UNAIDS recommendations for alternative language to some problematic articles in the N'Djamena legislation on HIV (2004)

Introduction

1. In September 2004, Action for West Africa Region- HIV/AIDS (AWARE-HIV/AIDS) held a meeting in N'Djamena, Chad. Meeting participants finalised the text of a law for West and Central Africa on HIV/AIDS ["the N'Djamena legislation"]. As recognised in the accompanying "Justification" to the N'Djamena legislation, national law can play a crucial role in shaping a country's response to the HIV epidemic. The "Justification" states, "the specificity of the AIDS pandemic, its multidimensional features, the rate at which it is spreading, the importance of the damage it causes… warrant an equally specific intervention."[1] The critical role of law in responding to HIV was confirmed in the United Nations General Assembly *Declaration of Commitment on HIV/AIDS* ["the Declaration of Commitment"][2] and in the General Assembly's *Political Declaration on HIV/AIDS* ["the Political Declaration"].[3] In the *Political Declaration*, Member States committed themselves to

> …intensifying efforts to enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV and members of vulnerable groups…[4]

2. In this regard, the N'Djamena law represents a positive step towards the realization of commitments made in the *Declaration of Commitment* and the *Political Declaration* and captures many elements of law that should form support for national responses to HIV. However, there are some provisions in the N'Djamena law which could benefit from reconsideration and revision so as to best meet two critical concerns in the response to the HIV epidemic: that of protecting public health and that of protecting human rights.

3. By way of introduction, UNAIDS would like to emphasise that, since the beginning of the epidemic, it has become apparent that every effort must be made to empower people to protect themselves from HIV infection, and if infected, to continue to live productive lives. To protect themselves from HIV infection and to live successfully with HIV if infected, people need four things: (a) access to HIV information and education on how to avoid infection, or re-infection; (b) access to HIV prevention commodities and services; (c) social support to encourage and sustain behaviour

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[1] AWARE-HIV/AIDS, "Regional Workshop to adopt a model law for STI/HIV/AIDS for West and Central Africa- General report", September 2004, annex 1, p. 7. Available at http://www.awarehiv.org/images%5Cinserts%5CModel%20law%20on%20HIV-AIDS%20.PDF.pdf .
[2] *Declaration of Commitment on HIV/AIDS,* United Nations General Assembly, Res/S-26/2, 27 June 2001, para 58.
[3] *Political Declaration on HIV/AIDS,* United Nations General Assembly, Res/60/262, 2 June 2006.
[4] *Political Declaration*, para. 29.

change; and (d) a social and legal environment that enables people to practice or negotiate safe sex and otherwise take precautions to protect themselves against infection; protects people from discrimination and sexual violence; and ensures access to treatment, care and support, if infected.

4. These are the elements of national responses to HIV that work, that is, that achieve the public health goals of HIV prevention, treatment, care and support in an effective manner. They are also the elements of a human rights-based response to HIV, that is, a response that is based on, and fundamental to, the realisation of human rights (e.g. the rights to education, information, health, non-discrimination, privacy, employment, social support and freedom from violence). Public health and human rights-based responses are founded in the rights and the responsibilities of both the non-infected and the infected, enabling all people to take responsibility to do their part in protecting themselves from infection and, if infected, from passing infection on to others and accessing treatment, which in turn reduces infectiousness.

5. On the other hand, punitive approaches that involve mandatory HIV testing, disclosure or treatment, or that criminalize HIV transmission, exacerbate already existing HIV stigma and discrimination and drive people away from HIV prevention and treatment into greater fear, secrecy and denial. As a result, people may be afraid to be tested, afraid to disclose their status and afraid to take up HIV prevention and treatment lest it reveal that they are HIV positive – all of which maintains a spiral of more infection, less treatment and more infection. Laws that comprise such punitive approaches attempt to enforce by law behaviour which in fact must be supported to change by information, community mobilisation and social support, and respect for human rights.

6. Thus, national legislation must be careful to support an approach to HIV that is based on education, empowerment, non-discrimination and community engagement, that is, the four elements mentioned above of an effective and human rights-based response. In this context, UNAIDS respectfully offers the text below as suggested alternatives to provisions in the N'Djamena law. This suggested text is offered with regard to the following subject matter:

   - Education on HIV and AIDS in learning institutions (article 2 of the N'Djamena law);
   - HIV testing issues (articles 17, 18 and 24);
   - Partner notification (article 26);
   - Prohibition of discrimination and vilification (Chapter VII);
   - Criminalization of HIV transmission (articles 1 and 36);
   - Women's rights (not found in the N'Djamena law);
   - Prisons (article 8); and
   - Other vulnerable groups (not found in N'Djamena law).

7. This paper presents alternative language for some of the provisions of the N'Djamena law. It does not comprise all the elements of law related to HIV that are critical. It does not contemplate any other laws and regulations that may be relevant to the HIV epidemic and how it is spread and experienced, such as laws relating to property rights and inheritance, health care policies, sexual violence,

education, amongst others. It should also be noted that even good law can only play a supportive role. Law cannot replace comprehensive programmes for HIV prevention, treatment, care and support that must be of sufficient scale and reach all populations in need.

8. A more comprehensive guidance on legislative responses to HIV is to be found in UNAIDS/OHCHR's *International Guidelines on HIV/AIDS and Human Rights,* 2006 Consolidated version ["International Guidelines"] and UNAIDS/UNDP/IPU's *Taking Action Against HIV- A handbook for parliamentarians,* 2007 ["Handbook for Parliamentarians"].

9. The *International Guidelines on HIV/AIDS and Human Rights* were developed at an expert consultation meeting convened in 1996 by the United Nations High Commissioner for Human Rights and UNAIDS. They were originally published in 1998 by OHCHR and UNAIDS. The *International Guidelines* contain 12 specific principles on how human rights should be promoted and protected in the context of the HIV/AIDS epidemic. Guideline 6 – outlining what governments should do, both nationally and internationally, to ensure access to prevention, treatment, care and support - was revised at a special consultation for this purpose in 2002. A consolidated version of the *International Guidelines* was published in 2006.

10. While the *International Guidelines* themselves are not legally-binding on states, they are based upon previously-existing legal obligations in international human rights law and represent an internationally-recognized standard for governments to live up to. The UN Commission on Human Rights (now the UN Human Rights Council) welcomed the *International Guidelines* and requested Member States "to take all necessary steps to ensure the respect, protection and fulfilment of HIV-related human rights as contained in the Guidelines on HIV/AIDS and Human Rights."[5]

11. The *Handbook for Parliamentarians* was developed by the Inter-Parliamentary Union and UNAIDS in 1999 and revised in 2007. The *Handbook for Parliamentarians* guides the process of forming or reforming law and policy regarding HIV-related issues and presents other concrete measures that legislators and state officials can take to implement the 12 *International Guidelines*.

12. As a general proposition, any process of developing or reforming law benefits enormously from a close consultation between law-makers and those affected by the law in question. With respect to law addressing HIV-related issues, close consultation requires that people living with and affected by HIV, as well as members of groups particularly vulnerable to HIV infection, be closely involved in determining the scope and content of law reform in this area. Policy makers have long recognised the importance and benefits of involving people living with HIV in formulating policy and delivering services. At the 1994 Paris AIDS Summit, a large number of governments formally recognised the principle of the "Greater Involvement of People Living with HIV/AIDS" (GIPA), declaring that GIPA is critical to ensuring that responses to the HIV epidemic are ethical and effective.

[5] Commission on Human Rights resolution 2003/47, 23 April 2003, para 1.

