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**FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS  
AND FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF  
THE PROGRAMME AND METHODS OF WORK OF THE COMMISSION  
ALTERNATIVE APPROACHES AND WAYS AND MEANS WITHIN THE  
UNITED NATIONS SYSTEM FOR IMPROVING THE EFFECTIVE  
ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

**Second International Consultation on HIV/AIDS and Human Rights**

**(Geneva, 23-25 September 1996)**

**Report of the Secretary-General**

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**Introduction**

1. The Commission on Human Rights, at its fifty-second session, in its resolution 1996/43 of 19 April 1996, requested the United Nations High Commissioner for Human Rights, inter alia, to continue his efforts, in

cooperation with UNAIDS and non-governmental organizations, as well as groups of people living with HIV/AIDS, towards the elaboration of guidelines on promoting and protecting respect for human rights in the context of HIV/AIDS. In the same resolution, the Commission requested the Secretary-General to prepare for the consideration of the Commission at its fifty-third session a report on the above-mentioned guidelines, including the outcome of the second expert consultation on human rights and AIDS, and on their international dissemination.

2. The call for guidelines on human rights and HIV/AIDS was based on a recommendation contained in an earlier report of the Secretary-General to the Commission at its fifty-first session (E/CN.4/1995/45, para. 135), which stated that "the development of such guidelines or principles could provide an international framework for discussion of human rights considerations at the national, regional and international levels in order to arrive at a more comprehensive understanding of the complex relationship between the public health rationale and the human rights rationale of HIV/AIDS. In particular, Governments could benefit from guidelines that outline clearly how human rights standards apply in the area of HIV/AIDS and indicate concrete and specific measures, both in terms of legislation and practice, that should be undertaken".

3. In response to the above requests, the United Nations High Commissioner/Centre for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) convened the Second International Consultation on HIV/AIDS and Human Rights in Geneva, from 23 to 25 September 1996. It may be recalled that the first International Consultation on AIDS and Human Rights was organized by the United Nations Centre for Human Rights, in cooperation with the World Health Organization, in Geneva from 26 to 28 July 1989. In the report of the first consultation (HR/PUB/90/2), the elaboration of guidelines to assist policy-makers and others in compliance with international human rights standards regarding law, administrative practice and policy had already been proposed.

4. The Second International Consultation on HIV/AIDS and Human Rights brought together 35 experts in the field of AIDS and human rights, comprising government officials and staff of national AIDS programmes, people living with HIV/AIDS (PLHAs), human rights activists, academics, representatives of regional and national networks on ethics, law, human rights and HIV, and representatives of United Nations bodies and agencies, non-governmental organizations and AIDS service organizations (ASOs). The list of participants is contained in annex III to the present report.

5. The Executive Director of UNAIDS, Dr. Peter Piot, opened the Consultation and the United Nations High Commissioner for Human Rights, Mr. José Ayala-Lasso, made a closing statement. The Consultation elected by acclamation Mr. Michael Kirby (Australia) as its Chairman and Mr. Babes Ignacio (Philippines) as its Rapporteur. The agenda of the Consultation is contained in annex II to the present report.

6. The Consultation had before it five background papers which had been commissioned for the purpose of eliciting specific regional and thematic experiences and concerns regarding HIV/AIDS and human rights, prepared by the following non-governmental organizations and networks of people living with HIV/AIDS: Alternative Law Research and Development Center (ALTERLAW) (Philippines); Network of African People Living with HIV/AIDS (NAP+) (Zambia); Colectivo Sol (Mexico); International Community of Women Living with HIV/AIDS (ICW+) (global) and Global Network of People Living with HIV/AIDS (GNP+) (global). The groups were asked, each within its specific context, to identify the most important human rights principles and concerns in the context of HIV/AIDS, as well as concrete measures that States could take to protect HIV-related human rights.

7. The Consultation also had before it draft guidelines on HIV/AIDS and human rights, prepared by Ms. Helen Watchirs (Australia) on the basis of the five regional background papers and other materials consulted. In addition, the international association Rights and Humanity conducted a global survey to review existing strategies and identify other measures necessary to ensure respect for human rights in the context of HIV/AIDS. An analysis of the 40 responses received to the survey was presented to the Consultation.

8. With regard to its methods of work, the Consultation formed four working groups to discuss and finalize the draft guidelines, focusing on the theoretical framework (WG.1), the institutional responsibilities and processes (WG.2), law review, reform and support services (WG.3) and on the promotion of a supportive and enabling environment (WG.4), respectively. The full text of the guidelines as adopted by the Consultation is contained in annex I to the present report. The Guidelines on HIV/AIDS and Human Rights will also be issued separately as a United Nations publication, in all official languages of the United Nations.

9. In the second part of the Consultation, participants were divided into a further three working groups in order to discuss and elaborate recommendations concerning strategies to ensure the dissemination and implementation of the guidelines, according to different actors, as follows: States (WG.6), United Nations system and regional intergovernmental bodies (WG.7) and non-governmental organizations (WG.8). The attention of the Commission is drawn to these recommendations, as outlined in chapter II below. [back to the contents]

## **I. CONCLUSIONS OF THE CONSULTATION**

10. HIV/AIDS continues to spread throughout the world at an alarming rate. Close in the wake of the epidemic is the widespread abuse of human rights and fundamental freedoms associated with HIV/AIDS in all parts of the world. In response to this situation the experts at the Second International Consultation on HIV/AIDS and Human Rights concluded the following:

(a) The protection of human rights is essential to safeguard human dignity in the context of HIV/AIDS and to ensure an effective, rights-based response to HIV/AIDS. An effective response requires the implementation of all human rights, civil and political, economic, social and cultural, and fundamental freedoms of all people, in accordance with existing international human rights standards;

