ms. Watchirs suggested that express reference should be made to the entitlement of government employees to health benefits, given the wording of the ILO Code. Justice Kirby asked whether it would be defensible to single out a specific category of workers in this fashion, as opposed to the obligation of other sorts of employers to provide benefits to their workers. Ms. Watchirs suggested it would be valuable and important to document instances in which governments and private sector employers have moved toward providing health benefits for their employees (including coverage for anti-retroviral medicines), highlighting this as good practice that should be followed.

Ms. Dhaliwal noted that some have suggested targeting specific people or categories of people for preferential entitlement to anti-retrovirals (e.g., teachers, doctors, etc). After further discussion, it was generally agreed that the specific complexities of that issue could not be productively addressed in this document.

Mr. Morka noted that the government should not only act to ensure benefits for its employees include coverage for HIV/AIDS treatment, care and support (including anti-retrovirals), but that government also had a responsibility to work with private sector employers to ensure coverage (including treatments such as anti-retrovirals), as well as to address coverage needs for those working in the informal sector without health insurance.

Mr. Gilks also noted that the field of occupational health and safety law could be relevant here, and noted that this was also a human rights issue. International law recognizes the right to a safe working environment, and in some cases this could require access to medicines for post-exposure prophylaxis following occupational exposures. Ms. Dhaliwal noted that this, in many jurisdictions, there was also a positive, clear legal obligation on employers to provide a safe working environment, including measures to prevent occupational injury in the first instance.

Mr. Elliott suggested the background document might also include some discussion of international norms (e.g., the Helsinki Declaration) regarding the conduct of health care workers in delivering health services, as this is relevant to realizing access to treatment, care and support.

There was general agreement that consideration should be given to incorporating these elements regarding both health care workers' rights to a safe working environment and their obligations (e.g., non-discrimination) related to realizing access to HIV/AIDS-related goods, services and information.

Mr. Heywood noted that other sources of international norms to guide State conduct could be referenced. For example, the Code on HIV/AIDS and Employment established by the Southern African Development Community (SADC) also mentions obligations regarding access to treatment for workers.

Mr. Wong stressed that the document should convey a sense of urgency, given the scale of the epidemic and reductions in the prices of drugs. He noted that there was still great need for getting governments to move on providing access to medicines, pointing to the incorrect argument advanced by the Government of Singapore that because there is no cure for HIV/AIDS, it is not viable to provide coverage.

Ms. Csete suggested there was no need for a draft sub-paragraph to Guideline 6 expressly singling out peacekeeping personnel as being entitled to treatment. To take this element of the UN Security Council's resolution out of its larger context risked creating a favourable impression of the Security Council's that was not warranted, as the Security Council's approach overall has been quite problematic from the perspective of human rights. Ms. Gruskin and Justice Kirby supported this suggestion, and after further consideration, it was agreed that the sub-paragraph need not make express reference to peacekeeping personnel. Similarly, participants welcomed the rapporteur's suggestion that the existing, short reference in the background document to the Security Council's resolution could more appropriately be removed from the "human rights" section to a footnoted accompanying the general text regarding the issue of benefits for workers.

It was agreed that consideration should be given to incorporating this entire sub-section of the paper into the section on international health policy.

Mr. Burzynski suggested that the paper make clear that realizing the right to health requires not just "public health" work in the narrow sense of referring to government infrastructure and initiatives, but should also acknowledge that communities are involved in delivering treatment, care and support. Ms. Gruskin noted that the US Institute of Medicine, in its 1988 report on public health, had adopted a good definition of "public health" as being "what we, as a society, do collectively to assure the conditions for people to be healthy." This widely cited definition makes it clear that realizing health goes beyond simply the actions of governments, and requires action by other actors as well. Mr. Gilks also noted that the document recently published by the World Health Organization on scaling up the use of anti-retroviral therapy in resource limited settings adopts a broad "public health" approach.

## **International human rights law**

There was agreement with Mr. Elliott's suggestion to delete the chronology of developments that appeared in the draft background document.