13. The process of consultation in law reform is also a specific expression of the right to "take part in the conduct of public affairs".[6] UNAIDS therefore recommends that that people living with and affected by HIV, as well as members of groups particularly vulnerable to HIV infection, be closely involved in discussions around alternative language to the more problematic parts of the N'Djamena law. Such people offer invaluable experience and insight that should guide law and the policies and programs that implement law.

A. Education and information (article 2)

Background policy guidance

14. Access to information about HIV without discrimination is an essential aspect of protecting the public health. It is also a human right. The *International Covenant on Civil and Political Rights* (ICCPR) guarantees that all people have the right to "seek, receive and impart information of all kinds," including information about their health.[7] The right to education is guaranteed by numerous international legal instruments.[8]

15. With regard to the needs and rights of young people to HIV information, the Committee on the Rights of the Child, which oversees the Convention of the Rights of the Child, has stated in its General Comment on HIV that children have the right to access adequate information related to HIV prevention. The Committee has emphasized that:

> Effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, and that, consistent with their obligations to ensure the right to life, survival and development of the child (art. 6). States parties must ensure that children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.[9]

16. The *International Guidelines* call on states to take positive steps to "ensure the access of children and adolescents to adequate health information and education, including information related to HIV prevention and care, inside and outside school, which is tailored appropriately to age level and capacity and enables them to deal positively with their sexuality."[10]

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[6] ICCPR, art 25.
[7] *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), article 19.
[8] *African Charter on Human and People's Rights*, article 9; *Universal Declaration of Human Rights*, article 26; *International Covenant on Economic, Cultural and Social Rights*, article 13; *Convention on the Elimination on All Forms of Discrimination against Women*, articles 10 and 14; *Convention on the Elimination on All Forms of Racial Discrimination*, article 5; *Convention on the Rights of the Child*, articles 28 and 29.
[9] Committee on the Rights of the Child, *General Comment No. 3 (2003) HIV/AIDS and the rights of the child*, 32nd Sess. (2003), para. 16.
[10] *International Guidelines*, para. 38(g).

17. Arbitrary restrictions on HIV education and information in schools are at odds with the reality of the age of first sexual intercourse in many countries. In Mali and Guinea, for example, the median age of first intercourse for girls is 16.[11] Comprehensive education programs that provide complete, factual, and unbiased information about HIV prevention, including information about the correct and consistent use of condoms, are crucial for adolescents and young adults.

18. Research has shown that even in sub-Saharan African countries with a widespread awareness of HIV among members of the general community, such awareness does not translate into knowledge of how to prevent infection—particularly among women and girls.[12] Women and girls may lack access to information about how to prevent and treat HIV and lack access to materials and supplies for safer sex.

19. Beyond basic information about the HIV virus and modes of transmission, such education might also include information on the importance of equal decision-making on sex between men and women, the right of all girls and women to refuse sex or demand use of a condom, the responsibilities of boys and men to under no circumstance engage in sexual coercion, sexual violence or sexual exploitation, nor to discriminate against or be physically violent toward women or girls, or anyone else, who disclose their positive HIV status.

Alternative language

(to add to definitional section)

"person living with HIV" means person with HIV antibodies present in his or her body;

"vulnerable populations" includes include women, children, those living in poverty, minorities, indigenous people, migrants, refugees and internally displaced persons, people with disabilities, prisoners, sex workers, men who have sex with men and people who inject drugs.[13]

Article xx - Education on HIV and AIDS in learning institutions (to replace article 2)

[1] The [Ministry responsible for education] and the [Ministry responsible for health] must ensure education on HIV and AIDS in public and private schools at primary, secondary and tertiary levels, including formal, non-formal and indigenous learning systems.

[2] The [Ministry responsible for education] and the [Ministry responsible for health] must ensure that

[11] M. Bozon, "At what age do women and men have their first sexual intercourse? World comparisons and recent trends" Institut National d'Études Demographiques (France) (drawing on DHS surveys), 2003.
[12] Human Rights Watch, *The Less they Know the Better*, 2005, quoting research in UBOS/ORC Macro, *Uganda Demographic and Health Survey 2000-2001*, p. 174.
[13] This wording is taken from *International Guidelines*, para 97.

i. the education covers the modes of transmission of, and ways of preventing, HIV and other sexually transmitted infections, as well as the human rights of people living with HIV and AIDS and vulnerable populations;
ii. the education provides lessons and activities promoting equality between men/boys and women/girls, zero tolerance for any form of violence against women and girls or any form of sexual exploitation of children, and the capacity of all persons to negotiate their sexual and other relationships so as to protect themselves and others by reducing or eliminating the risk of HIV transmission and being able to avoid sexual violence and coercion, as well as self-esteem and other life skills; and
iii. the content of such education is scientifically accurate, age-specific and, as appropriate, in local languages.

[3] The [Ministry responsible for education] and the [Ministry responsible for health] must ensure adequate training and educational materials for those who provide such education,

[4] The [Ministry responsible for education] and the [Ministry responsible for health] must ensure policies and enforcement so that all educational institutions (public and private schools at primary, secondary and tertiary levels, including formal, non-formal and indigenous learning systems) are free from sexual violence and sexual exploitation by administrators, teachers, students or others.

B. HIV testing issues (articles 17, 18 and 24)

Background policy guidance

20. The *International Guidelines* state that "[p]ublic health, criminal and anti-discrimination legislation should prohibit mandatory HIV-testing of targeted groups, including vulnerable groups."[14] The UNAIDS/WHO policy statement on HIV testing clearly states:

> The conditions of the '3 Cs', advocated since the HIV test became available in 1985, continue to be underpinning principles for the conduct of HIV testing of individuals. Such testing of individuals must be:
> - Confidential;
> - Be accompanied by counselling;
> - Only be conducted with informed consent, meaning that it is both informed and voluntary.
>
> UNAIDS/WHO do not support mandatory testing of individuals on public health grounds. Voluntary testing is more likely to result in behaviour change to avoid transmitting HIV to other individuals.[15]

21. According to WHO, mandatory testing of particular population groups can damage efforts to prevent HIV transmission – and is not therefore in the interest of public health –for the following reasons:
    - Because of the stigmatization and discrimination directed at people living with HIV, individuals who believe they might be living with the

[14] *International Guidelines*, para 30(j).
[15] UNAIDS/WHO, *Policy Statement on HIV Testing*, 2004, p 2.

disease tend to go "underground" to escape mandatory testing. As a result, those at highest risk for HIV infection may not hear or heed education messages about AIDS prevention;

- Testing without informed consent damages the credibility of the health services and may discourage those needing services from obtaining them;
- Mandatory testing can create a false sense of security especially among people who are outside its scope and who use it as an excuse for not following more effective measures for protecting themselves and others from infection;
- Mandatory testing programmes are expensive, and divert resources from effective prevention measures.[16]

22. According to the *International Guidelines*, public health legislation should ensure:
    - "that HIV testing of individuals should only be performed with the specific informed consent of that individual";
    - "whenever possible, that pre- and post-test counselling be provided in all cases";
    - "that HIV and AIDS cases reported to public health authorities for epidemiological purposes are subject to strict rules of data protection and confidentiality";
    - "that information relative to the HIV status of an individual be protected from unauthorized collection, use or disclosure in the health-care and other settings and that the use of HIV-related information requires informed consent".[17]

23. The one exception to the prohibition on mandatory testing which is considered justifiable is the case of blood and human tissue/organ donation, where there is an obvious health imperative to perform HIV testing and where the state owes a duty of legal care towards potential recipients.

