



WORLD HEALTH ORGANISATION

GLOBAL COMMISSION ON AIDS

GENEVA, 30 MARCH 1989

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The Hon Justice Michael Kirby CMG
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BASIC PROPOSITION

1. The strategies for the containment and ultimate elimination of the spread of HIV virus and AIDS must be designed within the framework of internationally recognised human rights norms. There is no human right to spread a dangerous virus. But the nature of HIV/AIDS, and of national and international reactions to its spread, are such that those who determine policy to meet the challenge must be alert to the particular risks of pressure which will arise to derogate from basic human rights.

2. The reasons for ensuring that WHO strategies comply with basic human rights may be obvious. But they include -

- (a) The international legal norms on human rights merely state fundamental rights of human beings which derive from the very fact of humanness and the entitlement to respect of each human being which that fact necessitates;
- (b) The norms are contained in international treaties, many of which have been developed and promulgated under the authority of the United Nations Organisation (of which WHO is part). The instruments include the U N Charter with its opening recital which is a reaffirmation of

"faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". Also relevant are the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. These and regional statements of human rights have acquired increasing recognition as part of the law of nations. They are binding rules of international law, even if their enforcement and application are sometimes uneven.

- (c) The 41st World Health Assembly (May 1988) urged member states "to protect the human rights and dignity of HIV-infected people and people with AIDS and of members of population groups and to avoid discriminatory action against and stigmatization of them in the provision of services, employment and travel ...".
- (d) If ethical and legal reasons for protecting human rights are insufficient, a strong case exists, based upon pragmatic grounds, that only by strategies which respect human rights can the behaviour modification be achieved which is essential to turning the tide of the AIDS epidemic at this stage.

STATUS OF HUMAN RIGHTS LAW

3. In many countries, basic legal norms of human rights are included in national and subnational constitutions. In some regions of the world, basic human rights are secured in regional treaties such as the European Convention on Human Rights (1953), the American Convention on Human Rights (1978) and the African Charter of Human Rights and Peoples' Rights (1985). For all countries, whether they have ratified these international instruments or not, the International Covenants, which entered into force in 1976, provide statements of rules which are legally binding because they

are now part of international law. Such rules may not be immediately enforceable. There is no international court or police force with powers to pronounce and sanction breaches. But these practical impediments to enforcement do not affect the legally binding nature of the norms. Moreover, a majority of member states of the United Nations submit to investigatory /supervisory organizations established to monitor compliance with human rights norms, e g the U N Human Rights Committee. Some have also submitted to an additional obligation which permits complaint by individuals concerning alleged violations of the basic standards.

4. In some countries international obligations are incorporated as part of domestic law. In most they are not. They require domestic legislation to give them local status as legally enforceable rules. But even in such countries, there is now a growing tendency for judges, in stating and developing local common law or interpreting ambiguous local statutes, to perform their functions with reference to international standards, including those relating to human rights.

5. The World Health Organization, as an organ of the United Nations organization is required to comply with international human rights norms. This obligation is recognised by the World Health Assembly (WHA 41.24). It is supported by the World Summit of Ministers on Health (London, 1988). It has been inherent in the strategy of WHO to date, in tackling HIV/AIDS. The lessons from the derogations from human rights in public health measures and other responses to earlier epidemics in all parts of the world emphasises the importance, in tackling this epidemic, to ensure that national and international policies conform to international law, particularly on human rights. Although this law will occasionally inhibit WHO and member states from adopting strategies which may at first seem attractive and useful, rejecting the inhibition is important -

- (a) It is the ethical and legal duty of WHO and of member states;

- (b) It ensures that abiding basic principles are respected in emergencies, when they are most likely to be ignored, yet when they are most important; and
- (c) Experience to date suggests that far from diminishing the effectiveness of policies to combat AIDS, because the virus tends to be spread primarily by sexual/IV drug use means, oppressive policies which do not respect basic human rights will drive what is typically already private behaviour still further underground. They will make behaviour modification (the principal target in default of a vaccine or a cure) difficult and in many cases impossible. All past experience shows that sexual and drug related activities are not readily susceptible to oppressive, punitive and prohibitory legal responses.