(b) Public health interests do not conflict with human rights. On the contrary, it has been recognized that when human rights are protected, less people become infected and those living with HIV/AIDS and their families can better cope with HIV/AIDS;

(c) A rights-based, effective response to the HIV/AIDS epidemic involves establishing appropriate governmental institutional responsibilities, implementing law reform and support services and promoting a supportive environment for groups vulnerable to HIV/AIDS and for those living with HIV/AIDS;

(d) In the context of HIV/AIDS, international human rights norms and pragmatic public health goals require States to consider measures that may be considered controversial, particularly regarding the status of women and children, sex workers, injecting drug users and men having sex with men. It is, however, the responsibility of all States to identify how they can best meet their human rights obligations and protect public health within their specific political, cultural and religious contexts;

(e) Although States have primary responsibility for implementing strategies that protect human rights and public health, United Nations bodies, agencies and programmes, regional intergovernmental bodies and non-governmental organizations, including networks of people living with HIV/AIDS, play critical roles in this regard.

11. The Consultation adopted Guidelines on HIV/AIDS and Human Rights, the purpose of which is to translate international human rights norms into practical observance in the context of HIV/AIDS. To this end, the Guidelines, as annexed to the present report, consist of two parts: first, the human rights principles underlying a positive response to HIV/AIDS and second, action-oriented measures to be employed by Governments in the areas of law, administrative policy and practice that will protect human rights and achieve HIV-related public health goals.

12. There are many steps that States can take to protect HIV-related human rights and to achieve public health goals. The 12 Guidelines elaborated by the Consultation for States to implement an effective, rights-based response are summarized below.

Guideline 1: States should establish an effective national framework for their response to HIV/AIDS which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV/AIDS policy and programme responsibilities across all branches of Government.

Guideline 2: States should ensure, through political and financial support, that community consultation occurs in all phases of HIV/AIDS policy design, programme implementation and evaluation and that community organizations are enabled to carry out their activities, including in the field of ethics, law and human rights, effectively.

Guideline 3: States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

Guideline 4: States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

Guideline 5: States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies.

Guideline 6: States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of qualitative prevention measures and services, adequate HIV prevention and care information and safe and effective medication at an affordable price.

Guideline 7: States should implement and support legal support services that will educate people affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of ministries of justice, ombudspersons, health complaint units and human rights commissions.

Guideline 8: States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.

Guideline 9: States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS to understanding and acceptance.

Guideline 10: States should ensure that government and private sectors develop codes of conduct regarding HIV/AIDS issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.

Guideline 11: States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV/AIDS, their families and communities.

Guideline 12: States should cooperate through all relevant programmes and agencies of the United Nations system, including UNAIDS, to share knowledge and experience concerning HIV-related human rights issues and should ensure effective mechanisms to protect human rights in the context of HIV/AIDS at international level. [back to the contents]

## **II. RECOMMENDATIONS FOR DISSEMINATION AND IMPLEMENTATION OF THE GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS**

13. At the Second International Consultation on HIV/AIDS and Human Rights, the participants considered strategies for dissemination and implementation of the Guidelines. It was considered that there are three groups of key actors who, jointly and separately, are critical to the implementation of the Guidelines, namely States, the United Nations system, regional intergovernmental organizations and non-governmental and community-based organizations. Set out below are recommendations for measures that these actors are encouraged to take in order to ensure that the Guidelines are widely disseminated and effectively implemented. [back to the contents]

### **A. States**

14. States, at the highest level of Government (head of State, Prime Minister and/or relevant ministers) should promulgate the Guidelines and ensure that the political weight of the Government is behind the dissemination and implementation of the Guidelines throughout all branches of the executive, legislature and judiciary.

15. States, at highest level of Government, should assign appropriate governmental bodies/staff with the responsibility to devise and implement a strategy for dissemination and implementation of the Guidelines and establish periodic monitoring of this strategy through, for example, reports to the Executive Office and public hearings. States should establish within the executive branch a staff member(s) responsible for this strategy.

16. States should disseminate the Guidelines, endorsed by the executive, to relevant national bodies, such as interministerial and parliamentary committees on HIV/AIDS and national AIDS programmes, as well as to provincial and local-level bodies.

17. States, through these bodies, should give formal consideration to the Guidelines in order to identify ways to build them into existing activities and prioritize necessary new activities and policy review. States should also organize consensus workshops with the participation of non-governmental organizations, community-based organizations and AIDS service organizations (ASOs), networks of people living with HIV/AIDS (PLHAs), networks on ethics, law, human rights and HIV, United Nations Theme Groups on HIV/AIDS, as well as political and religious groups:

(a) To discuss the relevance of the Guidelines to the local situation, to identify obstacles and needs, to propose interventions and solutions and to achieve consensus for the adoption of the Guidelines;

(b) To elaborate national, provincial and local plans of action for implementation and monitoring of the Guidelines within the local context;

(c) To mobilize and ensure the commitment of relevant governmental officials to apply the Guidelines as a working tool to be integrated into their individual workplans.

18. States, at national, subnational and local levels, should establish mechanisms to receive, process and refer issues, claims and information in relation to the Guidelines and to the human rights issues raised therein. States should create focal points to monitor the implementation of the Guidelines in relevant government departments.

19. States, in ways consistent with judicial independence, should disseminate the Guidelines widely throughout the judicial system and use them in the development of jurisprudence, conduct of court cases involving HIV-related matters and HIV-related training/continuing education of judicial officers.