Alternative language

(to add to definitional section)

"health care" means services provided by health care providers in the formal health system for prevention or treatment of mental or physical diseases or conditions;

"health care provider" means a person entitled under the [relevant health law] to provide health services. Health care providers include accredited physicians, registered nurses, paramedical staff and other trained medical staff;

"voluntary informed consent", in relation to an HIV test, means consent specifically related to the performance of an HIV test, freely given, without threat, coercion, duress, fraud, undue influence, mistake or misrepresentation and obtained after providing pre-test information and, in a language and manner understood by such a person, and to be followed by post-test counselling;

[16] WHO, *Statement from the Consultation on Testing and Counselling for HIV Infection*, 1992, at 3-4.
[17] *International Guidelines*, para 20b-f.

"pre-test information", in relation to an HIV test, shall include, at a minimum, the following information

i. the nature of HIV and of AIDS;
ii. the nature and purpose of an HIV test;
iii. the clinical and prevention benefits of testing and the potential risks, such as discrimination, abandonment or violence;
iv. the services that are available in the case of either an HIV-negative or an HIV-positive test result, including whether antiretroviral treatment is available;
v. the fact that the test result will be treated confidentially and will not be shared with anyone other than heath care providers directly involved in providing services to the patient;
vi. the fact that the patient has the right to decline the test;
vii. the fact that declining an HIV test will not affect the patient's access to services that do not depend upon knowledge of HIV status;
viii. in the event of an HIV-positive test result, encouragement of disclosure to other persons who may be at risk of exposure to HIV;
ix. an opportunity to ask the health care provider questions.

"post-test counselling", in relation to an HIV test, includes

i. where the HIV test result is negative, information about
   a) the test result, including information about the window period for the appearance of HIV-antibodies and a recommendation to repeat the test in case of a recent exposure;
   b) basic advice on methods to prevent HIV transmission; or

ii. where the HIV test result is positive, counselling by health care providers which should

   a) inform the patient of the result simply and clearly, and give the patient time to consider it;
   b) ensure that the patient understands the result;
   c) allow the patient to ask questions;
   d) help the patient to cope with emotions arising from the test result;
   e) discuss any immediate concerns and assist the patient to determine who in her/his social network may be available and acceptable to offer immediate support;
   f) describe follow-up services that are available in health facilities and in the community, with special attention to the available treatment, PMTCT and care and support services;
   g) provide information on how to prevent transmission of HIV, including provision of male and female condoms and guidance on their use;
   h) provide information on other relevant preventive health measures, as appropriate;
   i) discuss possible disclosure of the result, when and how this may happen and to whom;
   j) encourage and offer referral for testing and counselling of partners and children;

k) assess the risk of violence or suicide and discuss possible steps to ensure the physical safety of patients, particularly women;
l) arrange a specific date and time for follow up visits or referrals for treatment, care, counselling, support and other services as appropriate.[18]

Article xx - HIV testing (to replace articles 17 and 18)

This Part applies to all HIV tests except an HIV test performed on blood, bodily fluids or body parts (such as tissue, organs and germinal cells) donated by a person for the purposes of transfusion and/or transplantation to another person.[19]

Article xx

It is unlawful for any person to perform an HIV test except on the request of a health care provider with the legal authority to request such a test for a patient.

Article xx

It is unlawful for any person to perform an HIV test except

i. with the voluntary informed consent of the person to be tested; or
ii. where the person to be tested is aged [age prescribed for consenting to health care] or less and is, in the opinion of the person providing the pre-test information, incapable of understanding the meaning and consequences of an HIV test, with the voluntary informed consent of a parent or other legal guardian of the person; or
iii. where the person to be tested has a disability which, in the opinion of the person providing the pre-test information, renders the person incapable of understanding the meaning and consequences of an HIV test, with the voluntary informed consent of one of the following persons, said consent to be sought from these persons in the order in which they are listed:
    a) a legal guardian of the person; or
    b) a partner of the person; or
    c) a parent of the person; or
    d) a child aged 18 years or more of the person.

Article xx

It is unlawful for any person to perform an HIV test except

i. where pre-test information has preceded the test;
ii. where the results of the test will be provided to the person tested, and

[18] This language is derived from WHO/UNAIDS, *Guidance on provider-initiated HIV testing and counselling in health facilities*, 2007, p. 36-41.

[19] In addition, in any country where rapid HIV test kits are authorised, it may be necessary to insert "by a person on himself or herself using an HIV testing kit approved for this purpose pursuant to [relevant article or public health provision]" to this article. Law should closely regulate the use of such rapid HIV tests.

iii. where the person responsible for causing the test to be performed offers post-test counselling after the tested person has received their test results.

Article xx

It is unlawful for a person who has performed, or caused to be performed, an HIV test to divulge information about the result of that test except

i. to the person who has been tested or with the express written consent of the person who has been tested; or
ii. where another person legitimately gave the voluntary informed consent to the test of a minor or person with a disability in accordance with [above article], to that person; or
iii. with the consent of the person who gave the voluntary informed consent, to a person who is directly involved in providing care to, or treatment or counselling of, the person tested, where the information is required in connection with providing the care, treatment or counselling.

Article xx - Confidentiality (to replace article 24)

No person shall disclose any information concerning a person's HIV status to any other person, except

i. with the written consent of that person, or his or her guardian, partner or parent, as applicable;
ii. to a health care provider who is directly involved in providing health care to that person, where knowledge of the patient's diagnosis of HIV infection or AIDS is necessary or relevant to making clinical decisions in the best interests of the person;
iii. for the purpose of an epidemiological study, where the release of information cannot be expected to identify the person to whom it relates;
iv. upon an order of a court, where the information contained in the medical file is directly relevant to the proceedings before the court.

C. Partner notification (article 26)

Background policy guidance

24. Partner notification is the set of activities by which persons who have been exposed to an appreciable risk of HIV infection are notified and counselled about their possible exposure to HIV and are offered services.

25. The *International Guidelines* recommend voluntary partner notification, but with provision for exceptional circumstances. According to the *International Guidelines*:

> Public health legislation should authorize, but not require, that health-care professionals decide, on the basis of each individual case and ethical considerations,

whether to inform their patients' sexual partners of the HIV status of their patient. Such a decision should only be made in accordance with the following criteria:

- The HIV-positive person in question has been thoroughly counselled;
- Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;
- The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s);
- A real risk of HIV transmission to the partner(s) exists;
- The HIV-positive person is given reasonable advance notice;
- The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice;
- Follow-up is provided to ensure support to those involved, as necessary.[20]

26. For women in particular, confidentiality of medical information (including HIV status) is essential to the protection of their human rights, because women may find themselves abandoned, subject to domestic violence, or ostracized if their domestic partners, families or communities discover that they are HIV-positive. Research from Africa indicates that the fear of disclosure of HIV status is one of the main barriers to women's use of voluntary counseling and testing services, and that this fear "reflect[s] the unequal and limited power that many women have to control their risk for infection."[21] Further, in some cases – particularly for women – fear of violence may be a reason for not disclosing their status, i.e. notifying a partner. As part of the partner notification process, support should include screening for domestic violence or/and referral to specialized services for those who either fear violence and/or have already experienced it.[22]

Alternative language

Article xx - Partner notification (to replace article 26)

[1] A health care provider providing a treatment, care or counselling service to a person infected with HIV may notify a sexual partner of the person living with HIV where

i. s/he is requested by the person living with HIV to do so; or

ii. where all the following circumstances exist

a. in the opinion of the health care provider there is a significant risk of transmission of HIV by the person living with HIV to the sexual partner; and

b. counselling of the person living with HIV has failed to achieve a change in behaviour necessary to reduce sufficiently the risk of HIV transmission to the sexual partner such that it is no longer significant; and

[20] *International Guidelines*, Guideline 3(g).
[21] S. Maman et al., "Women's barriers to HIV-1 testing and disclosure: challenges for HIV-1 voluntary counseling and testing," *AIDS Care*, Vol. 13, No. 5, p. 601.
[22] A. Medley, C. Garcia-Moreno, S. McGill, and S. Maman, "Rates, barriers and outcomes of HIV serostatus disclosure among women in developing countries: implications for prevention of mother-to-child transmission programmes." *Bulletin of the World Health Organization*, 2004; 82: 299-307.

c. the person living with HIV has refused to notify, or consent to the notification of, the sexual partner; and
d. the health care provider gives the person living with HIV advance notice for a period that is reasonable in the circumstances; and
e. in the opinion of the health care provider the person living with HIV is not at risk of serious harm as a consequence of any notification to the sexual partner; or

iii. where all the following circumstances exist

a. the person infected with HIV is dead, unconscious or otherwise unable to give consent to the notification; and
b. unlikely to regain consciousness or the ability to give consent; and
c. in the opinion of the health care provider, there is or was a significant risk of transmission of HIV by the person infected with HIV to the sexual partner.