Ms. Gruskin suggested the document should be careful to avoid any references that could be misinterpreted as suggesting that providing nevirapine to prevent mother-to-child transmission of HIV be treated as an issue of care for the mother; rather, it is a prevention strategy. Ms. Csete and Ms. Dhaliwal also noted their concern about possible misinterpretation. Mr. Heywood agreed with the underlying point that this limited provision of drugs to prevent perinatal transmission was chiefly a prevention measure and could not be understood as representing adequate care for mothers living with HIV/AIDS. However, he cautioned against characterizing the provision of anti-retrovirals for preventing mother-to-child transmission as solely a matter of prevention, because such prevention implicates very substantially the psychological health and other aspects of the well-being of HIV-positive parents and families.

Ms. Gruskin welcomed the discussion of the work of the UN Committee on Economic, Social and Cultural Rights regarding the right to health and other relevant issues. But she suggested that the introduction to this section should outline how the Committee's work is relevant not only to States which have ratified the International Covenant on Economic, Social and Cultural Rights. For example, the Committee's comments and statements have also informed the work of the UN Commission on Human Rights, the Declaration of Commitment on HIV/AIDS adopted by the UN General Assembly, etc.

Ms. Gruskin expressed reservations regarding the amount of attention paid to the General Assembly's Declaration of Commitment in the draft background document, particularly since this discussion appears in the section on developments in "international human rights law". She welcomed its inclusion in the document, but was concerned that the Declaration represented a lowest common political denominator in terms of articulating international norms regarding State action on HIV/AIDS. Furthermore, the Declaration is very deficient as a human rights document, so the discussion should include greater assessment of its weaknesses.

Ms. Fahlen agreed that the Declaration represented a political compromise, but also felt that it is surprisingly good given developments in global politics since it was adopted. She suggested that what was achieved in the Declaration of Commitment would likely not be achieved today in 2002. From this perspective, the Declaration is a strong political platform for advancing access to treatment and should be used as such.

There was consensus that the background document should shorten the discussion of the Declaration of Commitment, and should identify notable limitations while also emphasizing the commitments States have agreed to regarding access to treatment, care and support.

Mr. Carrasco wondered whether the Guidelines and the background document needed to address treatment access issues raised specifically in the context of clinical trials of drugs. Mr. Elliott drew the attention of participants to an existing reference in Guideline 4 to the effect that prison authorities should provide prisoners with access to voluntary participation in HIV-related clinical trials. Participants also noted that UNAIDS had produced a guidance document regarding ethical considerations in HIV preventive vaccine research that could be referenced. It was agreed that the record of the meeting should reflect the fact that the issue of access to treatment for those screened for HIV in the context of clinical research into medicines, vaccines, or microbicides was raised, but that participants agreed it would not be dealt with in this process or in this background document.

Mr. Burzynski noted that the background paper does not address the issue of access to treatment, care and support for undocumented persons, and suggested this be addressed. Ms. Gruskin noted that UNAIDS had produced a guidance document on migrants, human rights and health. It was agreed by consensus that the record of the meeting should also reflect a recommendation that the newly mandated Special Rapporteur on the right to health pay particular attention to the issue of migrants' access to health care goods, services and information.

Ms. Gruskin also suggested that at the meetings of chairpersons of the UN human rights treaty-monitoring bodies commitments in relation to HIV/AIDS have been made and that these would be relevant for the discussion in the background document's section on developments in international human rights law.

Ms. Fahlen noted that refugees, internally displaced persons and others in emergency situations are sometimes covered by international humanitarian law, giving rise to State obligations regarding access to treatment. National AIDS councils/commissions could be asked to provide information regarding access to treatment for all people living with HIV/AIDS in the country and under the protection of the State, including refugees, internally displaced persons, etc. Ms. Oldring noted that an interagency standing committee working group was developing guidelines on HIV in emergency settings, and these might provide a source of relevant information. Ms. Csete noted that the non-governmental organization Women's Commission for Refugee Women and Children had recently released a publication on refugee law and HIV/AIDS that could be a useful source. Mr. Elliott also noted that there was case law regarding non-*refoulement* of persons living with HIV/AIDS to countries of origin on the basis they would lack access to adequate medication.