20. States should disseminate the Guidelines throughout the legislative branch of Government and particularly to parliamentary committees involved in the formulation of policy and legislation relevant to the issues raised in the Guidelines. Such committees should assess the Guidelines to identify priority areas for action and a longer-term strategy to ensure that relevant policy and law are in conformity with the Guidelines. [back to the contents]

## B. United Nations system and regional intergovernmental bodies

21. The United Nations Secretary-General should submit the Guidelines to the Commission on Human Rights as part of the report on the Second International Consultation on HIV/AIDS and Human Rights.

22. The Secretary-General should transmit the Guidelines to heads of State:

(a) Recommending that the document be distributed nationally through the appropriate channels;

(b) Offering, within the mandates of UNAIDS and the United Nations High Commissioner/Centre for Human Rights, technical cooperation in facilitating the implementation of the Guidelines;

(c) Requesting that compliance with the Guidelines be included in the national reports to existing human rights treaty bodies;

(d) Reminding Governments of the responsibility to uphold international human rights standards in promoting compliance with the Guidelines.

23. The Secretary-General should transmit the Guidelines to the heads of all relevant United Nations bodies and agencies, requesting that they be widely disseminated throughout the relevant programmes and activities of the bodies and agencies. The Secretary-General should request that all relevant United Nations bodies and agencies consider their activities and programmes on HIV/AIDS in the light of the provisions of the Guidelines and support the implementation of the Guidelines at the national level.

24. The Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as well as all human rights treaty bodies, should consider and discuss the Guidelines with a view to incorporating relevant aspects of the Guidelines within their respective mandates. Human rights treaty bodies, in particular, should integrate the Guidelines, as relevant, in their respective reporting guidelines, questions to States, and when developing resolutions and general comments on related subjects.

25. The Commission on Human Rights should appoint a special rapporteur on human rights and HIV/AIDS with the mandate, inter alia, to encourage and monitor implementation of the Guidelines by States, as well as their promotion by the United Nations system, including human rights bodies, where applicable.

26. The United Nations High Commissioner/Centre for Human Rights should ensure that the Guidelines are disseminated throughout the Centre and incorporated into the activities and programmes of the Centre, particularly those involving support to the United Nations human rights bodies, technical assistance and monitoring. This should be coordinated by a staff member with exclusive responsibility for the Guidelines. Similarly, the United Nations Division for the Advancement of Women should ensure the full integration of the Guidelines into the work of the Committee on the Elimination of Discrimination Against Women.

27. UNAIDS should transmit the Guidelines widely throughout the system - to co-sponsors of the UNAIDS Programme Coordinating Board, United Nations Theme Groups on HIV/AIDS, UNAIDS staff, including country programme advisers and focal points - and should ensure that the Guidelines become a framework for action for the work of the United Nations Theme Groups on HIV/AIDS and UNAIDS staff, including that Theme Groups use the Guidelines to assess the HIV-related human rights, legal and ethical situation in-country and to elaborate the best means to support implementation of the Guidelines at the country level.

28. Regional bodies (such as the Inter-American Commission on Human Rights, the Organization of American States, the African Commission on Human and Peoples' Rights, the Organization of African Unity, the European Commission on Human Rights, the European Commission, the Council of Europe, the Association of South-East Asian Nations, etc.) should receive the Guidelines and transmit them widely among members and relevant divisions with a view to assessing how their activities might be made consistent with the Guidelines and promote their implementation.

29. Specialized agencies and other concerned bodies (such as the International Labour Organization, the International Organization for Migration, the Office of the United Nations High Commissioner for Refugees, the United Nations Research Institute for Social Development and the World Trade Organization) should receive the Guidelines and transmit them widely among members and throughout their programmes with a view to assessing how their activities can be made consistent with the Guidelines and promote their implementation. [back to the contents]

#### C. Non-governmental organizations\*

30. NGOs should implement the Guidelines within a broad framework of communication around HIV and human rights, including through the establishment of ongoing communication between the HIV/AIDS community and the human rights community by:

(a) Establishing contacts at the international, regional and local levels between networks of ASOs and people living with HIV/AIDS and human rights NGOs;

(b) Developing mechanism(s) for ongoing communication and dissemination and implementation of the Guidelines, such as a bulletin board and/or home page on the Internet allowing for input and exchange of information on human rights and HIV and database linkages between groups working on human rights and HIV;

(c) Networking with human rights NGOs at meetings of United Nations human rights bodies;

(d) Promoting discussion of the Guidelines in their newsletters and other publications, as well as through other media;

(e) Developing an action-oriented and accessible version(s) of the Guidelines;

(f) Developing a strategy and process for the dissemination of the Guidelines and seeking funding and technical cooperation with regard to the dissemination.

31. Non-governmental organizations at the regional level should:

(a) Establish or use existing focal points to disseminate the Guidelines, with popularization and/or training;

(b) Establish a regional "technical group" to introduce the Guidelines to the region;

(c) Use the Guidelines as a tool for advocacy, interpretation, monitoring abuse and establishing best practice;

(d) Prepare regular reports on the implementation of the Guidelines to human rights bodies (human rights treaty bodies and United Nations extra-conventional fact-finding mechanisms, such as special rapporteurs and representatives, as well as regional commissions) and other relevant international agencies;

(e) Bring cases of HIV/AIDS-related discrimination and other violations of human rights in the context of HIV/AIDS to regional human rights judicial and quasi-judicial mechanisms.