[2] A notification under section (1) shall be made in such a manner as to conceal, so far as is possible, the identity of the infected person from the sexual partner.

[3] Where a person has been notified under section (1), the health care provider should offer HIV testing, accompanied by the requisite pre-test information and post-test counselling, as well as post-exposure prophylaxis where appropriate, to the notified person, in accordance with this Act.

D. Prohibition of discrimination and vilification (Chapter VII)

Background policy guidance

27. Discrimination against people living with or affected by HIV, or those presumed to be living with or affected by HIV, is a major barrier to increasing access to and uptake of HIV prevention, treatment, care and support. It also violates the right to be free from discrimination.[23] The United Nations Commission on Human Rights (now the Human Rights Council) declared that people should be protected from discrimination based on health status, including HIV or AIDS, actual or presumed.[24]

[23] See *Universal Declaration on Human Rights* (art. 2); *International Covenant on Civil and Political Rights* (ICCPR) (art. 2, 26); *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) (art. 2); *Convention on Elimination of All Forms of Discrimination Against Women* (art. 12); the *Convention on the Rights of the Child* (art. 2); *African Charter on Human and Peoples' Rights* (art. 2,28); *American Convention on Human Rights* (art. 1, 24); and *European Convention on Human Rights and Fundamental Freedoms* (art. 14).

[24] See, for example, *The protection of human rights in the context of human immune deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS)*, UN Commission on Human Rights, Resolution 1999/49. See, also, Resolutions 1995/44, 1996/43, 2001/51, 2003/47 and 2005/84.

28. The *International Guidelines* recommend that anti-discrimination legislation provide protection from discrimination in both the public and private sectors and include coverage of direct and indirect discrimination, as well as discrimination where HIV or AIDS is only one of several reasons for the discriminatory act. Furthermore, there should be no discrimination with regard to creating access to HIV goods, services and information, that is, these should be available, acceptable, of good quality, within physical reach and affordable for all.[25] The *International Guidelines* also recommend that States prohibit vilification based on HIV status.[26]
29. While the current version of the N'Djamena legislation includes a number of anti-discrimination provisions in Chapter VII, the current drafting leaves considerable gaps in the law. By way of illustration, the following acts could not be considered acts of discrimination under the N'Djamena legislation:
    - a person living with HIV who was refused service at a restaurant;
    - a swimming club that refused to admit a person living with HIV as a member;
    - a police officer who refused to offer assistance to a person living with HIV;
    - a radio presenter who incited violence against people living with HIV.

30. The existence of such gaps would appear to be inadvertent, as the "Justification" of the N'Djamena law notes that "[a]ny form of discrimination against people whose HIV positive status is known or suspected is a threat to the person and to the national interest." The provisions below would cover these and other "gaps" and could be included as an addition to Chapter VII.

Alternative language

(to add to definitional article)

"accommodation" includes residential and business premises, as well as temporary or provisional shelter;

"associate" of a person means any person with whom the person associates, whether socially or in business or commerce, or otherwise, and includes any person who is a member of the person's family or household;

"employment" includes formal and informal employment, including part-time and temporary employment and work under a contract of services;

"public act" includes

i. any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material;
ii. any other conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia; and
iii. the distribution or dissemination of any matter to the public;

[25] *International Guidelines*, Guidelines 5 and 6.
[26] *International Guidelines* paras. 22(a).

(to add to Chapter VII)

Article xx - Prohibition of discrimination on the grounds of HIV status

[1] It is prohibited to discriminate against a person, or a relative or associate of the person, on the grounds of that person's HIV status with respect to [the areas prescribed by anti-discrimination legislation], which shall include, but not be limited to

i. services, goods and facilities,
ii. the provision or occupancy of accommodation [or "housing and lodging" or equivalent term],
iii. employment,
iv. the capacity to contract,
v. education and training,
vi. membership in any trade union, trade or occupational association or self-governing profession,
vii. ownership of property (movable and immovable),
viii. division of property upon death or divorce,
ix. custody of children, and
x. inheritance.

[2] A person (the discriminator) discriminates against another person (the aggrieved person) on the ground of HIV status if, by reason of

i. the aggrieved person's real or perceived HIV status;
ii. the real or perceived HIV status of a relative or associate of the aggrieved person;

the discriminator

i. treats the aggrieved person less favourably than the discriminator treats or would treat a person without HIV, in circumstances that are the same or are not materially different; or

ii. disadvantages the aggrieved person by requiring the aggrieved person to comply with a provision, criterion or practice that is or would be disproportionately to the detriment of people living with HIV;

and said conduct is not reasonable and *bona fide* in the circumstances.

Article xx - Special measures intended to achieve equality

A person does not discriminate against another person under this Act by taking special measures for the purpose of achieving substantive equality between people of different HIV status.

Article xx - Prohibition of vilification/ hate speech

[1] It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is, or members of the group are, living with HIV or perceived to be living with HIV (whether or not actually living with HIV).

[2] Nothing in this article renders unlawful

i. a fair report of a public act referred to in section 1; or

ii. a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes, or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.[27]

E. Criminalisation of HIV transmission (articles 1 and 36)

Background policy guidance

31. Criminal law is generally viewed as "a blunt instrument that can neither adequately capture the complexity of the contexts in which HIV transmission occurs nor deal effectively with matters such as the relative probability of transmission."[28] There is no evidence that criminalizing HIV transmission is an effective means of preventing HIV transmission.[29] Furthermore UNAIDS is concerned that criminalizing HIV transmission is likely to undermine proven HIV prevention efforts by making people fearful to get tested or disclose their status, and undermine the message that people must take steps to protect themselves from HIV transmission rather than rely on the knowledge of status and disclosure of their sexual partner. Finally criminalization of HIV transmission contributes to HIV-related stigma and discrimination.[30] For these reasons, UNAIDS asks governments

[27] Togo's "Law on the protection of people with respect to HIV/AIDS" (No. 2005-012) has a similar article in article 63.

[28] WHO Europe, *WHO technical consultation in collaboration with European AIDS Treatment Group and AIDS Action Europe on the criminalization of HIV and other sexually transmitted infections* (Copenhagen, 16 October 2006), p. 3, online: www.euro.who.int/Document/SHA/crimconsultation_latest.pdf.

[29] Z. Lazzarini, S. Bray & S. Burris, "Evaluating the Impact of Criminal Laws on HIV Risk Behavior", *Journal of Law, Medicine & Ethics* 2002; 30: 239-253; S. Burris et al., "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial," (2007) 39 Ariz. State L.J. 467, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977274.

