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EXECUTIVE OFFICE
OF THE SECRETARY-GENERAL

UNAIDS

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

UNDP
Empowered lives.
Resilient nations.

14 October 2013

Dear Secretary-General,

Last year, the landmark report of the Global Commission on HIV and the Law (herein referred to as the Commission) concluded that laws grounded in human rights and informed by public health evidence not only protect health and dignity, but also are essential to an effective AIDS response. Undoubtedly such laws would also contribute significantly to achieving your vision of a life of dignity for all, as set out in your latest report on the Millennium Development Goals and the Post-2015 Development Agenda.

Based on an analysis of issues which could transform the trajectory of HIV epidemics, the Commission, convened by UNDP, on behalf of the Joint UN Programme on HIV/AIDS, chose to examine issues of intellectual property and treatment access. Today, with a global HIV treatment gap of sixteen million and the growing chorus of voices calling for universal health coverage, these issues remain critical beyond HIV; for example, for treatment of other diseases such as Tuberculosis and Hepatitis C which also continue to affect millions of people across the globe adversely. Evidence shows that lack of access to affordable medicines, a major component of health care, can push people back into poverty, negating the progress which has been made to lift people from poverty and improve development outcomes.

Based on an analysis of the relationship between legal responses, human rights, and HIV, the Commission concluded that current international intellectual property laws are a significant barrier to treatment access and, in consequence, the right to health, including the right to medicines. The Commission concluded that the international intellectual property regime which has been in place since 1994, developed under the World Trade Organization's Agreement's on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and outside the United Nations system and international human rights, has proven to be a barrier in making life-saving medicines accessible to poor people the world over. Given the importance of essential medicines to the achievement of health related and wider development goals, including the eradication of poverty, this failure is one of the principal reasons why many countries have not achieved more progress on poverty and health-related MDGs as illustrated by several reports including the recently released 2013 MDG Gap report. A revised intellectual property regime for pharmaceutical products – one which is more aligned with international human rights, including health-related rights, and provides alternative mechanisms to incentivise innovation and protect the justifiable rights of inventors – holds enormous potential for eradicating poverty, reducing health inequities, and improving global health and sustainable development more broadly.

His Excellency
Mr. Ban Ki-moon
Secretary-General of the United Nations

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We request your leadership and support to advance the recommendations of the Commission, in particular those recommendations related to intellectual property and treatment access. Chief among these is Recommendation 6.1[1] which calls on you to convene a neutral, high-level body to review and assess proposals and recommend a new intellectual property regime for pharmaceutical products that is consistent with international human rights and public health needs.

On 4-5 September 2013, as part of follow up to the Commission's recommendations, UNDP and UNAIDS convened a strategy meeting to assess proposals for taking forward a positive agenda on the intellectual property proposals contained in the report of the Commission. Participants included former Commissioners Michael Kirby, JVR Prasada Rao who is currently serving as your Envoy for AIDS in Asia and the Pacific, and Jon Ungphakorn; as well as your UN Special Envoys for HIV/AIDS, Michel Kazatchkine and Edward Greene. Government representatives from South Africa, Ecuador, and Nigeria, as well as key academic and civil society experts from low, middle - and high-income countries also took part in the discussions.

Participants agreed that the current discussions on the post-2015 development agenda present us with an important and unique opportunity to redesign the framework for pharmaceutical patents so that it is able to better serve the health needs of individuals and promote their rights, especially for those living in low- and middle-income countries. Like the Commission, participants agreed that instigating a panel under your purview, as suggested by Recommendation 6.1, was the best way to achieve this goal. Should you accept our request to convene the high-level body, UNDP and the UNAIDS Secretariat would be happy to offer support in the design of a terms of reference, and in performing the functions of Secretariat.

The following former Commissioners of the Global Commission on HIV and the Law have endorsed this letter: Ana Helena Chacón, Charles Chauvel, Shereen El Feki, Bience Gawanas, Carol Kidu, Michael Kirby, JVR Prasada Rao, Barbara Lee, Stephen Lewis, Sylvia Tamale and Jon Ungphakorn, as have UN Special Envoys on HIV/AIDS, Edward Green, Michel Kazatchkine and JVR Prasada Rao. We will also be reaching out to the World Health Organisation to seek their participation in this critical initiative. We thank you for your kind consideration and look forward to your response.