32. NGOs at the national level, in order to advocate the Guidelines, should obtain consensus on their acceptance and establish a joint strategy with governmental and non-governmental partners as a baseline for monitoring the Guidelines, through the following means:

(a) Hold national NGO strategy meetings on the Guidelines that include human rights NGOs (including women's organizations and prisoners' rights organization), ASOs, community-based organizations, networks on ethics, law, human rights and HIV and networks of people living with HIV/AIDS;

(b) Hold meetings with national governmental human rights organisms;

(c) Hold meetings with national Government (relevant ministries), legislative and judiciary;

(d) Establish or use existing national focal points to gather information and develop systems of information exchange on HIV and human rights, including the Guidelines. [back to the contents]

## Annex I

### GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS

#### Preamble

This document contains guidelines adopted at the Second International Consultation on HIV/AIDS and Human Rights, held in Geneva from 23 to 25 September 1996, to assist States in creating a positive, rights-based response to HIV/AIDS that is effective in reducing the transmission and impact of HIV/AIDS and respectful of human rights and fundamental freedoms.

The elaboration of such guidelines was first considered by the 1989 International Consultation on AIDS and Human Rights, organized jointly by the United Nations Centre for Human Rights and the World Health Organization. (1) The United Nations Commission on Human Rights and its Sub-Commission on Prevention

of Discrimination and Protection of Minorities have repeatedly reiterated the need for guidelines. (2) Increasingly, the international community has recognized the need for elaborating further how existing human rights principles apply in the context of HIV/AIDS and for providing examples of concrete activities to be undertaken by States to protect human rights and public health in the context of HIV/AIDS.

The purpose of these Guidelines is to translate international human rights norms into practical observance in the context of HIV/AIDS. To this end, the Guidelines consist of two parts: first, the human rights principles underlying a positive response to HIV/AIDS and second, action-oriented measures to be employed by Governments in the areas of law, administrative policy and practice that will protect human rights and achieve HIV-related public health goals.

The Guidelines recognize that States bring to the HIV/AIDS epidemic different economic, social and cultural values, traditions and practices - a diversity which should be celebrated as a rich resource for an effective response to HIV/AIDS. In order to benefit from this diversity, a process of participatory consultation and cooperation was undertaken in the drafting of the Guidelines, so that the Guidelines reflect the experience of people affected by the epidemic, address relevant needs and incorporate regional perspectives.

Furthermore, the Guidelines reaffirm that diverse responses can and should be designed within the context of universally recognized international human rights standards.

It is intended that the principal users of the Guidelines will be States, in the persons of legislators and government policy-makers, including officials involved in national AIDS programmes and relevant departments and ministries, such as health, foreign affairs, justice, interior, employment, welfare and education. Other users who will benefit from the Guidelines include intergovernmental organizations (IGOs), non-governmental organizations (NGOs), networks of persons living with HIV/AIDS (PLHAs), community-based organizations (CBOs), networks on ethics, law, human rights and HIV and AIDS service organizations (ASOs). The broadest possible audience of users of the Guidelines will maximize their impact and make their content a reality.

The Guidelines address many difficult and complex issues, some of which may or may not be relevant to the situation in a particular country. For these reasons, it is essential that the Guidelines are taken by critical actors at the national and community level and considered in a process of dialogue involving a broad spectrum of those most directly affected by the issues addressed in the Guidelines. Such a consultative process will enable Governments and communities to consider how the Guidelines are specifically relevant in their country, assess priority issues presented by the Guidelines and devise effective ways to implement the Guidelines in their respective contexts.

In implementing the Guidelines, it should be borne in mind that achieving international cooperation in solving problems of an economic, social, cultural or humanitarian character and promoting and encouraging respect for human rights and for fundamental freedoms for all, is one of the principal objectives of the United Nations. In this sense, international cooperation, including financial and technical support, is a duty of States in the context of the HIV/AIDS epidemic and industrialized countries are encouraged to act in a spirit of solidarity in assisting developing countries to meet the challenges of implementing the Guidelines.

## **I. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND HIV/AIDS**

Introduction: HIV/AIDS, human rights and public health

Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights is an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS. The protection and promotion of human rights is necessary both to protect the inherent dignity of persons affected by HIV/AIDS and to achieve the public health goals of reducing vulnerability to HIV infection, lessening the adverse impact of HIV/AIDS on those affected and empowering individuals and communities to respond to HIV/AIDS.

In general, human rights and public health share the common objective to promote and to protect the rights and well-being of all individuals. From the human rights perspective, this can best be accomplished by promoting and protecting the rights and dignity of everyone, with special emphasis on those who are discriminated against or whose rights are otherwise interfered with. Similarly, public health objectives can best be accomplished by promoting health for all, with special emphasis on those who are vulnerable to



threats to their physical, mental or social well-being. Thus, health and human rights complement and mutually reinforce each other in any context. They also complement and mutually reinforce each other in the context of HIV/AIDS.

One aspect of the interdependence of human rights and public health is demonstrated by studies showing that HIV prevention and care programmes with coercive or punitive features result in reduced participation and increased alienation of those at risk of infection. (3) In particular, people will not seek HIV-related counselling, testing, treatment and support if this would mean facing discrimination, lack of confidentiality and other negative consequences. Therefore, it is evident that coercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support.

Another aspect of the linkage between the protection of human rights and effective HIV/AIDS programmes is apparent in the fact that the incidence or spread of HIV/AIDS is disproportionately high among some populations. 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. Lack of human rights protection disempowers these groups to avoid infection and to cope with HIV/AIDS, if affected by it. (4)

Furthermore, there is growing international consensus that a broadly based, inclusive response, involving people living with HIV/AIDS in all its aspects, is a main feature of successful HIV/AIDS programmes. Another essential component of comprehensive response is the facilitation and creation of a supportive legal and ethical environment which is protective of human rights. This requires measures to ensure that Governments, communities and individuals respect human rights and human dignity and act in a spirit of tolerance, compassion and solidarity.

