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THE UNITED NATIONS

DEVELOPMENT PROGRAMME

GLOBAL COMMISSION ON HIV AND

THE LAW

REPORT OF THE COMMISSION:

JAMAICA.

The Hon. Michael Kirby AC CMG

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THE HON MICHAEL KIRBY AC CMG\*

*SETTING AND CONTEXT*

I pay respects to the United Nations Resident Co-ordinator and UNDP Resident Representative in Jamaica, (Dr Arun Kashyap), the Deputy-Resident Representative, UNDP, (Ms Akiko Fujii), representatives of other United Nations agencies based in Jamaica and of members of civil society, especially of youth.

A week ago, at United Nations Headquarters in New York, the report of the UNDP Global Commission on HIV and the Law was delivered by its Chairman, former President Fernando Henrique Cardoso (Brazil). The report addresses reforms of the law and of practice designed to strengthen the law where it can assist

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\* Formerly, Commissioner of the WHO Global Commission on AIDS (1988-92); President, International Commission of Jurists (1995-8); Member, UNAIDS Reference Group on HIV and Human Rights (2003-); Member, Eminent Persons Group, Commonwealth of Nations (2010-11); Commissioner UNDP Global Commission on HIV and the Law (2010-12); Justice of the High Court of Australia (1996-2009). Personal views.

combating the spread and where it should address adverse consequences of HIV/AIDS: including by removal of law, where this is part of the problem for the attainment of sensible strategies and desirable outcomes.

I am grateful for the opportunity afforded to me by UNDP to visit Jamaica, so soon after the delivery of the Commission's report. I appreciate the warm welcome accorded to me by Chief Justice McCalla and the Judges of Jamaica, in a judicial dialogue held on 15 July 2012. I also appreciate the opportunity provided to me by the University of Technology, Jamaica on 14 July 2012 to give a public lecture, and to answer community questions. The opportunity to brief civil society and the United Nations family on the report of the Commission is certainly to be welcomed.

During my visit to Jamaica, I have received every courtesy from the Minister of Justice (Senator, the Hon. Mark Goulding) and the permanent secretary, Ministry of Health (Dr Jean Dixon, on behalf of the Minister of Health). I approach my visit and my role with modesty and a full appreciation of the fact that the response to HIV/AIDS in Jamaica must arise from informed decisions made by

the people of this country and their leaders. However, to some extent, they can be assisted by international advisors and institutions, in what is, after all, a global predicament affecting humanity everywhere.

At the judicial dialogue, a foundation for strategy was set by the excellent epidemiological and statistical report given by Dr Nicola Skyers, describing the history, course and patterns of the Jamaican HIV epidemic. Her excellent data demonstrated the close inter-relationship between HIV and other serious problems of Jamaica, including poverty, access to food and nutrition, housing, education, illiteracy and the circumstances of various vulnerable minorities and of women.

The Global Commission's report<sup>1</sup>, which is available online, explains the three areas in which recommendations have been made for law reform:

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<sup>1</sup> United Nations Development Programme, *Global Commission on HIV and the Law, Risks, Rights & Health* (July 2012, UNDP New York).

1. Strengthening the law necessary to protect and empower women, children and young persons;
2. Reforming and repealing laws as they affect especially vulnerable populations:
  - a) Drug users;
  - b) Sex workers;
  - c) Men who have sex with men (MSM);
  - d) Transgender persons;
  - e) Prisoners;
  - f) Refugees;
  - g) Persons alleged to have exposed others to the virus;and
3. Enforcing and reforming the exceptions provided in international law for intellectual property protection, engaged by the development of essential healthcare medications, including the TRIPS agreement of WHO and its exceptions and insistence on the legitimacy of access to generic drugs where this is essential, in a grave national health crisis such as that facing many developing countries, especially in Africa and the Caribbean.

I acknowledge the success that has been achieved on Jamaica on several fronts in the HIV epidemic, most especially in addressing vertical transmission of the virus, mother to child. I appreciate the many difficulties and competing priorities facing decision makers in Jamaica as they address HIV and other pressing challenges. I also accept the economic challenges facing Jamaica more generally.<sup>2</sup> The entire world is now exposed to a new and unforeseen crisis in responding to HIV, namely the Global Financial Crisis (GFC) with its serious consequences for the diminution of funds to underwrite the programmes for the provision of cheaper antiretroviral drugs for developing countries in special need.

I also understand that responses to HIV, like any other national problem, must be found in the institutional arrangements and culture of the nation. I appreciate the opportunity to make a few suggestions on steps that should be considered by Jamaica in the light of the report of the UNDP Global Commission, of which I was proud to be part.