### **Key points**

As a result of the discussion of the various sections of the background document, it was agreed by consensus that:

- The background paper should include a section on developments in international economic law.

- Adding a brief explanation of the WTO and the significance of the TRIPS Agreement would strengthen the introduction to this section.
- There should be general reference to other international trade agreements and their relevance to the issue of access to treatment, care and support and the realization of the right to health, but a more detailed discussion of multiple such agreements was not necessary and was beyond the scope of the paper.
- The characterization of the WTO's Declaration on the TRIPS Agreement and Public Health would be revised to that of an interpretive norm of WTO law and some additional commentary regarding the limitations of what was achieved with the Declaration would be added.
- It should be recommended to the special rapporteur on the right to health that the rapporteur address the impact of international economic law such as the TRIPS Agreement on realization of this human right.
- The background document should incorporate references to the Global Strategy Framework on HIV/AIDS, policy documents and work done by UNAIDS co-sponsoring organizations, and give some examples of regional documents relevant to health policy.
- Particular note should be made of governments' obligations to address the health needs of those not attached to the formal work sector and therefore lacking even the possibility of any employment-related health benefits. It should also be noted that even for those with the possibility of accessing such benefits, stigma and discrimination related to HIV/AIDS often still act as a barrier to real access.
- Consider incorporating a brief discussion of both health care workers' rights to a safe working environment (which may include provision of treatment following occupational exposure) and their obligations (e.g., non-discrimination) related to realizing access to HIV/AIDS-related goods, services and information.
- There was no need for the Guidelines to make express reference to access to treatment for peacekeeping personnel; the UN Security Council resolution on HIV/AIDS should be removed from the human rights section and appropriately referenced in the section regarding benefits for workers.
- Shorten the discussion of the Declaration of Commitment and identify notable limitations while also emphasizing the commitments in the Declaration regarding access to treatment, care and support.

**26 July 2002**

The second day of the consultation was principally devoted to a discussion of the revised text to be added to Guideline 6 and the next steps following the consultation, and then to identifying opportunities and strategies for promoting the revised, updated Guidelines to be published jointly by UNAIDS and the OHCHR. The consultation concluded with a brief meeting with Ms. Mary Robinson, UN High Commissioner for Human Rights during which the outcomes of the consultation were summarized by the Chairperson.

### **AUDITING IMPLEMENTATION OF STATES' INTERNATIONAL OBLIGATIONS**

At the invitation of the Chairperson, Ms. Helen Watchirs gave a brief presentation of her work on auditing country compliance with the International Guidelines. She explained that one outcome of the process is to identify disparities between international obligations and the reality at the country level. The auditing instrument she had developed and piloted in the state of New South Wales in Australia uses ten quantitative indicators to assess whether, in the realm of law, a state is complying at the domestic level with its international human rights obligations. The process of developing an auditing instrument, and then engaging communities and government in the process of applying it, increases transparency and is itself a means of promoting awareness of international obligations. She noted that the auditing instrument developed expanded on the tools provided in documents such as the *Handbook for Legislators on HIV/AIDS, Law and Human Rights* originally produced by UNAIDS and the Inter-Parliamentary Union in 1999. Audits need to eventually go beyond the first step of auditing legal measures, to also assess non-legal measures taken to implement international human rights obligations, as well as assess actual compliance notwithstanding the adoption of legal measures. Audits can be useful to highlight best practice and identify gaps where law reform, and other kinds of initiatives, are needed. Developing a standard auditing tool would allow for comparisons between jurisdictions, although governments may resist this. Repeating an audit using a standardized tool also allows for the charting of progress over time. The results of such audits can be incorporated into the work of UN human rights treaty-monitoring bodies charged with monitoring States' compliance with their treaty obligations. Finally, in future such audits could be linked to other fields of research, as a qualitative tool that generates a quantitative outcome.