One essential lesson learned in the HIV/AIDS epidemic is that universally recognized human rights standards should guide policy-makers in formulating the direction and content of HIV-related policy and form an integral part of all aspects of national and local responses to HIV/AIDS.

#### A. Human rights standards and the nature of State obligations

The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in June 1993, (5) affirmed that all human rights are universal, indivisible, interdependent and interrelated. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, States have the duty, regardless of their political, economic and cultural systems, to promote and protect all universally recognized human rights and fundamental freedoms, in accordance with international human rights standards.

A human rights approach to HIV/AIDS is, therefore, based on these State obligations with regard to human rights protection. HIV/AIDS demonstrates the indivisibility of human rights since the realization of economic, social and cultural rights, as well as civil and political rights, is essential to an effective response. Furthermore, a rights-based approach to HIV/AIDS is grounded in concepts of human dignity and equality which can be found in all cultures and traditions.

The key human rights principles which are essential to effective State responses to HIV/AIDS are to be found in existing international instruments, such as the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Regional instruments, including the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights also enshrine State obligations applicable to HIV/AIDS. In addition, a number of conventions and recommendations of the International Labour Organization are particularly relevant to the problem of

HIV/AIDS, such as ILO instruments concerning discrimination in employment and occupation, termination of employment, protection of workers' privacy, and safety and health at work.

Among the human rights principles relevant to HIV/AIDS are, inter alia:

The right to non-discrimination, equal protection and equality before the law

The right to life

The right to the highest attainable standard of physical and mental health

The right to liberty and security of person

The right to freedom of movement

The right to seek and enjoy asylum

The right to privacy

The right to freedom of opinion and expression and the right to freely receive and impart information

The right to freedom of association

The right to work

The right to marry and found a family

The right to equal access to education

The right to an adequate standard of living

The right to social security, assistance and welfare

The right to share in scientific advancement and its benefits

The right to participate in public and cultural life

The right to be free from torture and cruel, inhuman or degrading treatment or punishment

The rights of women and children.

## B. Restrictions and limitations

Under international human rights law, States may impose restrictions on some rights, under narrowly defined circumstances, if such restrictions are necessary to achieve overriding goods, such as public health, the rights of others, morality, public order, the general welfare in a democratic society and national security. Some rights are non-derogable and cannot be restricted under any circumstances. (6) In order for restrictions on human rights to be legitimate, the State must establish that the restriction is:

(a) Provided for and carried out in accordance with the law, i.e. according to specific legislation which is accessible, clear and precise, so that it is reasonably foreseeable that individuals will regulate their conduct accordingly;

(b) Based on a legitimate interest, as defined in the provisions guaranteeing the rights;

(c) Proportional to that interest and constituting the least intrusive and least restrictive measure available and actually achieving that interest in a democratic society, i.e. established in a decision-making process consistent with the rule of law. (7)

Public health is most often cited by States as a basis for restricting human rights in the context of HIV/AIDS. Many such restrictions, however, infringe on the principle of non-discrimination, for example when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum. The right to privacy is known to have been restricted through mandatory testing and the publication of HIV status and the right to liberty of person is violated when HIV is used to justify deprivation of liberty or segregation. Although such measures may be effective in the case of diseases which are contagious by casual contact and susceptible to cure, they are ineffective with regard to HIV/AIDS since HIV is not casually transmitted. In addition, such coercive measures are not the least restrictive measures possible and are often imposed discriminatorily against already vulnerable groups.

Finally, and as stated above, these coercive measures drive people away from prevention and care programmes, thereby limiting the effectiveness of public health outreach. A public health exception is, therefore, seldom a legitimate basis for restrictions on human rights in the context of HIV/AIDS.

### C. The application of specific human rights in the context of the HIV/AIDS epidemic

Examples of the application of specific human rights to HIV/AIDS are illustrated below. These rights should not be considered in isolation but as interdependent rights supporting the Guidelines elaborated in this document. In the application of these rights, the significance of national and regional particularities and various historical, cultural and religious backgrounds must be remembered. It remains the duty of States, however, to promote and protect all human rights within their cultural contexts.

#### 1. Non-discrimination and equality before the law

International human rights law guarantees the right to equal protection before the law and freedom from discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Discrimination on any of these grounds is not only wrong in itself but also creates and sustains conditions leading to societal vulnerability to infection by HIV, including lack of access to an enabling environment that will promote behavioural change and enable people to cope with HIV/AIDS. Groups suffering from discrimination, which also disables them in the context of HIV/AIDS, are 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.

Responses by States to the epidemic should include the implementation of laws and policies to eliminate systemic discrimination, including where it occurs against these groups.