With best regards,

Helen Clark
Administrator, UNDP

Michel Sidibé
Executive Director, UNAIDS

Navi Pillay
High Commissioner, OHCHR

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[1] *The UN Secretary General must convene a neutral, high-level body to review and assess proposals and recommend a new intellectual property regime for pharmaceutical products. Such a regime should be consistent with international human rights law and public health requirements, while safeguarding the justifiable rights of inventors. Such a body should include representation from the High Commissioner on Human Rights, WHO, WTO, UNDP, UNAIDS and WIPO, as well as the Special Rapporteur on the Right to Health, key technical agencies and experts, and private sector and civil society representatives, including people living with HIV. (Global Commission on HIV and the Law: Risks, Rights and Health, July 2012. Accessed at www.hivlawcommission.org)*

EXECUTIVE SUMMARY

GLOBAL COMMISSION ON

HIV and the LAW

RISKS, RIGHTS & HEALTH

JULY 2012

ABOUT THE GLOBAL COMMISSION ON HIV AND THE LAW

The Global Commission on HIV and the Law consisted of fourteen distinguished individuals who advocate on issues of HIV, public health, law and development. Fernando Henrique Cardoso, former president of Brazil, chaired the Commission.

The Commission's unique convening power allowed it to focus on high-impact issues of HIV and the law, which have important ramifications for global health and development. The Commission advocated for evidence and human rights based legal environments for effective and efficient HIV responses.

The life experiences of the Commissioners gave them a formidable ability to access a wide cross-section of society. This means they are well placed to influence change on complex issues that require the engagement of multiple stakeholders across a range of sectors.

Fernando Henrique Cardoso
(Brazil)

Ana Helena Chacón-Echeverria
(Costa-Rica)

Charles Chauvel
(New Zealand)

Shereen El Feki
(Egypt)

Bience Gawanas
(Namibia)

Dame Carol Kidu
(Papua New Guinea)

Michael Kirby
(Australia)

Barbara Lee
(United States)

Stephen Lewis
(Canada)

Festus Gontebanye Mogae
(Botswana)

JVR Prasada Rao
(India)

Sylvia Tamale
(Uganda)

Jon Ungphakorn
(Thailand)

Miriam K. Were
(Kenya)

ABOUT THE COMMISSION'S REPORT

"HIV and the Law: Risks, Rights & Health" is the Commission's flagship publication. Released in July 2012, the report presents public health, human rights and legal analysis and makes recommendations for law and policy makers, civil society, development partners and private sector actors involved in crafting a sustainable global response to HIV.

PREFACE

The end of the global AIDS epidemic is within our reach. This will only be possible if science and action are accompanied by a tangible commitment to respecting human dignity and ending injustice.

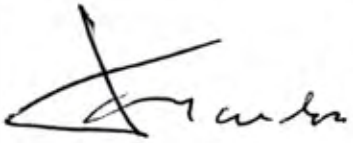
Law prohibits or permits specific behaviours, and in so doing, it shapes politics, economics and society. The law can be a human good that makes a material difference in people's lives. It is therefore not surprising that law has the power to bridge the gap between vulnerability and resilience to HIV.

We came together as a group of individuals from diverse backgrounds, experiences and continents to examine the role of the law in effective HIV responses. What we share is our abiding commitment to public health and social justice. We have listened with humility to hundreds of accounts describing the effects of law on HIV. In many instances, we have been overwhelmed by how archaic, insensitive laws are violating human rights, challenging rational public health responses and eroding social fabric. At other times, we have been moved by those who demonstrate courage and conviction to protect those most vulnerable in our societies.

Many would say that the law can be complex and challenging and is best left alone. Our experience during this Commission has shown us a very different perspective. We have been encouraged by how frank and constructive dialogue on controversial issues can sometimes quickly lead to progressive law reform, the effective defence of legislation or better enforcement of existing laws. Even in environments where formal legal change is a slow and arduous process, we have witnessed countries taking action to strengthen access to justice and challenge stigma and discrimination.

As we listened and learned over the past eighteen months, many of us found our perspectives and opinions changing on a range of complex issues. Ultimately, we chose to be guided in our final recommendations by the courage and humanity of those who have died of AIDS and the thirty four million strong who live on with HIV.