[30] C. Dodds et al., "Outsider Status: stigma and discrimination experienced by Gay men and African people with HIV" (London: Sigma Research, 2004), online: www.sigmaresearch.org.uk/downloads/report04f.pdf; C. Dodds et al., "A telling dilemma: HIV disclosure between male (homo)sexual partners" (London: Sigma Research, 2004), online: www.sigmaresearch.org.uk/downloads/report04e.pdf; R. Klitzman et al., "Naming names: perceptions of name-based reporting, partner notification and criminalisation of non-disclosure among persons living with HIV", *Sexuality Research and Social Policy* 2004; 1(3):38-57; C.L. Galletly & S.D. Pinkerton,

to limit criminalization of HIV transmission to the intentional transmission of HIV, that is, where someone engaged in acts with the deliberate purpose of transmitting HIV and did indeed transmit the virus.[31] Following these concerns, some African jurisdictions have recently passed HIV laws without any articles criminalising HIV transmission and/or exposure.[32]

32. To the extent that criminal law is used, the *International Guidelines* recommend to States that:

> Criminal and/or public health should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.[33]

33. In addition, UNAIDS has recommended that if criminal law is used:

- There should be no criminal liability unless there is clear proof, beyond a reasonable doubt, that the accused person was aware of his or her HIV infection and was aware that the conduct of which he or she is accused posed a significant risk of transmitting HIV;
- There should be no criminal liability in cases where a sexual or other partner was aware of the person's HIV-positive status, and gave a truly voluntary consent, as this would unjustifiably infringe autonomy. (If there is evidence that "consent" was coerced or was not freely given – for example, if the "consent" is given in the context of relationship marked by previous abuse – the law should be crafted so as to take this into account.);
- There should be no criminal liability if the person living with HIV has taken precautions to reduce the risk of transmission so that it is not significant (e.g., condom use, avoiding high-risk sexual activities), as this would trivialize the seriousness of criminal sanctions (which are society's harshest response to objectionable conduct) and would penalize those who act responsibly, in accordance with public health advice, by practising safer sex; and
- There should be no criminal liability if the person living with HIV does not disclose, or does not take precautions against transmission, because of a reasonable apprehension of violence or other serious adverse consequence. While this may be the reality for many people living with HIV, it is particularly and disproportionately likely to be of concern for women who are living with HIV, given the extent to which women worldwide experience violence, discrimination and other abuse including from their partners.[34]

"Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV", *AIDS and Behaviour* 2006; 10: 451-461.

[31] UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, 2002.

[32] See, for example, Mauritius' "HIV and AIDS Act", No. 31 of 2006.

[33] *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version (Geneva: UNAIDS/OHCHR, 2006), Guideline 4, para. 21(a), online: http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf (English).

[34] UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, 2002. For the disproportionate violence faced by women living with HIV, see *WHO Multi-country Study on Women's Health and Domestic Violence Against Women* (Geneva: WHO, 2004), online: www.who.int/gender/violence/who_multicountry_study/en/index.html; S. Maman & A Medley, *Gender*

Alternative language

Definition of "wilful transmission" (to replace current definition in article 1)

"Willful transmission" means transmission of HIV that occurs through an act done with the deliberate purpose of transmitting HIV;

Limitations on criminal responsibility (to add to article 36)

No person shall be criminally responsible under this Act or any other applicable law where the transmission of HIV, or exposure to the risk of HIV infection, arises out of or relates to:

i. an act that poses no significant risk of HIV infection;
ii. a person living with HIV who was unaware of his or her HIV infection at the time of the alleged offence;
iii. a person living with HIV who lacked understanding of how HIV is transmitted at the time of the alleged offence;
iv. a person living with HIV who practiced safer sex, including using a condom;
v. a person living with HIV who disclosed his or her HIV-positive status to the sexual partner or other person before any act posing a significant risk of transmission;
vi. a situation in which the sexual partner or other person was in some other way aware of the person's HIV-positive status;
vii. a person living with HIV who did not disclose his or her HIV status because of a well-founded fear of serious harm by the other person; or
viii. the possibility of transmission of HIV from a woman to her child before or during the birth of the child, or through breastfeeding of an infant or child.

F. Women's rights (not found in N'Djamena law)

Background policy guidance

34. Women in sub-Saharan Africa are disproportionately affected by the HIV epidemic.[35] Of the 22 500 000 people living with HIV in Sub-Saharan Africa in 2007, 61% were women. This disproportionate impact is particularly evident among young people.

35. The 2001 UN General Assembly Special Session (UNGASS) *Declaration of Commitment on HIV/AIDS* emphasized the need to integrate the rights of women and girls into the global struggle against HIV. It commits states to:

Dimensions of HIV Status Disclosure to Sexual Partners: Rates, Barriers and Outcomes – A Review Paper (Geneva: WHO, 2004), online: www.who.int/gender/documents/en/genderdimensions.pdf.

[35] Prevalence data in this section are drawn from UNAIDS/WHO, *AIDS Epidemic Update: December 2007*.

> 59. By 2005, bearing in mind the context and character of the epidemic and that, globally, women and girls are disproportionately affected by HIV/AIDS, develop and accelerate the implementation of national strategies that promote the advancement of women and women's full enjoyment of all human rights; promote shared responsibility of men and women to ensure safe sex; and empower women to have control over and decide freely and responsibly on matters related to their sexuality to increase their ability to protect themselves from HIV infection;
>
> 60. By 2005, implement measures to increase capacities of women and adolescent girls to protect themselves from the risk of HIV infection, principally through the provision of health care and health services, including for sexual and reproductive health, and through prevention education that promotes gender equality within a culturally and gender-sensitive framework;
>
> 61. By 2005, ensure development and accelerated implementation of national strategies for women's empowerment, the promotion and protection of women's full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices, abuse, rape and other forms of sexual violence, battering and trafficking in women and girls.

36. In the *Political Declaration*, Member States committed themselves to

> …eliminate gender inequalities, gender-based abuse and violence; increase the capacity of women and adolescent girls to protect themselves from the risk of HIV infection, principally through the provision of health care and services, including, inter alia, sexual and reproductive health, and the provision of full access to comprehensive information and education; ensure that women can exercise their right to have control over, and decide freely and responsibly on, matters related to their sexuality in order to increase their ability to protect themselves from HIV infection, including their sexual and reproductive health, free of coercion, discrimination and violence; and take all necessary measures to create an enabling environment for the empowerment of women and strengthen their economic independence; and in this context, reiterate the importance of the role of men and boys in achieving gender equality.[36]

37. The *International Guidelines* highlight the need for legislation addressing discrimination and violence against women. Guideline 8 of the *International Guidelines on HIV/AIDS and Human Rights* ("Women, children and other vulnerable groups") states that:

> Violence against women, harmful traditional practices, sexual abuse, exploitation, early marriage and female genital mutilation, should be eliminated. Positive measures, including formal and informal education programmes, increased work opportunities and support services, should be established… States should support women's organisations to incorporate HIV/AIDS and human rights issues into their programming… States should ensure that all women and girls of child-bearing age have access to accurate and comprehensive information and counselling on the prevention of HIV transmission and the risk of vertical transmission of HIV, as well as access to the available resources to minimise that risk, or to proceed with childbirth, if they do so choose.[37]

38. At the regional level, the *African Charter on Human and People's Rights* requires that "States shall ensure the elimination of every discrimination against women and

[36] *Political Declaration*, para 30.
[37] *International Guidelines*, para 9.

also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[38]

39. Article 14 of the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, notes:

> 1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
>
> a) the right to control their fertility;
> b) the right to decide whether to have children, the number of children and the spacing of children;
> c) the right to choose any method of contraception;
> d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;
> e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
> f) the right to have family planning education.