The Commission on Human Rights has confirmed that "other status" in non-discrimination provisions is to be interpreted to include health status, including HIV/AIDS. (8) This means that States should not discriminate against PLHAs or members of groups perceived to be at risk of infection on the basis of their actual or presumed HIV status. (9)

The Human Rights Committee has confirmed that the right to equal protection of the law prohibits discrimination in law or in practice in any fields regulated and protected by public authorities and that a difference in treatment is not necessarily discriminatory if it is based on reasonable and objective criteria. The prohibition against discrimination thus requires States to review and, if necessary, repeal or amend their laws, policies and practices to proscribe differential treatment which is based on arbitrary HIV-related criteria. (10)

#### 2. Human rights of women

Discrimination against women, de facto and de jure, renders them disproportionately vulnerable to HIV/AIDS. Women's subordination in the family and in public life is one of the root causes of the rapidly increasing rate of infection among women. It also impairs women's ability to deal with the consequences of their own infection and/or infection in the family, in social, economic and personal terms. (11)

With regard to prevention of infection, the rights of women and girls to the highest attainable standard of physical and mental health, to education, to freedom of expression, to freely receive and impart information, should be applied to include equal access to HIV-related information, education, means of prevention and

health services. However, even when such information and services are available, women and girls are often unable to negotiate safer sex or to avoid HIV-related consequences of the sexual practices of their husband or partners as a result of social and sexual subordination, economic dependence on a relationship and cultural attitudes. The protection of the sexual and reproductive rights of women and girls is, therefore, critical. This includes the rights of women to have control over and to decide freely and responsibly, free of coercion, discrimination and violence, on matters related to their sexuality, including sexual and reproductive health. (12) Measures for the elimination of sexual violence and coercion against women in the family and in public life not only protect women from human rights violations but also from HIV infection that may result from such violations.

Furthermore, in order to empower women to leave relationships or employment which threaten them with HIV infection and to cope if they or their family members are infected with HIV/AIDS, States should ensure women's rights to, inter alia, legal capacity and equality within the family, in matters such as divorce, inheritance, child custody, property and employment rights, in particular, equal remuneration of men and women for work of equal value, equal access to responsible positions, measures to reduce conflicts between professional and family responsibilities and protection against sexual harassment at the workplace. Women should also be enabled to enjoy equal access to economic resources, including credit, an adequate standard of living, participation in public and political life and to benefits of scientific and technological progress so as to minimize risk of HIV infection.

HIV/AIDS prevention and care for women are often undermined by pervasive misconceptions about HIV transmission and epidemiology. There is a tendency to stigmatize women as "vectors of disease", irrespective of the source of infection. As a consequence, women who are or are perceived to be HIV-positive face violence and discrimination in public and in private life. Sex workers often face mandatory testing with no support for prevention activities to encourage or require their clients to wear condoms and with no access to health-care services. Many HIV/AIDS programmes targeting women are focused on pregnant women but these programmes often emphasize coercive measures directed towards the risk of transmitting HIV to the foetus, such as mandatory pre- and post-natal testing followed by coerced abortion or sterilization. Such programmes seldom empower women to prevent perinatal transmission by pre-natal prevention education and an available choice of health services and overlook the care needs of women.

The Convention on the Elimination of All Forms of Discrimination against Women obliges States parties to address all aspects of gender-based discrimination in law, policy and practice. States are also required to take appropriate measures to modify social and cultural patterns which are based on ideas of superiority/inferiority and stereotyped roles for men and women. The Committee on the Elimination of Discrimination against Women (CEDAW) which monitors the Convention has underscored the link between women's reproductive role, their subordinate social position and their increased vulnerability to HIV infection. (13)

### 3. Human rights of children

The rights of children are protected by all international human rights instruments and in particular under the Convention on the Rights of the Child, which establishes an international definition of the child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (art. 1). The Convention reaffirms that children are entitled to many of the rights that protect adults (e.g. the rights to life, non-discrimination, integrity of the person, liberty and security, privacy, asylum, expression, association and assembly, education and health), in addition to particular rights for children established by the Convention.

Many of these rights are relevant to HIV/AIDS prevention, care and support for children, such as freedom from trafficking, prostitution, sexual exploitation and sexual abuse since sexual violence against children, among other things, increases their vulnerability to HIV/AIDS. The freedom to seek, receive and impart information and ideas of all kinds and the right to education provide children with the right to give and receive all HIV-related information they need to avoid infection and to cope with their status, if infected. The right to special protection and assistance if deprived of his or her family environment, including alternative care and protection in adoption, in particular protects children if they are orphaned by HIV/AIDS. The right of disabled children to a full and decent life and to special care and the rights to abolition of traditional practices which are prejudicial to the health of children, such as early marriage, female genital mutilation, denial of equal sustenance and inheritance for girls are also highly relevant in the context of HIV/AIDS. Under the Convention, the right to non-discrimination and privacy for children living with HIV/AIDS and

finally the rights of children to be actors in their own development and to express opinions and have them taken into account in making decisions about their lives should empower children to be involved in the design and implementation of HIV-related programmes for children.

#### 4. Right to marry and found a family and protection of the family

The right to marry and to found a family encompasses the right of "men and women of full age, without any limitation due to race, nationality or religion, ... to marry and found a family", to be "entitled to equal rights as to marriage, during marriage and at its dissolution" and to protection by society and the State of the family as "the natural and fundamental group unit of society". (14) Therefore, it is clear that the right of people living with HIV/AIDS is infringed by mandatory pre-marital testing and/or the requirement of "AIDS-free certificates" as a precondition for the grant of marriage licences under State laws. (15) Secondly, forced abortions or sterilization of women living with HIV violates the human right to found a family, as well the right to liberty and integrity of the person. Women should be provided with accurate information about the risk of perinatal transmission to support them in making voluntary, informed choices about reproduction. (16)

Thirdly, measures to ensure the equal rights of women within the family are necessary to enable women to negotiate safe sex with their husbands/partners or be able to leave the relationship if they cannot assert their rights (see also Human rights of women above). Finally, the recognition of the family as the fundamental unit of society is undermined by policies which have the effect of denying family unity. In the case of migrants, many States do not allow migrants to be accompanied by family members, and the resulting isolation can increase vulnerability to HIV infection. In the case of refugees, mandatory testing as a precondition of asylum can result in HIV-positive family members being denied asylum while the rest of the family is granted asylum.