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<sup>2</sup> “Jamaica at 50: On your marks, get set... Oh” *The Economist*, July 21, 2012, 31 (Vol. 404, number 8794).

## *UNITED NATIONS UNINIMITY*

From my own past experience with various agencies and institutions of the international community, and particularly the United Nations, I am aware of the challenges of rivalry and territorialism and the diversity of priorities that can sometimes arise as between different viewpoints. It was to address that danger in the context of HIV that Secretary-General Boutros-Ghali took the initiative of securing the creation of UNAIDS, the joint programme on HIV, of which UNDP is a lead agency.

It must be said that, upon the HIV epidemic, and specifically the relevant issues of law, the leadership of the United Nations has for some time been speaking with a single, clear, and firm voice. That voice provides the context for everything that the agencies do in furthering their programmes and advising member countries and their governments.

For example, the UN Secretary-General, Ban Ki-moon, in March 2012<sup>3</sup> added his strong advice, once again, to many similar statements which he had made earlier:

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<sup>3</sup> Address by the Secretary-General to the Human Rights Council. See *A Commonwealth of the People, Time for Urgent Reform*, Global Commission Report, above n1, 48.

“We see a pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or transgender. There is widespread bias at jobs, schools and hospitals. And appalling violent attacks, including sexual assault. People have been imprisoned, tortured, even killed. This is a monumental tragedy for those affected – a stain on our collective conscience. It is also a violation of international law... To those who are lesbian, gay, bisexual or transgender, let me say: you are not alone. Your struggle for an end to violence and discrimination is a shared struggle. Any attack on you is an attack on the universal values the United Nations and I have sworn to defend and uphold. Today, I stand with you... and I call upon all countries and people to stand with you too.”

Similar statements have been repeatedly made by the Administrator of UNDP (Helen Clark), the Executive Director of UNAIDS (Michel Sidibè) and the UN High-Commissioner for Human Rights (Navi Pillay). Additionally, current and former heads of state and of government have spoken strongly along the same lines. These include the Global Commission Chairman, former President Cardoso (Brazil) and its member, former President Festus Gontebarnye Mogae (Botswana). The



newly elected President of Malawi, Grace Banda, in her first address to Parliament following her election, also spoke strongly of the need for initiatives to address the HIV epidemic, including the removal of laws that impede the AIDS response, specifically laws against MSM and other minorities.

Although there have been some discordant voices and actions about the steps that are necessary, there is no doubt that the countries that have been most successful in their battle against HIV have been those that have addressed the legal impediments and have taken the steps proposed by the Global Commission (and also, earlier, by the Eminent Persons Group of the Commonwealth of Nations<sup>4</sup>).

Naturally, it is open to countries to reject the Commission's advice (and that of the EPG) and to take their own course, or to do nothing. However, if countries do not help themselves, this will obviously aggravate their situation. It will adversely affect the lives and wellbeing of their citizens. And it will discourage donors and supporters in other lands.

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<sup>4</sup> Commonwealth Secretariat, Eminent Persons Group: Recommendation 60.

As a result of the dialogue with UN agencies and civil society in Jamaica, a number of strategies were raised. In the balance of this note, I will record some of the main strategies that emerged during my meeting in Kingston.

### *IMMEDIATE STRATEGIES*

1. *Regular Dialogue:* Meetings between relevant UN agencies in Jamaica and representatives of civil society need not await visits by overseas visitors. It would be desirable if a regular schedule of meetings were held, to review data, to examine current responses and to agree on initiatives and priorities that could be advanced, and representations made, for consideration by officials, elected and otherwise.
2. *Heroes and Champions:* A particular feature of the Jamaican HIV epidemic is the absence, or presence in only very small numbers, of local champions and heroes, speaking up for vulnerable groups. Although there have been a small number of musicians and artists who have come forward, it is remarkable that virtually no high public officers, in academe, politics, sports (the learned professions), and

the churches have been open in identifying themselves with vulnerable groups, and particularly MSM. In countries that have been successful in reaching out to vulnerable groups, and thereby influencing prevention, care and treatment, value has been found in identifying champions who will become a public face for engagement, compassion and the removal of stereotypes. A remarkable feature of the Jamaican epidemic is the absence of such persons. Every urgent endeavour should be made to reverse this situation. If possible, champions should be found amongst people living with HIV and AIDS. This cause has proved very influential in the African/American population of the United States of America. It should also be possible in Jamaica, where the rate of infection is substantially higher.