40. Some governments have tried to protect women in the context of HIV by enacting laws that include a legal obligation to disclose HIV status, mandatory premarital testing and criminalization of HIV transmission. Such laws, however, do not protect women, and in fact may be applied disproportionately against women who are often the first to learn of their status since they attend health services more frequently than men. Instead of such laws, UNAIDS recommends that in order to protect women in the context of HIV, States enact and enforce laws that (1) protect women against rape, sexual and domestic violence, inside and outside marriage; (2) enable and empower women to be able to refuse to have sex or negotiate safe sex; (3) enable women to divorce (and otherwise leave) marriages and relationships that threaten them with infection under conditions that are equal to that of men divorcing in terms of property, inheritance and custody of children and (4) ensure women have equal access to education, employment, credit, inheritance and property so that they have economic independence from relationships that threaten them with infection.[39]

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[38] Article 18(3).

[39] The *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW) calls on States Parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women" (Article 2(f)) and "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women" (Article 5(a)). CEDAW also calls for "States Parties [to] take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning" (Article 12). See *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW), G.A. Res. 34/180, U.N. Doc. A/34/46, entered into force September 3, 1981.

Alternative language

(add to definitional article):

"Gender" means the economic, social and cultural attributes and opportunities associated with being male and female at a particular point in time and in a given cultural context;

"Sex" means the biological characteristics which define humans as female and male;[40]

Women and Girls (insert as new Chapter)

Article xx – Sex and gender sensitivity in providing the services authorised by this Act

The Director of the [National Health Authority and/or national AIDS commission, as appropriate] must ensure that, when providing the education, information, training, pre- and post test-counselling, notification of HIV test results, health care and other HIV-related services as authorised in this Act, the provision of such services shall take into account differences in sex and gender.

Article xx - National strategies, policies and programmes regarding HIV among women and girls

The Director of the [National Health Authority and/or national AIDS commission, as appropriate], in consultation with the [relevant] Minister(s) and key stakeholders, must develop and implement strategies, policies and programmes that respect, protect and fulfil the human rights of women and girls in the context of the HIV epidemic. These strategies, policies and programmes shall address issues such as

i. The role of women and girls at home and in public life;
ii. The sexual and reproductive rights and responsibilities of women and men, including women's right to refuse sex and the right and ability to negotiate safer sex and the right to access health and reproductive services independently; and men's responsibilities to take equal responsibility for sexual and reproductive health and outcomes; to avoid rape, sexual assault and domestic violence, inside and outside marriage; and to avoid sexual relations with a minor;
iii. Strategies for increasing educational, economic, employment and leadership opportunities for women;
iv. Sensitising service deliverers and improving health care and social support services for women; and
v. Strategies for reducing inequalities found in formal and customary laws with respect to marriage, divorce, property, custody of children, inheritance and others; and
vi. The impact of religious and cultural traditions on women and girls

with the aim of promoting the full enjoyment by women and girls of their human rights.

[40] World Health Organization, *Gender and Reproductive Rights Glossary*, 2007, available at http://www.who.int/reproductiv-health/gender/glossary.html

Article xx - Pregnant women living with HIV

[1] Women living with HIV have the rights to marry and found a family.[41]

[2] The Director of the [National Health Authority] must, in consultation with the [relevant] Minister(s) and key stakeholders, develop and implement national instructions regarding all matters which are to be followed by all health care providers and any other relevant persons when providing health care to women living with HIV who are pregnant.

[3] The national instructions referred to in section (2) must ensure that a woman living with HIV who is pregnant or plans to become pregnant has such counselling, information and services as to enable her to make fully informed and voluntary decisions in matters affecting her health and pregnancy, including:

i. HIV testing, including pre- and post- test counselling;
ii. options for protecting her health as a woman living with HIV; and
iii. options for preventing transmission of HIV to her child before, during and after the birth of the child.

Article xx – Addressing rape, sexual assault and domestic violence

No marriage or other relationship shall constitute a defence to an allegation of rape, sexual assault or domestic violence.[42]

Article xx - National instructions and directives regarding rape, sexual assault and domestic violence

[1] The Director of the [National Health Authority] must, in consultation with the [relevant Minister(s)] and key stakeholders, develop and implement national instructions regarding all matters which are to be followed by all health care providers and any other relevant persons when dealing with rape, sexual assault and domestic violence cases, with particular reference, among other things, to

i. the offer and administration of post-exposure prophylaxis to reduce the likelihood of HIV infection as a result of the assault;
ii. the manner in which HIV test results must be dealt with in order to ensure confidentiality;
iii. the manner in which the reporting of an alleged case of rape, sexual assault and/or domestic violence is to be dealt with if the case is reported to a public health establishment; and
iv. the manner in which assistance to the complainant in the investigation and prosecution of rape, sexual assault and/or domestic violence, generally, must be provided

in order to fully protect the rights and health of women who are victims of violence.

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[41] This provision is derived from article 30 of Madagascar's "Law on the Fights against HIV/AIDS and the protection of the Rights of People Living with HIV", No. 2005-040 of 20 February 2006.

[42] This article will be applicable to those jurisdictions where marriage operates as a legal defence to charges of rape, sexual assault and domestic violence. This provision is based upon Namibia's *Combating of Rape Act* (No. 8 of 2008).

[2] The Director of the [National Health Authority] must, in consultation with the [relevant Minister(s)] and key stakeholders, develop and implement training courses for health care providers, which:

i. include training on the directives referred to in section (1);
ii. include social context training in respect of rape, sexual assault and domestic violence; and
iii. provide for and promote the use of uniform norms, standards and procedures, with a view to ensuring that as many health care providers and any other relevant persons as possible are able to deal with rape, sexual assault and domestic violence cases consistently in an appropriate, efficient and sensitive manner.

[3] The National Commissioner of the [relevant] Police Service must, in consultation with the [relevant] Minister(s) and key stakeholders, develop and implement national instructions regarding all matters which must be followed by all police officials who are tasked with receiving reports of and the investigation of rape, sexual assault and domestic violence, including the following

i. the manner in which the reporting of an alleged case of rape, sexual assault and domestic violence is to be dealt with by police officials;
ii. the manner in which rape, sexual assault and domestic violence cases are to be investigated by police officials, including the circumstances in which an investigation in respect of a rape, sexual assault and domestic violence case may be discontinued

in order to fully protect the rights and health of women who are victims of violence.

[4] The National Commissioner of the [relevant] Police Service must, in consultation with the [relevant Minister(s)] and key stakeholders, develop and implement a training course for police officers which must:

i. include training on the national instructions referred to in section (3);
ii. include social context training in respect of rape, sexual assault and domestic violence; and
iii. provide for and promote the use of uniform norms, standards and procedures, with a view to ensuring that as many police officers as possible are able to deal with rape, sexual assault and domestic violence cases in an appropriate, efficient and sensitive manner.

[5] The National Director of [the relevant Prosecuting Authority] must, in consultation with the [relevant] Minister(s) develop and implement directives regarding all matters which are to be followed by all members of the prosecuting authority who are tasked with conducting prosecutions of rape, sexual assault and domestic violence cases, including the following:

i. the manner in which rape, sexual assault and domestic violence cases should be dealt with in general, including the circumstances in which a charge may be withdrawn or a prosecution stopped;
ii. the circumstances in which the prosecution must request the court to consider directing that the proceedings not take place in open court and in which the court should consider prohibiting the publication of the identity of the complainant; and

iii. the information to be placed before the court during sentencing, including pre-sentence reports

in order to fully protect the rights and health of women who are victims of violence.