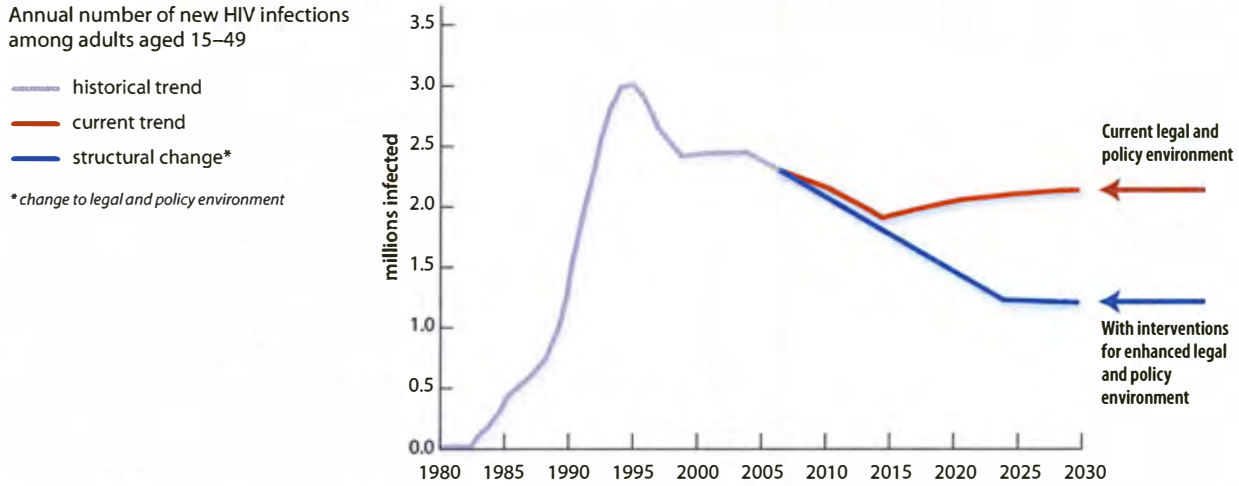
This report presents persuasive evidence and recommendations that can save lives, save money and help end the AIDS epidemic. The recommendations appeal to what is common to all our cultures and communities—the innate humanity of recognising and respecting the inherent worth and dignity of all individuals. This report may make a great many people uncomfortable—hopefully uncomfortable enough to take action. Undoubtedly, different countries will prioritise different recommendations. Each country needs to develop its own road map for reform, depending on its legal and political environment. Nevertheless, we are confident that all of the recommendations are relevant in every country of the world, given that the drivers of the HIV epidemic exist all over the world. The time has come to act on these recommendations. We cannot continue to let people suffer and die because of inequality, ignorance, intolerance and indifference. The cost of inaction is simply too high.



Fernando Henrique Cardoso
Chair, Global Commission on HIV and the Law

EXECUTIVE SUMMARY

WHY THE LAW MATTERS



Source: Results for Development Institute, Costs & Choices: Financing the Long-Term Fight Against AIDS, An aids2031 Project, 2010.

In just three decades, over 30 million people have died of AIDS, and 34 million more have been infected with HIV. The HIV epidemic has become one of the greatest public health challenges of our time. It is also a crisis of law, human rights and social justice. The good news is that we now have all the evidence and tools we need to radically slow new HIV infections and stop HIV-related deaths. Paradoxically, this comes at a time when bad laws and other political obstacles are standing in the way of success.

34 million people are living with HIV, 7,400 are newly infected daily and 1.8 million died in 2010 alone. The legal environment—laws, enforcement and justice systems—has immense potential to better the lives of HIV-positive people and to help turn the crisis around. International law and treaties that protect equality of access to health care and prohibit discrimination—including that based on health or legal status—underpin the salutary power of national laws.

But nations have squandered the potential of the legal system. Worse, punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fueling the epidemic. These legal practices create and punish vulnerability. They promote risky behaviour, hinder people from accessing prevention tools and treatment, and exacerbate the stigma and social inequalities that make people more vulnerable to HIV infection and illness. HIV-positive people—be they parents or spouses, sex workers or health workers, lovers or assailants—interact intimately with others, who in turn interact with others in ever-larger circles, from the community to the globe. From public health to national wealth, social solidarity to equality and justice, HIV affects everyone. The prevention, treatment and care of HIV—and the protection and promotion of the human rights of those who live with it—are everyone's responsibility.

The Global Commission on HIV and the Law undertook 18 months of extensive research, consultation, analysis and deliberation. Its sources included the testimony of more than 700 people most affected by HIV-related legal environments from 140 countries, in addition to expert submissions and the large body of scholarship on HIV, health and the law.

The Commission's findings offer cause for both distress and hope for people living with or at risk for HIV. In June 2011, 192 countries committed to reviewing legislation and creating enabling legal and social environments that support effective and efficient HIV responses. The Commission's recommendations offer guidance to governments and international bodies in shaping laws and legal practices that are science based, pragmatic, humane and just. The findings and recommendations also offer advocacy tools for people living with HIV, civil society, and communities affected by HIV. The recommendations take into account the fact that many laws exist for purposes beyond public health, such as the maintenance of order, public safety and the regulation of trade. But they place the highest priority on creating legal environments that defend and promote internationally recognised human rights and legal norms.

Among the Commission's findings:

- 123 countries have legislation to outlaw discrimination based on HIV; 112 legally protect at least some populations based on their vulnerability to HIV. But these laws are often ignored, laxly enforced or aggressively flouted.

- In over 60 countries it is a crime to expose another person to HIV or to transmit it, especially through sex. At least 600 individuals living with HIV in 24 countries have been convicted under HIV-specific or general criminal laws (due to underreporting, these estimates are conservative). Such laws do not increase safer sex practices. Instead, they discourage people from getting tested or treated, in fear of being prosecuted for passing HIV to lovers or children.