#### 5. Right to privacy

Article 17 of the International Covenant on Civil and Political Rights provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". The right to privacy encompasses obligations to respect physical privacy, including the obligation to seek informed consent to HIV testing and privacy of information, including the need to respect confidentiality of all information relating to a person's HIV status.

The individual's interest in his/her privacy is particularly compelling in the context of HIV/AIDS, firstly, because of the invasive character of a mandatory HIV test and, secondly, because of the stigma and discrimination attached to the loss of privacy and confidentiality if HIV status is disclosed. The community has an interest in maintaining privacy so that people will feel safe and comfortable in using public health measures, such as HIV/AIDS prevention and care services. The interest in public health does not justify mandatory HIV testing or registration, except in case of blood/organ/tissue donations where the human product, rather than the person, is tested before use on another person. All information on HIV sero-status obtained during the testing of donated blood or tissue must also be kept strictly confidential.

The duty of States to protect the right to privacy, therefore, includes the obligation to guarantee that adequate safeguards are in place to ensure that no testing occurs without informed consent, that confidentiality is protected, particularly in health and social welfare settings, and that information on HIV status is not disclosed to third parties without the consent of the individual. In this context, States must also ensure that HIV-related personal information is protected in the reporting and compilation of epidemiological data and that individuals are protected from arbitrary interference with their privacy in the context of media investigation and reporting.

In those societies and cultures where traditions place greater emphasis on the community, patients may more readily authorize the sharing of confidential information with their family or community. In such circumstances, disclosure to the family or community may be for the benefit of the person concerned and such shared confidentiality may not breach the duty to maintain confidentiality.

The Human Rights Committee has found that the right to privacy under article 17 of the International Covenant on Civil and Political Rights is violated by laws which criminalize private homosexual acts

between consenting adults. The Committee noted that "... the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS ... by driving underground many of the people at risk of infection ... [it] would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention". (17)

The Committee also noted that the term "sex" in article 26 of the Covenant which prohibits discrimination on various grounds includes "sexual orientation". In many countries, there exist laws which render criminal particular sexual relationships or acts between consenting adults, such as adultery, fornication, oral sex and sodomy. Such criminalization not only interferes with the right to privacy but it also impedes HIV/AIDS education and prevention work.

#### 6. Right to enjoy the benefits of scientific progress and its applications

The right to enjoy the benefits of scientific progress and its applications is important in the context of HIV/AIDS in view of the rapid and continuing advances regarding testing, treatment therapies and the development of a vaccine. More basic scientific advances which are relevant to HIV/AIDS concern the safety of the blood supply from HIV infection and the use of universal precautions which prevent the transmission of HIV in various settings, including health care. In this connection, however, developing countries experience severe resource constraints which limit not only the availability of such scientific benefits but also the availability of basic pain prophylaxis and antibiotics for the treatment of HIV-related conditions. Furthermore, disadvantaged and/or marginalized groups within societies may have no or limited access to available HIV-related treatments or to participation in clinical and vaccine development trials. Of deep concern is the need to share equitably among States and among all groups within States basic drugs and treatment, as well as the more expensive and complicated treatment therapies, where possible.

#### 7. Right to liberty of movement

The right to liberty of movement encompasses the rights of everyone lawfully within a territory of a State to liberty of movement within that State and the freedom to choose his/her residence, as well as the rights of nationals to enter and leave their own country. Similarly, an alien lawfully within a State can only be expelled by a legal decision with due process protections.

There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status. According to current international health regulations, the only disease which requires a certificate for international travel is yellow fever. (18) Therefore, any restrictions on these rights based on suspected or real HIV status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public health concerns.

Where States prohibit people living with HIV/AIDS from longer-term residency due to concerns about economic costs, States should not single out HIV/AIDS, as opposed to comparable conditions, for such treatment and should establish that such costs would indeed be incurred in the case of the individual alien seeking residency. In considering entry applications, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic considerations.

#### 8. Right to seek and enjoy asylum

Everyone has the right to seek and enjoy in other countries asylum from persecution. Under the 1951 Convention relating to the Status of Refugees and under customary international law, States cannot, in accordance with the principle of non-refoulement, return a refugee to a country where she or he faces persecution. Thus, States may not return a refugee to persecution on the basis of his or her HIV status. Furthermore, where the treatment of people living with HIV/AIDS can be said to amount to persecution, it can provide a basis for qualifying for refugee status.

The United Nations High Commissioner for Refugees issued policy guidelines in March 1988 which state that refugees and asylum seekers should not be targeted for special measures regarding HIV infection and that there is no justification for screening being used to exclude HIV-positive individuals from being granted asylum. (19)

The Human Rights Committee has confirmed that the right to equal protection of the law prohibits discrimination in law or in practice in any fields regulated and protected by public authorities. (20) These would include travel regulations, entry requirements, immigration and asylum procedures. Therefore, although there is no right of aliens to enter a foreign country or to be granted asylum in any particular country, discrimination on the grounds of HIV-status in the context of travel regulations, entry requirements, immigration and asylum procedures would violate the right to equality before the law.

#### 9. Right to liberty and security of person

Article 9 of the International Covenant on Civil and Political Rights provides that "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are prescribed by law".

The right to liberty and security of the person should, therefore, never be arbitrarily interfered with based simply on HIV status by using measures such as quarantine, detention in special colonies, or isolation. There is no public health justification for such deprivation of liberty. Indeed, it has been shown that public health interests are served by integrating people living with HIV/AIDS within communities and benefiting from their participation in economic and public life.