### **REVISED TEXT FOR GUIDELINE 6 AND SUB-PARAGRAPHS**

After much debate, a majority voted in favour of the proposal that the consultation should not generate a recommended revised text of a single paragraph to replace the chapeau that currently appears in paragraph 31 and constitutes Guideline 6 proper. Rather, the majority felt it was preferable to supplement the existing paragraph with a second paragraph providing additional clarity and guidance to States and based on existing and emerging international norms.

After additional discussion, and further consideration of a revised text for a supplementary second paragraph drafted by the rapporteur, participants reached consensus on recommending to UNAIDS and the OHCHR that the following additional paragraph be added after the first sentence currently appearing in paragraph 31 of the Guidelines booklet:

*States should also take measures necessary to ensure for all persons, on a sustained and equal basis, available, accessible and good-quality:*

- i. treatment, care, and support, including anti-retroviral and other safe and effective medicines, as well as diagnostics and related technologies, for preventive, curative and palliative care of HIV/AIDS and related opportunistic infections and conditions; and*
- ii. goods, services and information for HIV/AIDS prevention, treatment, care, and support.*

*States should take such measures at both the domestic and international levels, with particular attention to vulnerable individuals and populations.*

It was also agreed by consensus that it was important for the Guideline to refer explicitly to prevention as well as treatment, care and support, given the connection between each of these and the necessity of work in each area in order to respect, protect and fulfil human rights related to health.

It was also agreed by consensus to recommend to UNAIDS and the OHCHR that the title of the Guideline be revised to read:

*Guideline 6: Access to prevention, treatment, care, and support*

Finally, participants considered the draft sub-paragraphs presented in the background paper for the purposes of discussion. These sub-paragraphs would be added to paragraph 31 as it appears in the Guidelines booklet, supplementing the text of the sub-paragraphs that already appears there. In general, participants felt the draft text for sub-paragraph captured many of the important elements that should be reflected in the Guidelines document, and had suggestions for some additional points that should be captured. Participants also identified specific revisions that should be made to the draft text.

Participants agreed with the suggestion by Mr. Heywood to place the sub-paragraph dealing with the need for national plans and strategies at the beginning of the list, given the importance of this step in progressively realizing equal access to treatment, care and support for all.

There was also consensus that strategies, plans and programs need to be monitored, in consultation with civil society, to ensure their adequate and appropriate implementation, as well as improvement and expansion if necessary.

Participants also agreed with Ms. Gruskin's suggestion that a sub-paragraph needed to directly address the issue of "progressive realization" of rights related to health, to correct any suggestion that the nature of some such rights means they can delay taking action aimed at their realization.

Participants also agreed that one of the sub-paragraphs needed to be clear about identifying the specific attention that must be paid to realizing access to prevention, treatment, care and support for vulnerable individuals and groups. It was agreed that it was important for the Guidelines to make express reference to factors affecting vulnerability, and that express reference should be made, in some fashion, to the vulnerability of gay men and other men who have sex with men, sex workers, prisoners, transgender people, drug users, and others.

It was agreed that there was no need for express reference in the sub-paragraphs to access to treatment for peacekeeping personnel.

It was agreed that references to "comprehensive care" needed to be clearer in indicating the elements of such care, perhaps incorporating the items referenced in the UN General Assembly's Declaration of Commitment.

Participants agreed with the caution that the language of a sub-paragraph on the issue of developing guidelines for treatment, care and support should not encourage States to delay action by claiming the need to first develop guidelines where these already exist from other sources. There was concern that some States might also develop sub-standard guidelines. The sub-paragraph should not be open to being interpreted in a fashion that would encourage "reinvention of a lesser wheel."

It was agreed that references to sources such as the outcome document of the Monterrey conference on Financing for Development, as well as to other targets or commitments agreed in international forums, such as the UNGASS Declaration, should be referenced where relevant to a specific sub-paragraph.

Participants agreed that it was important for a sub-paragraph to address the need for public resources devoted to research and development, and in particular to complement encouragement of private sector research and development with commitments to research and development in the public sector.