- Women and girls make up half of the global population of people living with HIV. Laws and legally condoned customs—from genital mutilation to denial of property rights—produce profound gender inequality; domestic violence also robs women and girls of personal power. These factors undermine women's and girls' ability to protect themselves from HIV infection and cope with its consequences.

- Where sex education, harm reduction and comprehensive reproductive and HIV services are accessible to youth, young people's rates of HIV and other sexually transmitted infections (STIs) drop. These interventions are rare, however, and in both developed and developing nations, the denial of the realities of young people's lives is reflected in the high physical, emotional and social toll of HIV among the young.

- In many countries, the law (either on the books or on the streets) dehumanises many of those at highest risk for HIV: sex workers, transgender people, men who have sex with men (MSM), people who use drugs, prisoners and migrants. Rather than providing protection, the law renders these "key populations" all the more vulnerable to HIV. Contradictory to international human rights standards, 78 countries—particularly governments influenced by conservative interpretations of religion—make same-sex activity a criminal offence, with penalties ranging from whipping to execution. Similarly, laws prohibiting—or interpreted by police or courts as prohibiting—gender nonconformity, defined vaguely and broadly, are often cruelly enforced. The criminalisation of sex work, drug use and harm reduction measures create climates in which civilian and police violence is rife and legal redress for victims impossible. Fear of arrest drives key populations underground, away from HIV and harm reduction programmes. Incarceration and compulsory detention exposes detainees to sexual assault and unsafe injection practices, while condoms are contraband and harm reduction measures (including antiretroviral medicines) are denied.

- A growing body of international trade law and the over-reach of intellectual property (IP) protections are impeding the production and distribution of low-cost generic drugs. IP protection is supposed to provide an incentive for innovation but experience has shown that the current laws are failing to promote innovation that serves the medical needs of the poor. The fallout from these regulations—in particular the TRIPS

framework—has exposed the central role of excessive IP protections in exacerbating the lack of access to HIV treatment and other essential medicines. The situation is most dire in low- and middle-income countries but reverberates through high-income countries as well. Provisions allowing some low- and middle-income countries exceptions to and relaxations of these rules could help alleviate the crisis, but pressure against their use is substantial. A small number of countries have been able to take advantage of the few international legal flexibilities that exist.

The Commission has found reason for hope. There are instances where legal and justice systems have played constructive roles in responding to HIV, by respecting, protecting and fulfilling human rights. To some such an approach may seem a paradox—the AIDS paradox.[a] But compelling evidence shows that it is the way to reduce the toll of HIV.

- Where the police cooperate with community workers, condom use can increase and violence and HIV infection among sex workers can decrease. Where governments promulgate harm reduction, such as clean needle distribution programmes and safe injection sites, HIV infection rates among people who use drugs can drop significantly.

- Effective legal aid can make justice and equality a reality for people living with HIV, and this can contribute to better health outcomes. Advocates can creatively use traditional law in progressive ways to promote women's rights and health. Court actions and legislative initiatives, informed by fairness and pragmatism, can help nations shrug off the yoke of misconceived criminalisation, introduce gender-sensitive sexual assault law and recognise the sexual autonomy of young people.

- Despite international pressures to prioritise trade over public health, some governments and civil society groups are using the law to ensure access to affordable medicines, while exploring new incentives for medical research and development.

These successes can be—and need to be—expanded. It will take money and will. Donors, whose giving has flagged, must step up and reverse this trend, especially if the latest advances in science and in prevention programming are to benefit those in need. Countries must honour international human rights and national legal obligations. Where laws do not enhance human well-being and where laws do not respond to contemporary realities, they must be repealed and replaced by those that do. For justice and dignity, human rights and human life, the world can afford no less.

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations, the Commission forcefully calls for governments, civil society and international bodies to:

- Outlaw all forms of discrimination and violence directed against those who are vulnerable to or living with HIV or are perceived to be HIV-positive. Ensure that existing human rights commitments and constitutional guarantees are enforced.

- Repeal punitive laws and enact laws that facilitate and enable effective responses to HIV prevention, care and treatment services for all who need them. Enact no laws that

[a] According to The Hon. Michael Kirby, the AIDS paradox can be described as follows: "It is a paradox, one of the most effective laws we can offer to combat the spread of HIV is the protection of persons living with HIV, and those about them, from discrimination. This is a paradox because the community expects laws to protect the uninfected from the infected. Yet, at least at this stage of this epidemic, we must protect the infected too. We must do so because of reasons of basic human rights. But if they do not convince, we must do so for the sake of the whole community which has a common cause in the containment of the spread of HIV."

explicitly criminalise HIV transmission, exposure or non-disclosure of HIV status, which are counterproductive.

- Work with the guardians of customary and religious law to promote traditions and religious practice that promote rights and acceptance of diversity and that protect privacy.