3. *Prisoners' Condoms*: I am aware of the savage event in August 1997, in three prisons in Jamaica, when 16 prisoners were murdered by inmates following a poorly handled initiative to introduce condoms, ostensibly to reduce rates of infection in prisons. According to Dr Skyers' research, prisons in Jamaica (as elsewhere) can act as significant incubators of HIV. Every attempt should be made to introduce condom availability, under proper conditions, without impediments which would make their use practically

impossible. This has been done in several countries. The state of the epidemic in Jamaica surely demands that it should be done here. Whilst in custody, prisoners are effectively in a trust relationship with the state and its officials. Prison is a place for the loss of liberty, not exposure to a virus which, untreated, will lead to a loss of life.

4. *Vending Machines*: The difficulty in some parts of Jamaica for potential users, including young people, to gain access to condoms is a serious problem. Whilst the disinclination of some parents and church groups to accept promiscuous sex is understood, even more urgent and important is the need to protect young people from exposure to HIV, present in the Jamaican community. Damage to condom vending machines can be minimised by proper placement and maintenance of such machines. In countries like Australia, such machines are placed in public toilets in closely monitored environments. To the extent that the community makes purchase of condoms difficult or awkward, it inflicts a wound on its citizens and on itself, especially on the young.

5. *Pharmaceutical Associations*: In Australia, HIV strategists have worked closely with pharmaceutical guilds and associations. This has been done to explain various strategies, including provision of

condoms and the needle exchange system that has so radically reduced levels of HIV in the sexually active and drug using population. Although injecting drug use is not presently an urgent priority in Jamaica, access to condoms is. Dialogue with pharmaceutical bodies and companies in order to secure a protocol for the unembarrassed provision or sale of condoms would definitely reduce significantly the risk of passing the virus. In a high level epidemic country such as Jamaica, this initiative should have high priority.

6. *Age of Consent:* There is a disparity between the statutory age of consent for lawful sexual intercourse in Jamaica and the age at which young persons may secure medical advice and treatment on sexual matters, without parental consent (16 v 18 years). This disparity should be exposed and lead to legislative reform so as to reduce the age at which a young person may seek medical advice on contraception, self protection and (where necessary) HIV testing, post exposure prophylaxis (PEP) and counselling. These are basic human needs that inhere especially in young people. According to statistical evidence, the debut for sexual activity in Jamaica is falling and is well below the current statutory age under criminal law. This would not be changed by increasing the age for criminal law

purposes. At the very least, a public facility to permit access, without parental intervention, to life saving assistance and support should be made available and made known throughout Jamaica. This is a responsibility of government.

7. *Police Co-operation:* It would be desirable, in co-operation with senior police officers, for briefings to be given, including by Dr Skyers, to police personnel concerning the importance of HIV strategies and the reduction of infection. Police officers enjoy legal discretions under the law. In exercising those discretions, police should be aware of the urgency of the HIV crisis facing Jamaica and of the need for their actions to be supportive of HIV strategies, not hostile to them. For example, to prosecute a person for sex work offences on the basis of their carrying a condom, and to tender the condom as evidence of a criminal offence, will only reduce the use of protectives aimed to diminish the spread of HIV. It is important that police should understand the urgency and the various strategies necessary for HIV prevention.

8. *Education in Schools:* Reports were given of initiatives in some schools and colleges in Jamaica (including some church schools) to inform students about protection and to provide condoms in some instances. Given the state of the HIV epidemic in Jamaica, these

programmes should be expanded. If necessary, this should be done discretely and in dialogue with schools, and with the full support of the Minister of Education and officials. Schools have a legal responsibility of care towards their students. In circumstances of the actuality of sexual conduct, it is vital that schools should engage in an active program to inform students about the dangers of HIV in Jamaica and to provide various practical options, in harmony with Jamaican realities, to reduce the risks of HIV infection. Young people should be consulted and involved in the design of such strategies.

9. *Social Networking*: Because the use by young people of social networking (Facebook, Twitter, LinkedIn, YouTube etc) it is highly desirable that these means should be used (a) to alert young people in Jamaica about the high dangers of HIV infection present in their society; (b) to inform them of the various means and availability of self-protection; and (c) to alert them to the vulnerable groups and to the need to reduce bullying, stereotyping and unscientific hostility towards especially vulnerable persons, including MSM. Bullying and violence directed towards MSM exclude those citizens from effectively accessing the means of self-protection and knowledge about dangers. Serious stigma produces low self esteem. This

increases the risks of infection and encourages thoughtless sexual conduct. In the established circumstances of activity by MSM with concurrent sexual partners and opposite sex partners, the risks of the HIV infection spreading rapidly are aggravated. Young people should be engaged, and encouraged to participate, in blogs, information sharing and advice columns so as to enhance awareness about HIV and the practical means of protection. This is already beginning in Jamaica. It should have the strong support of the Department of Health and other public agencies.