THE GENERAL JUSTIFICATION OF DEROGATIONS

6. International human rights law only permits restrictions upon basic human rights where -

- (a) They are provided by law;
- (b) They are necessary in a democratic society;
- (c) They are needed because of a pressing social need for them;
- (d) The restrictions adopted are proportional to the needs and weighed against the adverse effects on the persons whose rights are restricted and upon the public which has its own interest in the free exercise of the rights concerned;
- (e) The derogation must be for the protection of a legitimate aim of society. One such aim is "the protection of the rights and freedoms of others" and "the protection of public health".

7. These "legitimate aims" do not provide a blanket entitlement to derogate from basic human rights. It must be shown that the derogation is necessary in each case to meet a pressing social need and that the response proposed is

proportional to the risks inherent in derogating from basic human rights. These rules require close attention to the nature of the virus in question, its established modes of transmission and the risks and incidence of transmission. Good laws and policies arise out of good understanding of the relevant scientific data. They do not arise out of hunches, guesswork, indiosyncratic decisions, still less from prejudice, fear and loathing.

8. Thus, a total quarantine of all persons infected with HIV would be grossly disproportional to the risks of further transmission of the virus (except possibly in the case of a person proved to be guilty of repeated deliberate transmission). Similarly, universal testing or even widespread testing of particular groups will be disproportional to the benefits secured thereby. The risks of discriminatory use of the data secured, uncounselled signification of infection, false results with consequent diminution of precautions and diversion of scarce health funds all render such strategies unnecessary to a democratic society, inappropriate to the pressing social need of containing HIV/AIDS and and disproportional to the limited benefits attained.

THE RIGHT TO PRIVACY

9. The International Covenant on Civil and Political Rights (ICCP), Art 17 provides:

"17.1 No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation.

2 Everyone has the right to the protection of the law against such interference or attacks."

10. A number of strategies proposed or adopted in respect

of AIDS would appear to conflict with this basic right. They include mandatory testing for HIV; compulsory registration of suspects; mandatory collection of data on suspects; making HIV or AIDS notifiable diseases; the provision of test results to third parties and the criminalization of behaviour considered likely to spread HIV/AIDS. In each case, it is therefore necessary to consider the issues of necessity, proportionality and legitimacy of the strategy used or proposed. For example, so far as the criminalization (or re-criminalization) of male homosexual conduct or particular sexual acts (e g anal intercourse) are concerned, differing decisions have emanated from different courts considering the application of basic human rights. The Supreme Court of the United States has refused to strike down under that country's Bill of Rights a state statute imposing criminal penalties on anal intercourse and an Army Regulation requiring discharge for proved homosexual orientation. On the other hand the European Court of Human Rights has held that criminal sanctions on homosexuals (whether or not energetically enforced) conflict with respect for private life in a way which cannot be justified consistent with the basic human rights norms. See Dudgeon v United Kingdom and Norris v Ireland.

RIGHT TO LIBERTY AND SECURITY

11. The ICCP contains a guarantee of the "right to liberty and security". (See article 9(1)). The same is true of virtually all international human rights instruments. Deprivations of liberty can be total (e g strict quarantine) or partial (e g to administer compulsory blood tests). Such liberty may only be taken away by law (i e not arbitrarily) and in the circumstances previously mentioned. Only one country (Cuba) has so far adopted a strategy of strict quarantine for HIV infected persons. Other countries have adopted policies of expulsion of persons who are found to be infected. Many have laws providing for compulsory detention of particular AIDS suspects, e g those deliberately and repeatedly spreading the virus indiscriminately. The

derogation from the human rights of persons compulsorily detained because of HIV infection is completely disproportional to the benefits secured thereby. The infection may last indefinitely. On average it may last ten years or more before causing disabilities. The impact on family and economic life of such a strategy is obviously devastating. The risk of the spread of the virus lies in activity not in the existence of the carrier. If the activity can be controlled in a more precisely targeted law directed at the activity, the gross, heavy-handed response directed at the liberty of the individual can be avoided.

FREEDOM OF MOVEMENT

12. The ICCP (Art 12(4)) provides for the right of liberty of movement and freedom to choose a residence in every person lawfully within the territory of a state. It also provides for freedom in everyone to leave any country, including his own. Such freedoms are subject to restrictions "necessary" inter alia "for public health". No one is to be arbitrarily deprived of the right to enter his own country. The rights listed are limited to nationals and persons lawfully within countries. Aliens and stateless persons generally enjoy no such rights under this heading.