- Decriminalise private and consensual adult sexual behaviours, including same-sex sexual acts and voluntary sex work.

- Prosecute the perpetrators of sexual violence, including marital rape and rape related to conflict, whether perpetrated against females, males, or transgender people.

- Abolish all mandatory HIV-related registration, testing, and forced treatment regimens. Facilitate access to sexual and reproductive health services and stop forced abortion and coerced sterilisation of HIV-positive women and girls.

- Reform approaches towards drug use. Rather than punishing people who use drugs but do no harm to others, governments must offer them access to effective HIV and health services, including harm reduction programmes and voluntary, evidence-based treatment for drug dependence.

- Enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work.

- Ensure that the enforcement of laws against human trafficking is carefully targeted to punish those who use force, dishonesty or coercion to procure people into commercial sex, or who abuse migrant sex workers through debt bondage, violence or deprivation of liberty. Laws against human trafficking must be used to prohibit sexual exploitation, but they must not be used against adults involved in consensual sex work.

- In matters relating to HIV and the law, offer the same standard of protection to migrants, visitors and residents who are not citizens as is extended to citizens. Restrictions that prohibit people living with HIV from entering a country and/or regulations that mandate HIV tests for foreigners within a country should be repealed.

- Enforce a legal framework that ensures social protection for children living with and affected by HIV and AIDS. Laws must protect guardianship, property and inheritance rights, and access to age-appropriate, comprehensive sex education, health and reproductive services.

- Develop an effective IP regime for pharmaceutical products. Such a regime must be consistent with international human rights law and public health needs, while safeguarding the justifiable rights of inventors.

The Commission forcefully calls for a renewed and vigorous international collaboration in response to HIV. It calls on donors, civil society and the UN to hold governments accountable to their human rights commitments. It urges groups outside government to develop and implement humane, workable HIV-related policies and practices and to fund action on law reform, law enforcement and access to justice. Such efforts should include educating people about their rights and the law, preventing violence as well as challenging the stigma and discrimination within families, communities and workplaces that continue to feed a worldwide epidemic that should have ended long ago.

SUMMARY RECOMMENDATIONS

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations:

1. DISCRIMINATION

1.1 Countries must ensure that their national HIV policies, strategies, plans and programmes include effective, targeted action to support enabling legal environments, with attention to formal law, law enforcement and access to justice. Every country must repeal punitive laws and enact protective laws to protect and promote human rights, improve delivery of and access to HIV prevention and treatment, and increase the cost-effectiveness of these efforts.

1.2 Where they have not already done so, countries must explicitly prohibit discrimination on the basis of actual or perceived HIV status and ensure that existing human rights commitments and constitutional guarantees are enforced. Countries must also ensure that laws and regulations prohibiting discrimination and ensuring participation and the provision of information and health services protect people living with HIV, other key populations and people at risk of HIV.

1.3 Donors, civil society and private sector actors, and the UN should hold governments accountable to their human rights commitments. Groups outside government should develop and implement rights-based HIV-related policies and practices and fund action on HIV-related law reform, law enforcement and access to justice. Such efforts should include educating people about their rights and the law, as well as challenging stigma and discrimination within families, communities and workplaces.

2. CRIMINALISATION OF HIV TRANSMISSION, EXPOSURE AND NON-DISCLOSURE

2.1 Countries must not enact laws that explicitly criminalise HIV transmission, HIV exposure or failure to disclose HIV status. Where such laws exist, they are counterproductive and must be repealed. The provisions of model codes that have been advanced to support the enactment of such laws should be withdrawn and amended to conform to these recommendations.

2.2 Law enforcement authorities must not prosecute people in cases of HIV non-disclosure or exposure where no intentional or malicious HIV transmission has been proven to take place. Invoking criminal laws in cases of adult private consensual sexual activity is disproportionate and counterproductive to enhancing public health.

2.3 Countries must amend or repeal any law that explicitly or effectively criminalises vertical transmission of HIV. While the process of review and repeal is under way, governments must place moratoria on enforcement of any such laws.

2.4 Countries may legitimately prosecute HIV transmission that was both actual and intentional, using general criminal law, but such prosecutions should be pursued with care and require a high standard of evidence and proof.

2.5 The convictions of those who have been successfully prosecuted for HIV exposure, non-disclosure and transmission must be reviewed. Such convictions must be set aside or the accused immediately released from prison with pardons or similar actions to ensure that these charges do not remain on criminal or sex offender records.

3. KEY POPULATIONS

3. To ensure an effective, sustainable response to HIV that is consistent with human rights obligations, countries must prohibit police violence against key populations. Countries must also support programmes that reduce stigma and discrimination against key populations and protect their rights.