10. *Patent Law:* Jamaica should be vigilant to protect its TRIPS exceptions, given the serious state of its HIV epidemic. Although I was assured that this was already in hand, a danger experienced by many developing countries has been the division of responsibility for intellectual property law, in the context of negotiations of new multilateral IP treaties (such as ACTA) and bilateral Free Trade Agreements (FTAs). Commonly, the general responsibility for such laws rests with justice and health ministries. But the responsibility for negotiating treaties such as ACTA and economically favourable FTAs often rests with more politically powerful departments and bureaucracies, including the Treasury and the Foreign Ministry. There should be co-ordination amongst ministries to ensure ongoing



vigilant protection of the TRIPS exceptions available to Jamaica in the circumstances of its serious and growing health crisis concerning HIV. Jamaica should also support the calls in the UNDP Global Commission report for investigation of a new and more equitable international regime for patent protection and for differentiation between the development of ineffective *counterfeit* drugs (on the one hand) and the development of life saving *generics* (on the other).

#### *A JOINT CABINET SUBMISSION*

It would be highly desirable that a facility should be provided to afford a briefing to the entire Jamaican cabinet on the serious state of the HIV epidemic in Jamaica (Dr Skyers) and on the urgency of legal and administrative responses (UNDP and other agencies). Whilst the time available for such cabinet presentations is necessarily limited, the scope and nature of the epidemic in Jamaica are such as to warrant a facility for a full briefing (at least 1-2 hours), along the same lines as was given on this visit to the Jamaican judiciary. The seriousness with which the judiciary addressed the issues raised in the dialogue indicates that even a relatively short, but intensive, briefing can be highly beneficial.

The rate of HIV in Jamaica in the general Jamaican population is 1.7%. This is a very significant epidemic in global terms. It demands strong and highly focused action. Such action has been taken in other countries to address their particular epidemics. Thus, in Australia, the initial potential of the epidemic amongst injecting drug users (IJU) was large. The early decision to institute a national system of needle exchange, proved been highly beneficial for the protection of life and the wellbeing of citizens. The rate of HIV amongst IJUs in New Zealand and Australia (with needle exchange) is respectively 1% and 2%. In Canada where there is a limited system of needle exchange it is 18%. In the United States of America (very few exchange facilities) it is 33%. In Russia (no needle exchange) it is 37% and Thailand (no needle exchange) it is 43%.<sup>5</sup>

Whilst the pattern of Jamaica's epidemic is different, similar inferences about opportunity costs can be drawn from the very high level of HIV amongst MSM (estimated 33%).<sup>6</sup> In such circumstances, to ignore this cohort of the epidemic, to isolate, stigmatise and tolerate violence

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<sup>5</sup> Global Commission Report above n1, 33.

<sup>6</sup> Global Commission Report above n1, 46.

against MSM, is extremely dangerous in the Jamaica context. Apart from all other considerations, in a country dependent on tourism, where sexual activity by tourists with the local population is statistically likely to occur, the risks of damage to the economy are large (as in Haiti) when knowledge of high HIV rates becomes international property.

Such information would also be damaging to new projects such as medical tourism and other initiatives of the Government for boosting the Jamaican economy. A purely pragmatic and economics-driven strategy to bring down HIV rates amongst MSM can be justified, even if the appeal to human rights and human dignity falls on deaf ears. The experience of other nations, which have changed their strategies to include especially vulnerable groups should be brought to the attention of Jamaican leaders and decision makers in a strong, co-ordinated and effective way. It should have support at the highest level of the Jamaican Government.

### *CONCLUSIONS*

I pay respects to the political leaders, the judiciary, officials and civil society in Jamaica. I honour the United Nations agencies which, with

small resources and diminishing budgets, are attempting to play a useful and effective role in responding to the HIV epidemic in Jamaica. However, the situation revealed by the statistical data provided to the judicial dialogue by Dr Nicola Skyers is extremely serious. It is deserving of very high priority. Certainly, it warrants close and active consideration of the report of the UNDP Commission and pursuit of the strategies, described in that report, that have succeeded in other countries but have been neglected or ignored so far in Jamaica.

It is urgent that Jamaica take steps to address the serious need for better strategies required for prevention, in the context of a high level epidemic. It is also urgent, in the context of the GFC and the decline in international subventions for the acquisition of antiretroviral drugs, that Jamaica develop contingency plans. These should address the risks presented to the availability of such drugs to the population, including (a) declining international financial support; (b) increasing side effects and limitations of the first line ARVs with the need to acquire second and third line ARVs not presently available in generic form; and (c) concurrent attacks on the manufacture of genetic drugs and potential overreach of intellectual property protection, contrary to national interests.

I know that UNDP and UNAIDS, which have performed such vital work to assist countries in their HIV response, will be ready to support Jamaica as it enters the fourth decade of the HIV/AIDS epidemic.