Participants welcomed the inclusion of sub-paragraphs specifically addressing the issues related to international economic law and the conduct of States in international forums, including sub-paragraphs addressing the obligations of States regarding international assistance and co-operation in responding to the global HIV/AIDS pandemic.

Participants agreed that the phrase "non-governmental organizations" should be used throughout the sub-paragraphs, noting that this term has already been used elsewhere in the Guidelines.

It was agreed that the structure of the sub-paragraphs should fall roughly into the following areas: (a) national strategies or plans as the overarching framework for State action, and the particular issues or elements thereof; (b) specific legislative or policy measures to address access to HIV/AIDS-related goods, services and information for prevention, treatment, care and support; (c) resources for realizing access, both domestically and internationally; (d) international co-operation and action.

The rapporteur was tasked with preparing a revised draft of the sub-paragraphs, taking into account the input received. Participants agreed a timeline and a process for reviewing and finalizing the text of the sub-paragraphs in the days following the meeting.

### **NEXT STEPS FOLLOWING THE CONSULTATION**

The participants agreed a timeline and process for providing additional input on the re-drafted text of an additional paragraph and sub-paragraphs for the Guideline. It was recognized that participants would provide this as a set of recommended revisions to UNAIDS and OHCHR, which offices would subsequently make their final decisions regarding the text.

Participants also agreed a timeline and process for the rapporteur to finalize the background document and prepare a summary of the meeting. Participants agreed that the background document, once finalized, would serve as a valuable resource for a broad audience, and recommended that UNAIDS and OHCHR jointly publish the final document as such, with at least a summary of the document printed in all official UN languages. Participants agreed the revised text should be circulated for further comment and, if possible, the final text unanimously endorsed by the expert consultation.

It was noted the author of the background document would also be submitting a separate memorandum to UNAIDS and OHCHR regarding additional aspects of the Guidelines that might benefit from review and revision, in the interests of maintaining the Guidelines as a current document evolving in response to developments in the HIV/AIDS epidemic and in the realm of international law and policy.

### **PROCESS FOR COMPLETION OF PROJECT**

Participants agreed on a timeline for completing this project of publishing an updated booklet containing the International Guidelines incorporating the revised, updated text for Guideline 6 and sub-paragraphs. It was agreed that there were several components remaining:

- Based on the discussion at the consultation, the rapporteur would prepare a revised text of Guideline 6 and sub-paragraphs for circulation, further comment, and approval by participants. This would be submitted to UNAIDS and the OHCHR, who would solicit input on it from other international agencies and programmes they deemed fit. The final text would be agreed upon by UNAIDS and the OHCHR.
- The rapporteur would prepare a summary record of the consultation in draft, which would be circulated for review, comment and approval by the participants. The final text would be submitted to UNAIDS and the OHCHR.
- The background paper would be revised in the light of the discussion at the consultation, re-circulated to participants for review, comment and endorsement (if satisfactory) by the expert consultation. Consultation participants recommended to UNAIDS and the OHCHR that they jointly publish the background paper, once endorsed by the experts at the consultation, as a resource, with the UNAIDS and OHCHR logos attached. It was also recommended that at least an abstract of the background document be translated and published in other UN languages.
- The rapporteur would also provide a separate note to UNAIDS and OHCHR for their information regarding other possible areas of priority for updating other aspects of Guidelines.

It was also noted that UNAIDS and the OHCHR would prepare a new foreword for the document.

## **PROMOTING THE GUIDELINES**

Participants then undertook to discuss, in more general terms, how the revised International Guidelines could be promoted to States and others to inform national and international responses to the epidemic that protect and promote human rights and achieve HIV-related public health goals.

Participants agreed that, given the nature of the global HIV/AIDS epidemic and the ongoing pace of related international developments, including in areas of law and policy related to human rights, the Guidelines should be seen as based on sound, constant human rights principles but evolving in the light of those developments to provide current, ongoing guidance to States. Therefore, participants recommended that the Guidelines should be reviewed and updated on a regular basis as developments may require.

Participants also addressed the issue of dissemination and promotion of the revised Guidelines, incorporating the new text for Guideline 6 generated by this process regarding access to care, treatment and support.