PEOPLE WHO USE DRUGS

3.1 Countries must reform their approach towards drug use. Rather than punishing people who use drugs who do no harm to others, they must offer them access to effective HIV and health services, including harm reduction and voluntary, evidence-based treatment for drug dependence. Countries must:

3.1.1 Shut down all compulsory drug detention centres for people who use drugs and replace them with evidence-based, voluntary services for treating drug dependence.

3.1.2 Abolish national registries of drug users, mandatory and compulsory HIV testing and forced treatment for people who use drugs.

3.1.3 Repeal punitive conditions such as the United States government's federal ban on funding of needle and syringe exchange programmes that inhibit access to HIV services for people who use drugs.

3.1.4 Decriminalise the possession of drugs for personal use, in recognition that the net impact of such sanctions is often harmful for society.

3.1.5 Take decisive action, in partnership with the UN, to review and reform relevant international laws and bodies in line with the principles outlined above, including the UN international drug control conventions: the Single Convention on Narcotic Drugs (1961); Convention on Psychotropic Substances (1971); the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) and the International Narcotics Control Board.

SEX WORKERS

3.2 Countries must reform their approach towards sex work. Rather than punishing consenting adults involved in sex work, countries must ensure safe working conditions and offer sex workers and their clients access to effective HIV and health services and commodities. Countries must:

3.2.1 Repeal laws that prohibit consenting adults to buy or sell sex, as well as laws that otherwise prohibit commercial sex, such as laws against "immoral" earnings, "living off the earnings" of prostitution and brothel-keeping. Complementary legal measures must be taken to ensure safe working conditions to sex workers.

3.2.2 Take all measures to stop police harassment and violence against sex workers.

3.2.3 Prohibit the mandatory HIV and STI testing of sex workers.

3.2.4 Ensure that the enforcement of anti-human-trafficking laws is carefully targeted to punish those who use force, dishonesty or coercion to procure people into commercial sex, or who abuse migrant sex workers through debt bondage, violence or by deprivation of liberty. Anti-human-trafficking laws must be used to prohibit sexual exploitation and they must not be used against adults involved in consensual sex work.

3.2.5 Enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work.

3.2.6 Ensure that existing civil and administrative offences such as "loitering without purpose", "public nuisance", and "public morality" are not used to penalise sex workers and administrative laws such as "move on" powers are not used to harass sex workers.

3.2.7 Shut down all compulsory detention or "rehabilitation" centers for people involved in sex work or for children who have been sexually exploited. Instead, provide sex workers with evidence-based, voluntary, community empowerment services. Provide sexually exploited children with protection in safe and empowering family settings, selected based on the best interests of the child.

3.2.8 Repeal punitive conditions in official development assistance – such as the United States government's PEPFAR anti-prostitution pledge and its current anti-trafficking regulations – that inhibit sex workers' access to HIV services or their ability to form organisations in their own interests.

3.2.9 Take decisive action to review and reform relevant international law in line with the principles outlined above, including the UN Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women And Children (2000).

MEN WHO HAVE SEX WITH MEN

3.3 Countries must reform their approach towards sexual diversity. Rather than punishing consenting adults involved in same sex activity, countries must offer such people access to effective HIV and health services and commodities. Countries must:

3.3.1 Repeal all laws that criminalise consensual sex between adults of the same sex and/or laws that punish homosexual identity.

3.3.2 Respect existing civil and religious laws and guarantees relating to privacy.

3.3.3 Remove legal, regulatory and administrative barriers to the formation of community organisations by or for gay men, lesbians and/or bisexual people.

3.3.4 Amend anti-discrimination laws expressly to prohibit discrimination based on sexual orientation (as well as gender identity).

3.3.5 Promote effective measures to prevent violence against men who have sex with men.

TRANSGENDER PERSONS

3.4 Countries must reform their approach towards transgender people. Rather than punishing transgender people, countries must offer transgender people access to effective HIV and health services and commodities as well as repealing all laws that criminalise transgender identity or associated behaviours. Countries must:

3.4.1 Respect existing civil and religious laws and guarantees related to the right to privacy.

3.4.2 Repeal all laws that punish cross-dressing.

3.4.3 Remove legal, regulatory or administrative barriers to formation of community organisations by or for transgender people.

3.4.4 Amend national anti-discrimination laws to explicitly prohibit discrimination based on gender identity (as well as sexual orientation).

3.4.5 Ensure transgender people are able to have their affirmed gender recognised in identification documents, without the need for prior medical procedures such as sterilisation, sex reassignment surgery or hormonal therapy.

PRISONERS

3.5.1 Necessary health care is available, including HIV prevention and care services, regardless of laws criminalising same-sex acts or harm reduction. Such care includes provision of condoms, comprehensive harm reduction services, voluntary and evidence-based treatment for drug dependence and ART.

