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Statement submitted by Hunter College Center for Community and Urban Health, National Association of Negro Business and Professional Women’s Clubs and Salesian Missions, non-governmental organizations in consultative status with the Economic and Social Council

The Secretary-General has received the following statement, which is being circulated in accordance with paragraphs 36 and 37 of Economic and Social Council resolution 1996/31.



Statement

Criminalization related to HIV and women

From the beginning of the HIV epidemic, discrimination, stigma and fear have fuelled mistreatment of the HIV/AIDS community. One manifestation of this is the misuse of criminal law to target persons living with HIV/AIDS. These laws criminalize allegedly exposing others to or transmitting HIV through conduct, such as spitting or biting, that poses no significant risk of HIV transmission, or consensual sexual activity without prior disclosure of HIV status. HIV-specific laws are particularly harmful to women and girls in both high-income and developing countries. These laws are likely to be used to prosecute women more frequently than men due to gender-based violence, power inequality and economic dependence within relationships, and vertical transmission. Women are also more likely than men to know their status, leaving them vulnerable to disclosure mandates. We, members of the NGO Committee on HIV/AIDS, stand against the criminal treatment of persons — and especially women and girls — on the basis of their HIV-positive status and seek to educate others about this injustice. This issue calls for a comprehensive, public health- and human rights-oriented review of HIV-specific laws with the end goal of repealing all laws criminalizing HIV transmission, exposure to HIV, or failure to disclose HIV status. If these HIV-specific laws persist, women and girls across the world will continue to be at increased risk of HIV infection and HIV-related violence and human rights violations.

Scope of the problem

As of July 2012, HIV-specific laws existed in 37 states and territories in the United States, 27 countries in Africa, 13 countries in Asia and the Pacific, 11 in Latin America and 9 in Europe, according to the Global Commission on HIV and the Law. The Global Criminalisation Scan Report 2010 issued by the Global Network of People Living with HIV states that at least 600 people living with HIV/AIDS across the world have been convicted under HIV-specific laws or general criminal laws on the basis of their status. These general laws concern administration of a noxious substance (France), malicious spread of a communicable disease (Cuba), assault (Brazil) and attempted homicide (United States), among others. Many sentences and sentence enhancements imposed under HIV-specific laws, including incarceration, sex offender registration, civil commitment and quarantine orders, are grossly disproportionate to the actual harm inflicted or intended.

Many of these HIV-specific laws and prosecutions are based on outdated, scientifically inaccurate beliefs about the routes and risks of HIV transmission. Some jurisdictions do not require actual transmission for conviction, instead imposing criminal sanctions on people living with HIV/AIDS convicted of exposing others to HIV. Exposure laws are often too broadly written and applied, thus criminalizing conduct that carries with it little to no risk of HIV transmission. Courts have accepted testimony deeming the saliva, mouth, teeth and sexual organs of HIV-positive persons as deadly and dangerous weapons. Many jurisdictions criminalize any type of sexual activity that a person living with HIV/AIDS engages in without first disclosing his/her status, including those activities with little to virtually no risk of transmission such as oral intercourse and protected vaginal and anal intercourse. Many HIV-specific laws do not treat condom use or undetectable viral loads as evidence that an HIV-positive person did not intend to harm his or her

partners, despite the fact that consistent condom use, adherence to antiretroviral treatment and other safer sex practices reduce the risk of transmission to near zero.

Global scans indicate that HIV-specific laws and prosecutions disproportionately target the marginalized and disenfranchised, including immigrants, refugees, sex workers and the indigent. Among the most targeted populations worldwide are women and girls. As the Global Commission on HIV and the Law states, “Although proponents often argue that criminalisation is needed to protect women, especially monogamous wives, from the risk of HIV infection by male sexual partners, in reality such laws make criminals of the same women they’re intended to protect.”

First, HIV-specific laws do not account for women who are unable or unwilling to disclose their status to partners out of fear of harassment, violence and abuse. Advancing Gender Equity and Human Rights in the Global Response to HIV/AIDS (ATHENA Network) reports that young women with HIV are 10 times more likely to experience violence than HIV-negative women, and that accounts of women killed by their partners for “bringing HIV into the family” are on the rise. HIV-positive survivors of sexual violence and rape may be held liable under HIV exposure and transmission laws as well.

Second, in addition to the increased risk of violence, women face the possibility of abandonment by partners and families, eviction, property loss, disinheritance and other retaliation should they disclose their status or request the use of condoms and other safer sex measures. Disclosure complicates child custody and pregnancies. The Global Criminalisation Scan Report finds that “HIV-positive mothers are criminal under all of the HIV laws of West and Central Africa, which explicitly or implicitly forbid them from being pregnant or breastfeeding, lest they transmit the virus to foetus or child”. These laws further restrict women’s already limited ability to make autonomous decisions regarding their sexual and reproductive health. The risk of prosecution for HIV transmission, exposure or non-disclosure of status complicates women’s decisions on whether, how, when, and with whom to engage in sexual activity and whether to have children.

Third, women are at greater risk of prosecution under HIV-specific laws than are men simply because they are more likely to know their HIV status. Women more regularly engage with health-care systems generally and HIV testing rates among pregnant women are rising as many Governments move towards routine prenatal testing. Meanwhile, women have less access to legal services, putting them at a significant disadvantage should they face arrest or prosecution on the basis of their HIV status. Broadly drawn and applied exposure and transmission laws may be construed to apply to women who transmit HIV to a child during pregnancy, leaving women at further risk of prosecution.

Recommendations

We join the Global Commission on HIV and the Law in setting forth the following recommendations to Member States:

- Countries must not enact laws that explicitly criminalize 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.

- Law enforcement authorities must not prosecute people in cases of non-disclosure of HIV status or exposing others to HIV 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.
- Countries must amend or repeal any law that explicitly or effectively criminalizes vertical transmission of HIV. While the process of review is under way, Governments must place moratoriums on enforcement of any such laws.
- 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.
- The convictions of those who have been successfully prosecuted for exposing others to or transmission of HIV or non-disclosure of HIV status 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.