In exceptional cases involving objective judgements concerning deliberate and dangerous behaviour, restrictions on liberty may be imposed. Such exceptional cases should be handled under ordinary provisions of public health, or criminal laws, with appropriate due process protection.

Compulsory HIV testing can constitute a deprivation of liberty and a violation of the right to security of person. This coercive measure is often utilized with regard to groups least able to protect themselves because they are within the ambit of government institutions or the criminal law, e.g. soldiers, prisoners, sex workers, injecting drug users and men who have sex with men. There is no public health justification for such compulsory HIV testing. Respect for the right to physical integrity requires that testing be voluntary and based on informed consent.

#### 10. Right to education

Article 26 of the Universal Declaration of Human Rights states in part that "Everyone has the right to education. ... Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship ...". This right includes three broad components which apply in the context of HIV/AIDS. Firstly, both children and adults have the right to receive HIV-related education, particularly regarding prevention and care. Access to education concerning HIV/AIDS is an essential life-saving component of effective prevention and care programmes. It is the State's obligation to ensure, in every cultural and religious tradition, that appropriate means are found so that effective HIV/AIDS information is included in educational programmes inside and outside schools. The provision of education and information to children should not be considered to promote early sexual experimentation; rather, as studies indicate, it delays sexual activity. (21)

Secondly, States should ensure that both children and adults living with HIV/AIDS are not discriminatorily denied access to education, including access to schools, universities, scholarships and international education or subject to restrictions because of their HIV status. There is no public health rationale for such measures since there is no risk of transmitting HIV casually in educational settings. Thirdly, States should, through education, promote understanding, respect, tolerance and non-discrimination in relation to persons living with HIV/AIDS.

#### 11. Freedom of expression and information

Article 19 of the International Covenant on Civil and Political Rights states in part that "Everyone shall have the right to hold opinions without interference. ... Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds ...". This right, therefore, includes the right to seek, receive and impart HIV-related prevention and care information. Such educational material which may necessarily involve detailed information about transmission risks and may be targeted to groups engaging in illegal behaviour, such as injecting drug use and homosexual

behaviour, where applicable, should not be wrongfully subject to censorship or obscenity laws or laws making those imparting the information liable for "aiding and abetting" criminal offences. States are obliged to ensure that appropriate and effective information on methods to prevent HIV transmission is developed and disseminated for use in different multicultural contexts and religious traditions. The media should be respectful of human rights and dignity, specifically the right to privacy, and use appropriate language when reporting on HIV/AIDS. Reporting on HIV/AIDS by media should be accurate, factual, sensitive, and should avoid stereotyping and stigmatization.

## 12. Freedom of assembly and association

Article 20 of the Universal Declaration of Human Rights provides that "Everyone has the right to freedom of peaceful assembly and association". This right has been frequently denied to non-governmental organizations working in the field of human rights, AIDS service organizations (ASOs) and community-based organizations (CBOs), with applications for registration being refused as a result of their perceived criticism of Governments or of the focus of some of their activities, e.g. sex work. In general, non-governmental organizations and their members involved in the field of human rights should enjoy the rights and freedoms recognized in human rights instruments and the protection of national law. In the context of HIV/AIDS, the freedom of assembly and association with others is essential to the formation of HIV-related advocacy, lobby and self-help groups to represent interests and meet the needs of various groups affected by HIV/AIDS, including PLHAs. Public health and an effective response to HIV/AIDS are undermined by obstructing interaction and dialogue with and among such groups, other social actors, civil society and Government. Furthermore, persons living with HIV/AIDS should be protected against direct or indirect discrimination based on HIV status in their admission to organizations of employers or trade unions, continuation as members and participation in their activities, in conformity with ILO instruments on freedom of association and collective bargaining. At the same time, workers' and employers' organizations can be important factors in raising awareness on issues connected with HIV/AIDS and in dealing with its consequences in the workplace.

### 13. Right to participation in political and cultural life

Realization of the right to take part in the conduct of public affairs, (22) as well as in cultural life, (23) is essential to guarantee participation by those most affected by HIV/AIDS in the development and implementation of HIV-related policies and programmes. These human rights are reinforced by the principles of participatory democracy, which assumes the involvement of PLHAs and their families, women, children and groups vulnerable to HIV/AIDS in designing and implementing programmes that will be most effective by being tailored to the specific needs of these groups. It is essential that PLHAs remain fully integrated into political, economic, social and cultural aspects of community life. People with HIV/AIDS have the right to their cultural identity and to various forms of creativity, both as a means of artistic expression and as a therapeutic activity. Increasing recognition has been given to the expression of creativity as a popular medium for imparting HIV/AIDS information, combating intolerance, and as a therapeutic form of solidarity.

### 14. Right to the highest attainable standard of physical and mental health

The right to the highest attainable standard of physical and mental health comprises, inter alia, "the prevention, treatment and control of epidemic ... diseases" and "the creation of conditions which would assure to all medical service and medical attention in the event of sickness". (24) In order to meet these obligations in the context of HIV/AIDS, States should ensure the provision of appropriate HIV-related information, education and support, including access to services for sexually transmitted diseases, to the means of prevention (such as condoms and clean injection equipment) and to voluntary and confidential testing with pre- and post-test counselling, in order to enable individuals to protect themselves and others from infection. States should also ensure a safe blood supply and implementation of "universal precautions" to prevent transmission in settings such as hospitals, doctors' offices, dental practices and acupuncture clinics, as well as informal settings, such as during home births. States should also ensure access to adequate treatment and drugs, within the overall context of their public health policies, so that people living with HIV/AIDS can live as long and successfully as possible. PLHAs should also have access to clinical trials and should be free to choose amongst all available drugs and therapies, including alternative therapies.