3.5.2 Any treatment offered must satisfy international standards of quality of care in detention settings. Health care services, including those specifically related to drug use and HIV, must be evidence-based, voluntary and offered only where clinically indicated.

MIGRANTS

3.6.1 In matters relating to HIV and the law, countries should offer the same standard of protection to migrants, visitors and residents who are not citizens as they do to their own citizens.

3.6.2 Countries must repeal travel and other restrictions that prohibit people living with HIV from entering a country and/or regulations that mandate HIV tests for foreigners within a country.

3.6.3 Countries must implement regulatory reform to allow for legal registration of migrants with health services and to ensure that migrants can access the same quality of HIV prevention, treatment and care services and commodities that are available to citizens. All HIV testing and STI screening for migrants must be informed and voluntary, and all treatment and prophylaxis for migrants must be ethical and medically indicated.

4. WOMEN

4.1 Countries must act to end all forms of violence against women and girls, including in conflict situations and post-conflict settings. They must:

4.1.1 Enact and enforce specific laws that prohibit domestic violence, rape and other forms of sexual assault, including marital rape and rape related to conflict, whether perpetrated against females, males or transgender persons.

4.1.2 Take judicial or legislative steps to remove any immunity–or interpreted immunity–from prosecution for rape when the perpetrator is a married or unmarried partner.

4.1.3 Fully enforce existing laws meant to protect women and girls from violence, and prosecute perpetrators of violence against women and girls to the full extent of the law.

4.1.4 Formulate and implement comprehensive, fully resourced national strategies to eliminate violence against women and girls, which include robust mechanisms to prevent, investigate and punish violence. Provision of health services, including post-exposure prophylaxis, legal services and social protection for survivors of violence, must be guaranteed.

4.2 Countries must prohibit and governments must take measures to stop the practice of forced abortion and coerced sterilisation of HIV-positive women and girls, as well as all other forms of violence against women and girls in health care settings.

4.3 Countries must remove legal barriers that impede women's access to sexual and reproductive health services. They must ensure that:

4.3.1 Health care workers provide women with full information on sexual and reproductive options and ensure that women can provide informed consent in all matters relating to their health. The law must ensure access to safe contraception and support women in deciding freely whether and when to have children, including the number, spacing and methods of their children's births.

4.3.2 Health care workers are trained on informed consent, confidentiality and non-discrimination.

4.3.3 Accessible complaints and redress mechanisms are available in health care settings.

4.4 Countries must reform property and inheritance laws to mandate that women and men have equal access to property and other economic resources, including credit. They must take measures to ensure that in practice property is divided without gender discrimination upon separation, divorce or death and establish a presumption of spousal co-ownership of family property. Where property and inheritance practices are influenced or determined by religious or customary legal systems, the leaders of these systems must make reforms to protect women, including widows and orphans.

4.5 Countries must ensure that social protection measures recognise and respond to the needs of HIV-positive women and women whose husbands have died of AIDS and that labour laws, social protection and health services respond to the needs of women who take on caregiving roles in HIV-affected households.

4.6 Countries must ensure that laws prohibiting early marriage are enacted and enforced.

4.7 The enforcers of religious and customary laws must prohibit practices that increase HIV risk, such as widow inheritance, "widow cleansing" and female genital mutilation.

5. CHILDREN AND YOUTH

5.1 Countries must enact and enforce laws that:

5.1.1 Ensure that the birth of every child is registered. This is crucial for supporting children's access to essential services. Ensure that their rights are protected and promoted, as per the Convention on the Rights of the Child.

5.1.2 Ensure that every orphaned child is appointed an appropriate adult guardian. This includes provisions for transfer of guardianship of AIDS orphans from deceased parents to adults or older siblings who can ensure their well-being. In selecting a guardian, preference should be given to adults from the biological or extended families. HIV-positive adults who are otherwise in good health should not be prohibited from adopting children.

5.1.3 Support community-based foster care for children orphaned by AIDS as an alternative to institutionalization, when formal adoption is not possible or appropriate.

5.1.4 Ensure HIV-sensitive social protections as required, such as direct cash transfers for affected children and their guardians.

5.1.5 Prohibit discrimination against children living with or affected by HIV, especially in the context of adoption, health and education. Take strict measures to ensure that schools do not bar or expel HIV-positive children or children from families affected by AIDS.

5.2 Countries must enact and enforce laws to ensure that children orphaned by AIDS inherit parental property. Children orphaned by AIDS should inherit regardless of their sex, HIV status or the HIV status of family members. Such enforcement includes:

5.2.1 Collaboration with the enforcers of religious and customary laws to ensure justice for children orphaned by AIDS.

5.2.2 Reconciliation of conflicts between discriminatory customary laws and traditional practices and international human rights standards to ensure compliance with international law.

5.3 Countries must enact and enforce laws ensuring the right of every child, in or out of school, to comprehensive sexual health education, so that they may protect themselves and others from HIV infection or live positively with HIV.