With regard to **dissemination**, participants in the consultation recommended that UNAIDS and OHCHR distribute the revised publication widely, and in particular identified a number of offices and individuals that should receive the document with a covering joint communication from the Executive Director of UNAIDS and the UN High Commissioner for Human Rights. These included the following:

- national AIDS commissions, councils or similar bodies
- national (and sub-national as appropriate) human rights commissions, council, ombudspersons, or similar bodies
- heads of State and government cabinet ministers and officials with responsibilities in the areas of health, justice, finance, foreign affairs, trade, industry, and international development)
- networks of non-governmental organizations, community-based organizations, and people living with HIV/AIDS, including via organizations such as the International Coalition of AIDS Service Organizations (ICASO)
- the Secretary-General of the United Nations, and the UN envoys on HIV/AIDS
- all co-sponsoring organizations of UNAIDS (i.e., WHO, ILO, UNICEF, UNDP, World Bank, UNFPA, UNESCO, UNDCP)
- regional human rights bodies (e.g., Inter-American Commission on Human Rights, African Commission on Human and Peoples' Rights, the Council of Europe Commissioner for Human Rights)
- all UN-system treaty monitoring bodies responsible for monitoring implementation of, and compliance with, the major human rights treaties adopted in the UN system
- all special rapporteurs (including the special rapporteur on the right to health), independent experts, working groups and similar entities or persons with mandates relevant to HIV/AIDS and human rights
- other relevant UN bodies (e.g., UNCTAD)
- other relevant inter-governmental bodies (e.g., World Trade Organization, World Intellectual Property Organization, Commonwealth Secretariat, ASEAN Secretariat, etc.)
- heads of States' missions to the United Nations and other relevant, non-UN system bodies (e.g., the World Trade Organization)
- the head of the Global Fund to Fight AIDS, Tuberculosis and Malaria
- the International Federation of Red Cross and Red Crescent Societies
- the Inter-Parliamentary Union
- the International AIDS Society
- the Global Business Council on HIV/AIDS

With respect other avenues or methods for **promotion** of the Guidelines and their content (including the updated Guideline 6 on access to treatment, care and support), the consultation participants identified a number of possible opportunities:

- UNAIDS and OHCHR should launch the revised Guidelines booklet, including with a press release and/or conference.

- The Executive Director of UNAIDS and the UN High Commissioner for Human Rights should promote the Guidelines through formally presenting them to a variety of recipients (such as those listed above on the list for dissemination) as an updated source of guidance for State practice, produced through the process of a third international expert consultation on HIV/AIDS and human rights.
- The Guidelines should be integrated into national HIV/AIDS plans and strategies, including via the efforts of country-level UNAIDS representatives.
- UNAIDS should consider the Guidelines generally, and the new text for Guideline 6 in particular, in developing and applying their indicators to measure progress in implementation of the commitments in the UN General Assembly's Declaration of Commitment on HIV/AIDS adopted at its Special Session on HIV/AIDS in June 2001.
- The revised Guidelines should be integrated into the work of Special Rapporteurs on human rights as appropriate, and in particular the newly-mandated special rapporteur on the right to health.
- The updated Guidelines booklet should be distributed and promoted at upcoming regional conferences on HIV/AIDS and at future international conferences on HIV/AIDS, health more generally, human rights, or other issues relevant to the global HIV/AIDS pandemic.
- A plainer-language summary of the updated Guidelines could be produced to make the document as accessible and useful a tool for advocates as possible.
- NGOs should use the Guidelines in their domestic efforts to engage their governments in developing and implementing national policies, strategies and plans, as well as in reporting internationally (e.g., to treaty monitoring bodies) on their human rights obligations.
- In 2003, the UN Secretary General will reporting to the UN Commission on Human Rights on the information provided by States regarding their implementation of the existing Guidelines. This provides an opportunity for the Secretary General to report on the publication of revised, updated Guidelines, and to draw the attention of States and others to the new text accompanying Guideline 6 in particular.
- In one year's time, UNAIDS and the OHCHR should convene a group to evaluate what follow-up has been done with respect to promoting the updated Guidelines and to generate further strategies for follow-up that should be undertaken. Participants at this present consultation could submit comments to UNAIDS and the OHCHR with their own assessment of what has been achieved by way of follow-up, and the impact of the updated Guidelines, in their own settings.
- The consultation participants also strongly recommended that the OHCHR strongly strengthen its support for HIV/AIDS work and its capacity to work on HIV/AIDS-related human rights issues, as this is critical to promoting a rights-based approach to the epidemic. They also recommended that UNAIDS strengthen its work on human rights issues to the same end.