13. Some countries have introduced restrictions on the entry and movement of persons with HIV/AIDS. No such restrictions may be placed upon nationals. Those placed upon other persons lawfully within a country must run the gauntlet of necessity, legitimacy and proportionality. They must also be provided by law and not imposed arbitrarily e g by border officials with an unreviewable unstructured discretion. A general blanket restriction on the international movement of HIV infected persons would not appear to be proportional to the risks of their spreading the infection. The right of international travel is now an important attribute of freedom. It is an important contribution to peace. Whilst there is no right to spread an infection internationally (particularly in countries where there is a low incidence of it) the widespread requirement of border checks, health

certificates or post-entry examinations of aliens would seem, in the present state of the epidemic at least, to be disproportional to the benefits secured thereby. AIDS exists in all countries. The imposition of a general requirement of AIDS-free certificates would add enormously to the costs of travel, impede greatly the travel of poorer persons and provide no sure protection because of false positives, the "window period" before antibodies appear and the need for constant retesting at disproportionate cost to the benefit gained.

THE RIGHT TO MARRY AND FOUND A FAMILY

14. Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESC) recognises that the family is the "natural and fundamental group unit of society". It contemplates the recognition of marriage so long as it is "entered into with the free consent of the intending spouses". Other international instruments specifically recognise the right to marry and to found a family (see e g European Convention on Human Rights, art 12). Mandatory pre-marital HIV testing does not derogate from this right. However a prohibition on marriage for persons found positive clearly would. Similarly, laws or practises which forbid women infected with HIV from bearing children would infringe such human rights norms. The question would then arise concerning the necessity, legitimacy and proportionality of such laws and practises.

RIGHT TO WORK

15. The right to gain a living by working freely chosen and accepted by the individual is a common provision of international instruments (see e g ICESC art 6(1)). Pre-employment HIV/AIDS screening derogates from such right. The ILO has condemned it. Having regard to the modes and risks of transmission, a blanket requirement of such screening as a pre-condition to employment would be disproportional to the benefits obtained save possibly in a small number of occupations where there may be a very high risk of spreading infection. It is the dangerous activity

which should be targeted not the occupation.

OTHER RIGHTS

16. There are other human rights which are relevant to policies on AIDS. These include the right to education, the right to social security and assistance and freedom from inhuman or degrading treatment or punishment. There has also developed a jurisprudence around the circumstances which permit a derogation from human rights e g "public emergencies" and "public health". It is important that those who design legislation, strategies and policies on AIDS/HIV should familiarise themselves with the basic rights so secured and the limited circumstances in which derogations from them will be authorised by international law.

CONCLUSIONS

17. The purpose of this paper has been to draw attention to the international legal environment in which national and subnational governments, WHO and the Global Commission on AIDS operate in developing responses to the AIDS epidemic. National and international agencies are not free to adopt policies without any regard at all to international law. International law includes international human rights law. This has now become part of the law of nations. It is a central tenet of the U N system itself. Various provisions of the Charter, the Universal Declaration and International Covenants are relevant to the respect for human rights which must be accorded at the same time as combating HIV/AIDS.

18. Derogations from basic human rights are normally permitted on the ground of "measures necessary for public health". But this does not give a blanket exemption from respect for human right. The derogations must be specifically provided by law, they must not be arbitrary, they must be legitimate, necessary and proportional to the benefits to public health secured thereby. Good laws and policies will therefore be designed with a high degree of precision. They will be targeted at a particular risky activities rather than at people as such. They will also be grounded in a thorough understanding of the nature of the

virus, its modes of transmission and the measures necessary to secure, at critical moments, the behaviour modification that will prevent the spread of the virus. The Global Commission on AIDS should familiarize itself with and accept the framework of international human rights norms. It should do so not simply because it is part of international law and thus binding on WHO. It should do so from an ethical respect of humanness, because of the sad lessons of derogations from human rights in past epidemics and because any strategy which ignores basic human rights norms is almost certain, in HIV/AIDS, to be less successful than a strategy which respects human rights.

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19. This essay is based upon an extended monograph prepared for the British Medical Association Foundation for AIDS by Mr Paul Sieghart. It is entitled "AIDS and Human Rights". It will be published by that Foundation in 1989. It was the last work which Mr Sieghart completed before his death in December 1988. It provides a timely statement of the principles applicable to AIDS and human rights written by a lawyer who had devoted much of his life to the defence of human rights.