5.4 Sexually active young people must have confidential and independent access to health services so as to protect themselves from HIV. Therefore, countries must reform laws to ensure that the age of consent for autonomous access to HIV and sexual and reproductive health services is equal to or lower than the age of consent for sexual relations. Young people who use drugs must also have legal and safe access to HIV and health services.

6. INTELLECTUAL PROPERTY LAW AND THE GLOBAL FIGHT FOR TREATMENT

6.1 The UN Secretary General must convene a neutral, high-level body to review and assess proposals and recommend a new intellectual property regime for pharmaceutical products. Such a regime should be consistent with international human rights law and public health requirements, while safeguarding the justifiable rights of inventors. Such a body should include representation from the High Commissioner on Human Rights, WHO, WTO, UNDP, UNAIDS and WIPO, as well as the Special Rapporteur on the Right to Health, key technical agencies and experts, and private sector and civil society representatives, including people living with HIV. This re-evaluation, based on human rights, should take into account and build on efforts underway at WHO, such as its Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property and the work of its Consultative Expert Working Group. Pending this review, the WTO must suspend TRIPS as it relates to essential pharmaceutical products for low- and middle-income countries.

6.2 High-income countries, including donors such as the United States, European Union, the European Free Trade Association countries (Iceland, Liechtenstein, Norway and Switzerland) and Japan must immediately stop pressuring low- and middle-income countries to adopt or implement TRIPS-plus measures in trade agreements that impede access to life-saving treatment.

6.2.1 All countries must immediately adopt and observe a global moratorium on the inclusion of any intellectual property provisions in any international treaty that would limit the ability of countries to retain policy options to reduce the cost of HIV-related treatment. Agreements such as the Anti-Counterfeiting Trade Agreement (ACTA) must be reformed; if ACTA is not reformed to exclude such intellectual property provisions, countries should not sign it. All countries must cease unilateral practices to this same, access-limiting end.

6.2.2 High-income countries must stop seeking to impose more stringent, TRIPS-plus intellectual property obligations on developing country governments. High-income countries must also desist from retaliating against countries that resist adopting such TRIPS-plus measures so that they may achieve better access to treatment.

6.3 While the Commission recommends that WTO Members must urgently suspend TRIPS as it relates to essential pharmaceutical products for low and middle income countries, we recognise that such change will not happen overnight. In the interim, even though individual countries may find it difficult to act in the face of political pressure, they should, to the extent possible, incorporate and use TRIPS flexibilities, consistent with safeguards in their own national laws.

6.3.1 Low- and middle-income countries must not be subject to political and legal pressure aimed at preventing them from using TRIPS flexibilities to ensure that infants, children and adolescents living with HIV have equal access to HIV diagnosis and age-appropriate treatment as adults.

6.3.2 It is critical that both countries with significant manufacturing capacity and those reliant on the importation of pharmaceutical products retain the policy space to use TRIPS flexibilities as broadly and simply as they can. Low- and middle-income countries must facilitate collaboration and sharing of technical expertise in pursuing the full use of TRIPS exceptions (for instance, by issuing compulsory licences for ARVs and medicines for co-infections such as hepatitis C). Both importer and exporter countries must adopt straightforward, easy-to-use domestic provisions to facilitate the use of TRIPS flexibilities.

6.3.3 Developing countries should desist from adopting TRIPS-plus provisions including anti-counterfeiting legislation that inaccurately conflates the problem of counterfeit or substandard medicines with generics and thus impedes access to affordable HIV-related treatment.

6.3.4 Countries must proactively use other areas of law and policy such as competition law, price control policy and procurement law which can help increase access to pharmaceutical products.

6.4 The WTO Members must indefinitely extend the exemption for LDCs from the application of TRIPS provisions in the case of pharmaceutical products. The UN and its member states must mobilise adequate resources to support LDCs to retain this policy latitude.

6.5 The August 30, 2003 Decision of the WTO General Council has not proved to be a viable solution for countries with insufficient pharmaceutical manufacturing capacity. It is essential that the system established by that decision be revised or supplemented with a new mechanism, to allow the easier import of pharmaceutical products produced under compulsory licence. WTO Members should desist from ratifying the adoption of the August 30, 2003 Decision as a new Article 31 bis of the TRIPS Agreement, and they must pursue efforts to reform or replace the system.

6.6 TRIPS has failed to encourage and reward the kind of innovation that makes more effective pharmaceutical products available to the poor, including for neglected diseases. Countries must therefore develop, agree and invest in new systems that genuinely serve this purpose, prioritising the most promising approaches including a new pharmaceutical R&D treaty and the promotion of open source discovery.

THE FULL COMMISSION REPORT IS AVAILABLE AT: WWW.HIVLAWCOMMISSION.ORG

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