[6] The National Director of [the relevant Prosecuting Authority] must, in consultation with the [relevant Minister(s)] and key stakeholders, develop and implement training courses for Public Prosecutors which must:

i. include training on the directives referred to in section (5);
ii. include social context training in respect of rape, sexual assault and domestic violence; and
iii. provide for and promote the use of uniform norms, standards and procedures, with a view to ensuring that as many prosecutors as possible are able to deal with rape, sexual assault and domestic violence cases in an appropriate, efficient, and sensitive manner.

G. Prisons (article 8)

Background considerations and policy guidance

41. It is a well-established principle that prisoners have the same right to protection of their physical and mental health, and to treatment of disease, of the same quality and standard as is afforded to those who are not imprisoned or detained.[43]

42. The *International Guidelines* make it clear that HIV programming in prisons should not be limited to merely providing information. They note:

> Prison authorities should take all necessary measures, including adequate staffing, effective surveillance and appropriate disciplinary measure, to protect prisoners from rape, sexual violence and coercion. Prison authorities should also provide prisoners (and prison staff, as appropriate), with access to HIV-related prevention information, education, voluntary testing and counselling, means of prevention (condoms, bleach and clean injecting equipment), treatment and care and voluntary participation in HIV-related clinical trials, as well as ensure confidentiality, and should prohibit mandatory testing, segregation and denial of access to prison facilities, privileges and release programmes for HIV-positive prisoners. Compassionate early release of prisoners living with AIDS should be considered.[44]

43. This approach to health care and human rights is supported in the World Health Organization's (WHO) *Guidelines on HIV Infection and AIDS in Prisons*, which outline principles relating to (a) prisoners' right to access to health care and (b) implementing HIV prevention strategies in prisons. [45] A number of recent HIV

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[43] UN General Assembly (1982). Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment. G.A. Res. 37/194, U.N.GAOR, 111th mtg., Annex, U.N. Doc. A/RES/37/194.
[44] *International Guidelines*, para. 21(e).
[45] WHO *Guidelines on HIV Infection and AIDS in Prisons*, WHO/GPA/DIR/93.3, 1993.

laws from African jurisdictions have included a chapter addressing HIV in prison settings.[46]

44. Given that sexual relationships (both consensual and non-consensual) are common in prisons, the availability of safer sex materials helps prevent the spread of sexually transmitted infections and preserves the right to health of prisoners. As noted above, the *International Guidelines* recommend the availability of condoms as an important component in the prevention of HIV and the preservation of the rights of people living with HIV. Similarly, UNODC/UNAIDS/WHO has recommended that a full-range of HIV prevention tools should be available to prisoners, including condoms.[47]

Alternative language

(add to definitional article)

"Prison" includes

i. a facility of any description that is operated, permanently or temporarily, by the [relevant prison authority] for the care and custody of prisoners; and
ii. a private prison facility constructed or operated under an agreement with the relevant prison authority for the confinement of prisoners.

"Prisoner" includes

i. a person who is in a prison pursuant to a sentence for an offence; or who has been convicted of an offence and is awaiting imposition of a sentence; or who is in prison because of a condition imposed by the [relevant authority] in connection with parole or statutory release;
ii. a person who, having been sentenced, committed or transferred to prison, is temporarily outside prison by reason of a temporary absence or work release authorized under [relevant legislation]; or is temporarily outside prison for reasons other than a temporary absence, work release, parole or statutory release, but is under the direction or supervision of a staff member or of a person authorized by the [relevant authority]; and
iii. a person who is in prison awaiting trial.

[46] See, for example, Madagascar's "Law on the Fight against HIV/AIDS and the Protection of the Rights of People Living with HIV/AIDS", Chapter V; Togo's "Law on the protection of people with respect to HIV/AIDS" (No. 2005-012), Section 3 of Chapter V.
[47] UNODC/WHO/UNAIDS, *HIV/AIDS prevention, care, treatment and support in prison settings*, 2006, available at http://data.unaids.org/pub/Report/2006/20060701_hiv-aids_prisons_en.pdf .

Prisons (insert as new chapter, to replace article 8)

Article xx - Right to equal and adequate health care for prisoners

[1] A prisoner who has tested positive for infection with HIV is entitled to adequate health care, counselling and referrals to support services while in prison.

[2] Health care providers shall provide prisoners with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained.[48]

Article xx - Voluntary counselling and testing for prisoners

[1] A prisoner is entitled to free confidential testing for infection with HIV and other blood-borne viruses and to pre-test information and post-test counselling in connection with such testing.

[2] No test for HIV or other blood-borne disease shall be undertaken except with the informed voluntary consent in writing of the prisoner and only in order to provide treatment, care and support.

[3] All prisoners presenting themselves for testing shall be offered pre-test information and post-test counselling by a health care provider, in accordance with professional standards.

[4] All prisoners who are tested for HIV status shall be offered their test results in the context of post-test counselling.

Article xx - Confidentiality for prisoners

[1] All information on the health status and health care of a prisoner is confidential and all health care procedures shall be designed so as to preserve the confidentiality of prisoners.

[2] Information referred to in section (1) shall be recorded in files available only to health care providers and not to non-health care prison staff. No mark, label, stamp or other visible sign shall be placed on prisoner's files, cells or papers that could indicate his or her HIV status, other than necessary notations inside the medical file in accordance with standard professional practice for recording clinically relevant information about a patient.[49]

[3] Information referred to in section (1) may only be disclosed

[48] UN, *Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment*, G.A. Res. 37/194 of 18 December 1982, U.N.GAOR, 111th mtg., Annex, U.N. Doc. A/RES/37/194, Principle 1.

[49] This wording is derived from *WHO Guidelines on HIV Infection and AIDS in Prisons,* Recommendations 31 and 33.

i. with the prisoner's consent; or
ii. where necessary to ensure the safety of other prisoners or staff;

with the same principles as generally applied in the community applying to the disclosure.[50]

Article xx - No discrimination against prisoners on the basis of HIV or HCV status

[1] In all prison facilities, it shall be illegal to discriminate against a prisoner on the basis of his or her infection with HIV or diagnosis of AIDS, or his or her infection with hepatitis C or otherwise on the basis of his or her health status.

[2] Prisoners living with HIV, HCV or AIDS shall

i. be housed with the general prisoner population, unless they require a level of health care which cannot be provided in such a setting or unless separate housing is necessary for their protection from other prisoners;
ii. be offered the same opportunities as other prisoners to participate in educational, job, vocational or other programs, except where limitations to a specific assignment are clinically indicated; and
iii. have access to the full range of available institutional counselling and support services and, to the greatest extent possible, to local community counselling and support services.

Article xx - Compassionate release

Conditional or unconditional release may be granted by [relevant authority] at any time to a prisoner

i. who is terminally ill;
ii. whose physical or mental health is likely to suffer serious adverse effects if the prisoner continues to be held in confinement; or
iii. for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the prisoner was sentenced.

Article xx - Information and education for prisoners

[1] The [national health authority] shall develop and implement information and education programs in every prison to help prevent the spread of HIV, other blood-borne diseases, and to address drug dependence among prisoners.

[2] In developing such programs, the [national health authority] shall use materials that are likely to be effective in reducing transmission of blood-borne diseases within prisons and outside prison following the release of prisoners, as well as providing information on treatment, care and support.

[50] This wording is derived from *WHO Guidelines on HIV Infection and AIDS in Prisons*, Recommendations 31 and 32.

[3] Such programs required by section (1) may include peer education and use of non-[relevant prison authority] personnel, including delivery of these programs by community-based organizations.

[4] Materials shall, as much as possible, be available in the languages of the relevant populations, shall take into account the literacy level of the relevant populations, and shall be sensitive to the social and cultural needs of the relevant populations.

