

**UNDP and UNAIDS Secretariat
Consultation on criminalization of HIV transmission
Geneva
31 October – 2 November 2007**

Opening remarks on 2 November and recap of previous day (1 November 2007) by
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(Disclaimer: These remarks are those of the author and do not necessarily reflect the view of
those attending the meeting or of the UNAIDS Secretariat, UNDP or other Cosponsors of
UNAIDS.)

The debate over the last two days has revealed many differences between us – but also substantial common ground. We have found broad agreement amongst ourselves that:

- the criminal law is in general an inappropriate tool for regulating HIV infection and transmission;
- there is no public health rationale for invoking criminal law sanctions against those who transmit HIV or expose others to it;
- the sole rationale for so doing must be found in the criminal law aim of retribution;
- the retributive nature of the justification means that a high threshold is required for its invocation to be warranted;
- the use of the criminal law in this context should therefore generally be confined to cases of the intentional transmission of HIV; and
- use of the criminal law can never be justified where the person accused of HIV transmission or exposure has no actual knowledge of his or her HIV infection.

More importantly even than these areas of consensus, and far more important than the issues that continue to divide us is this: that we have, in this meeting, found our moral and intellectual centre, as well as a clear path to our forward impetus. This lies in what can appropriately be called a “crisis of criminalization”: laws are being enacted that appear to be so ill-judged, so poorly formulated and so over-broadly expressed that they unite us in alarm at their enactment and in concern that their adoption might be emulated elsewhere. (1) We have reached strong consensus on the need for a clearly and respectfully expressed, but emphatic and unequivocal response to these laws and to the threat of further such enactments.

In thinking about the terms of this response, there are, as Justice Michael Kirby has observed, questions of both principle and strategy. These require us to be pragmatic in the terms and content of our response, and to bear in mind – as we have rightly been reminded by the legislators among us – that those enacting these laws hold positions of authority and come from communities that are feeling the real impact of HIV.

Yet strategy and pragmatism should not mute our commitment to a clearly principled position. We tend to feel defensive in opposing criminal statutes which we know to be detrimental to HIV prevention and to the lives and safety of those living with and at risk of HIV. Yet here we must draw strength by reminding ourselves of the history of other battles that were fought in this epidemic. Often these appeared to involve “unwinnably” quixotic struggles: yet in each case the viewpoint of justice and rationality ultimately prevailed.

¹ The meeting considered generally laws in Asia, Europe, Southern, Western and Central Africa.

Here we should remind ourselves of the struggle to make human rights count at all in global and national responses to the epidemic – a struggle started by Jonathan Mann, and most prominently and eloquently advanced by Michael Kirby over the last twenty years; and the battle to formulate and adopt the International Guidelines on Human Rights and HIV and AIDS – which initially seemed over-ambitious, but which were vindicated when the entire international community stood behind human rights principles in the Declaration of Commitment adopted at the UN General Assembly Special Assembly on HIV and AIDS in 2001.

Most signally, the fight to introduce mass public provision of anti-retroviral treatment in resource-poor settings in Africa and elsewhere – until 2000, that seemed an impossible prospect; yet now it is a commonplace of national and international AIDS policy. For myself, this last issue has an especial resonance, since next week I will mark a significant anniversary. It will be ten years since I started on the ARV therapy that saved me from certain death from AIDS.

This for me is not merely a private celebration, but a constant reminder that far too few of those who right now need ARVs are receiving them – and that daily the toll of unnecessary deaths from AIDS continues to climb. While 400 000 people are receiving publicly-provided ARVs in South Africa, and 60 000 in Zimbabwe – figures whose growth we should celebrate – many multiples more people need the life-saving medications but are not receiving them, and are facing death from AIDS. And it bears most directly on our deliberations, for the ill-judged laws that trouble us seem indubitably certain to make access to testing and thence to treatment more difficult in countries where they are adopted. And treatment access represents the most urgent issue in the response to the epidemic in Africa today.

Our response must therefore take into account both the increasing prosecutions of HIV transmission and exposure in resource-rich countries, where HIV prevalence generally remains low and the enactment of these laws in high-prevalence, low-resource countries. Our response has an especial importance in these countries, for regrettably the capacity for strong, well-informed and assertive civil-society responses to these laws is often lacking there. And it is in these countries, as many in the meeting have insistently reminded us, that the burden of the HIV epidemic falls most harshly on women; and it is upon women that the severest impact of these laws will also fall, for most people in Africa who know their HIV status are women who discover it through their visits to ante-natal clinics.

In formulating the imperative arguments against criminal responses to HIV transmission and exposure we must again go back to the roots of this epidemic. HIV is treated exceptionally for one over-riding reason: the stigma associated with it as a sexually transmitted infection. No other infectious disease, not even any other sexually transmitted disease, is treated as HIV is treated. From May 1981, when the first case of AIDS was diagnosed within the gay community of San Francisco, HIV has been treated differentially, and more harshly.

It can truly be said that stigma lies at the heart of the experience of every person living with HIV – as is poignantly articulated by the witness of persons with HIV recorded at the

meeting that the AIDS and Rights Alliance of Southern Africa held with the Open Society Institute in Johannesburg in July 2007. (2)

It is stigma that makes those at risk of HIV reluctant to be tested; it is stigma that makes it difficult – and often impossible – for them to speak about their infection; and it is stigma that continues to hinder access to the life-saving ARV therapies that are now increasingly available across Africa and elsewhere. Legislators - bewildered, or baffled, or at a loss as to how to respond effectively to the epidemic - may be seduced into erroneously taking recourse to criminalization, which may seem attractive, effective and media-friendly. Yet, tragically, it is primarily stigma that lies behind the drive towards criminal responses to the epidemic. It is stigma, rooted in the moralism connected with the sexual transmission of HIV that often provides the main impulse behind the enactment of these laws.

But the enactment of such laws in turn merely adds fuel to the fires of stigma. It is not only prosecutions for HIV transmission and exposure, but the chilling content of the enactment of the laws themselves, that reinforces the idea of HIV as a shameful, disgraceful, unworthy condition. And so prosecutions and laws of this sort, by reinforcing stigma, make it more difficult for those with or at risk of HIV to access testing, to talk about diagnosis with HIV, and to receive treatment and support.

We therefore have a drab but irrefutable calculus: these laws will lead to more deaths, more suffering and greater debilitation from AIDS. We ourselves and the UN system must speak skillfully and deftly and respectfully, but must not compromise principle in setting out the case against laws and prosecutions that detrimentally affect a just and rational response to AIDS. Too many lives are at stake for that message to be blunted.

² See Meeting Report, ARASA/OSISA Meeting on the Criminalization of HIV Transmission, July, 2007