## CONCLUSION

To conclude the meeting, participants were joined by Ms. Mary Robinson, UN High Commissioner for Human Rights. As Chairperson of the consultation, Justice Kirby provided a summary of the very productive deliberations held over the two days, for the benefit of the High Commissioner and the participants. He highlighted the numerous developments that have occurred since the Guidelines were first elaborated in 1996 that warranted UNAIDS and the OHCHR undertaking to revise Guideline 6 in relation to the issue of access to treatment, care and support. He noted the tenor of the discussion and highlighted some aspects.

Justice Kirby indicated that the participants had agreed the Guidelines should insist upon States' obligations that are clearly established under international law, and should also highlight that a universal principle of international human rights law is emerging that addresses States' responsibility to realize access to treatment, care and support for people living with HIV/AIDS. Indeed, participants felt that one contribution of this process and of updating the International Guidelines was to assist in identifying that emerging norm and to provide expert guidance as to its future evolution.

Justice Kirby noted that it was agreed to not change the existing text of Guideline 6, but rather to supplement it with an additional paragraph and sub-paragraphs. The text of the former had already been agreed by consensus. The rapporteur was to draft the text of the latter, based on the discussion at the consultation, which text was to be circulated and approved by the participants in the near future, and then submitted to the OHCHR and UNAIDS.

Justice Kirby closed his summation by noting the hard work of experts who all contributed to the discussion. He thanked Ms. Fahlen and Ms. Maluwa of UNAIDS and Ms. Grant and Ms. Oldring of the OHCHR for their contributions to the project. He noted the debt owed to Mr. Elliott as the author of the background document and the rapporteur of the meeting. Finally, he thanked the High Commissioner and Dr. Piot of UNAIDS for their long-standing commitment to advancing the cause of human rights for people living with HIV/AIDS.

Ms. Robinson thanked the Chair for his remarks and the participants in the expert consultation for their hard work, including those who had brought their experience of participating in the previous, Second International Consultation on HIV/AIDS and Human Rights, to bear in this discussion. She noted that Dr. Piot of UNAIDS was a valued colleague, and that it was a pleasure to work with someone who champions the human rights dimension of responding to HIV/AIDS. She noted that it was a matter of personal interest and satisfaction to be able to complete this project to update this important aspect of the International Guidelines such that she could re-issue the Guidelines jointly with Dr. Piot, with whom she had issued the original Guidelines. She thanked her colleagues at UNAIDS for collaborating with her office on this initiative, and the staff of her own office for their efforts. She thanked Mr. Elliott and the Canadian HIV/AIDS Legal Network for having prepared the background document and for acting

as rapporteur of the meeting. She thanked Justice Kirby for having chaired the consultation, and noted that he was another pioneer in the area of HIV/AIDS and human rights who has provided much appreciated guidance over the years to her office in this area and others.

Mr. Robinson noted that she appreciated the prudent approach adopted by the participants regarding reflecting the status of "soft law" and emerging norms of international human rights law in this area. She spoke of the global HIV/AIDS epidemic as being both a health crisis and a crisis of human rights, and noted that, among other things, the availability of more effective therapies assists in eliminating the stigma associated with HIV/AIDS that leads to discrimination. She looked forward to producing and promoting a tool, as soon as possible, that would assist in fully realizing access to treatment, care and support, and to further collaboration in this area between her office and UNAIDS.

## **ANNEX: PARTICIPANTS IN CONSULTATION**

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