Article xx - Condoms and other HIV prevention measures

[1] The [national health authority] shall ensure that condoms and other safer sex materials, such as water-based lubricants and dental dams, along with appropriate information on their proper use and on their importance in preventing the spread of HIV infection and other sexually transmitted infections, are made available and easily accessible to prisoners in a manner that protects their anonymity.

[2] The [national health authority] shall develop a plan for the disposal of used condoms that protects the anonymity of prisoners and the health of prison officers.

[3] The distribution and possession of condoms and other safer sex materials in prisons in accordance with this Part shall not constitute a criminal nor administrative offence, nor are condoms and other safer sex materials admissible as evidence of sexual relations for the purposes of determining any criminal or administrative offence.

[4] The [national health authority] shall periodically assess what information and HIV prevention measures are needed to protect the health of prisoners, in light of the best available evidence about risk activities within prisons, and shall have the authority to implement, or cause to be implemented, such measures.[51]

Article xx - Responsibility of the [national health authority] for training and education

The [national health authority] is responsible for ensuring

i. that training and education are provided to staff and prisoners on a regular basis, and that such training and education include the principles of standard precautions to prevent and control blood borne diseases; the personal responsibility of staff and prisoners to protect themselves and others at all times; and information on post-exposure prophylaxis;
ii. that training and education provided to prisoners also include available services and treatments; and peer education and counselling programs that include the meaningful participation of prisoners as counsellors; and
iii. that prisoners and staff who may be exposed to blood and body fluids receive training in universal precautions.[52]

[51] Article 25 of Madagascar's "Law on the Fight against HIV/AIDS and the Protection of the Rights of People Living with HIV/AIDS" guarantees the distribution of free condoms to prisoners.
[52] Universal precautions are simple standards of infection control practices to be used in the care of all patients, at all times, to reduce the risk of transmission of blood borne infections. They include: careful handling and disposal of "sharps"; hand washing with soap and water before and after all procedures; use

Article xx - Statistics on sexual violence (including rape) in prisons

[1] The [national health authority] shall carry out, at regular intervals, a comprehensive statistical review and analysis of the incidence of sexual violence in prisons, which shall include, but not be limited to, the identification of the common characteristics of:

i. both victims and perpetrators of sexual violence; and
ii. prisons and prison systems with a high incidence of said violence.

[2] In carrying out section (1), the [national health authority] shall consider:

i. how incidents of sexual violence will be defined for the purposes of the statistical review and analysis; and
ii. how the [national health authority] should collect information about sexual violence against prisoners committed by other prisoners and by staff, beyond prisoner self-reports of such violence.

[3] The [national health authority] shall solicit views from representatives of the following: state prison departments, county and municipal prisons, juvenile prison facilities, former prisoners, health care providers, victim advocates, researchers, and other experts in the area of sexual violence (including within prisons).

H. Other vulnerable groups (not found in N'Djamena law)

Background policy guidance

45. According to the *International Guidelines*,

> Depending on the nature of the epidemic and the legal, social and economic conditions in each country, groups that may be disproportionately affected include women, children, those living in poverty, minorities, indigenous people, migrants, refugees and internally displaced persons, people with disabilities, prisoners, sex workers, men having sex with men and injecting drug users — that is to say groups who already suffer from a lack of human rights protection and from discrimination and/or are marginalized by their legal status.[53]

46. Such an observation is particularly true with respect to vulnerable groups. It makes considerable sense, when adopting a general law on HIV, to include provisions specifically addressing these legal issues, even if legislative action with respect other existing laws is also necessary. The *International Guidelines* provide some points of reference for other laws that should be reviewed in the context of the epidemic.

47. The *International Guidelines* recommend that "States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups…"[54]

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of protective barriers such as gloves, gowns, aprons, masks and goggles for direct contact with blood and other body fluids; safe disposal of waste contaminated with blood or body fluids; proper disinfection of instruments and other contaminated equipment; and proper handling of soiled linen.

[53] *International Guidelines*, para 97.

[54] *International Guidelines*, para 22.

48. Among those vulnerable persons identified in the laws under consideration, there is almost no recognition of men who have sex with men. Such an observation is even more relevant given recent research showing elevated rates of HIV infection among men who have sex with men in western Africa.[55]

49. On the issue of laws relating to men who have sex with men (and other persons vulnerable to sexual transmission), the *International Guidelines* note that:

> Criminal law prohibiting sexual acts (including adultery, sodomy, fornication and commercial sexual encounters) between consenting adults in private should be reviewed, with the aim of repeal. In any event, they should not be allowed to impede provision of HIV prevention and care services.

50. On the issue of people who inject drugs, the *International Guidelines* state:

> Criminal law should not be an impediment to measures taken by States to reduce the risk of HIV transmission among injecting drug users and to provide HIV-related care and treatment for injecting drug users. Criminal law should be reviewed to consider:
>
> - the authorization or legalisation and promotion of needle and syringe exchange programmes;
> - the repeal of laws criminalizing the possession, distribution and dispensing of needles and syringes.

51. A number of recent national HIV laws from around the world, including from African countries, have including specific reference to harm reduction programmes, including needle and syringe exchange programmes.[56] An article enabling harm reduction programs for people who inject drugs is absent from the N'Djamena law.

52. With regard to adult commercial sex work, some of the more problematic provisions targeting sex workers are discussed above in the section on testing and criminal law. More generally, the *International Guidelines* recommend:

> With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work.

[55] For example, one paper reported an HIV prevalence rate of 21.5% among a cohort of men who have sex with men in Senegal. See A.S. Wade et al., "HIV infection and sexually transmitted infections among men who have sex with men in Senegal," *AIDS* 2005 (19): 2133-2140.

[56] The framework for sterile syringe programs in Tasmania (Australia) is set out in the *HIV/AIDS Preventative Measures Act* 1993 (Tasmania), No.25 of 1993, part 3. Vietnam's *Law on the Prevention and Control of HIV/AIDS* (2006) calls for the implementation of harm reduction measures (art. 21) which, according to the definition (art. 2.15), include "promotion of the use of … clean needles and syringes". The *HIV and AIDS Preventative Measures Act* 2006 of Mauritius provides for syringe and needle exchanges in Articles 15-17.

Alternative language

Article xx - National strategies, policies and programmes regarding HIV among vulnerable groups

The Director of the [National Health Authority and/or national AIDS commission, as appropriate], in consultation with the [relevant] Minister(s) and key stakeholders, must develop and implement strategies, policies and programmes to promote and protect the health of those vulnerable groups which currently have high or increasing rates of HIV infection or which public health information indicates are most vulnerable to new infection as indicated by such factors as the local history of the epidemic, poverty, sexual practices, drug-using behaviour, livelihood, institutional location, disrupted social structures and population movements (forced or otherwise).[57]

Article xx – Prohibition on discrimination

It is prohibited to discriminate against a person on the grounds of race, gender, sex, pregnancy, marital status, family status, national or ethnic origin, colour, sexual orientation, age, physical or mental disability, dependence on alcohol or other drugs, religion, conscience, belief, culture, language, property, health status, record of criminal conviction, birth or other status.[58]

[57] This wording is derived from the *Declaration of Commitment on HIV/AIDS*, 2001, para. 64, unanimously endorsed by all UN Member States at the UN General Assembly's Special Session on HIV/AIDS in June 2001.

[58] This language is derived from various non-discrimination provisions, such as article 9 of the Constitution of the Republic of South Africa (1996), article 14 of the European Convention on Human Rights (1950), article 2 of the African Charter of Human and People's Rights (1986) and article 25 of Canada's Human Rights Act (1985).