

Statement

ILGA World Conference Pre-Conference: MSM & Gay Men's Health

Geneva, 29 March 2006

Men Having Sex with Men and Human Rights The UNAIDS Perspective

Statement by:

Susan Timberlake

Senior Law and Human Rights Adviser

UNAIDS Secretariat

Geneva

I am grateful for the opportunity to be here with you, and I look forward to the break-out sessions. These exchanges are critical to inform UNAIDS advocacy and programming. They are especially critical around issues like those affecting men who have sex with men. In this situation UNAIDS operates in a politically and culturally charged atmosphere and has to find our way, as an intergovernmental organization, to both do the right thing and maintain our ability to be a broker among all the key players.

I am speaking today on the human rights of men who have sex with men and the UNAIDS perspective. Let me start by saying that UNAIDS does not have formal oversight of any human rights treaty, like UNICEF, but like any UN agency, UNAIDS is accountable for respecting and promoting the principles of the UN Charter. For the staff, the Standards of Conduct for the International Civil Service, paragraph 3, state that “The values that are enshrined in the United Nations organizations must also be those that guide international civil servants in all their actions: fundamental human rights, social justice, the dignity and worth of the human person and respect for the equal rights of men and women and of nations great and small.”

These values are exactly what we are talking about here: human rights, social justice, the dignity and worth of every person, and equality. But as you well know, all the world does not agree that these concepts apply to men who have sex with men. A recent Swedish study reports that same-sex sex remains criminalised in approximately 70 countries.¹ Laws in at least six countries allow for the death penalty in cases of consenting, adult homosexual acts. Other countries provide for severe punishments, including lifetime imprisonment, forced labour, and public whippings. We see cases of harassment and arbitrary detention, including of HIV peer educators and health outreach workers. With regard to the latter, I would say that an attack on HIV educators is an attack on human rights defenders, because these people are in their own way protecting the rights of men having sex with men.

So what does this mean for men having sex with men in the AIDS epidemic? What does it mean for UNAIDS work in this area? It means that the ambivalence, stigma, discrimination and violence faced by men having sex with men have resulted in what you all know - an incredible amount of denial that men having sex with men exist, that they have rights, that governments have human rights obligations to them, that the international community has duties to ensure that their rights and needs are addressed, including in the AIDS epidemic. Twenty-five years into the epidemic, we barely have any data on the number of men having sex with men or under what circumstances. With regard to women, we say, “If you want women to count, count women”. But not only do we not count men having sex with men, in many places we *cannot* count them without endangering them. Furthermore, most national AIDS responses have never come anywhere near providing the political, funding or programmatic commitment needed to ensure that the HIV needs and the human rights of these men are met. Finally, neither countries, international or national courts nor the UN have sufficiently developed, promulgated or sought to enforce the human rights norms and laws that would protect men having sex with men and other sexual minorities.

¹ SIDA (2005), *LGBTI issues in the world: A Study on Swedish policy and administration of Lesbian, Gay, Bisexual Transgender and Intersex issues in international development cooperation*. Stockholm: Government Offices of Sweden.

Now we are in the midst of the push towards universal access to HIV prevention, treatment, care and support. If there's any hope of achieving universal access, we are going to have to confront the difficult issues of the epidemic that have been sidelined for 25 years. The country and regional consultations that took place in the universal access process confirmed that stigma and discrimination, including the stigma, discrimination and criminalization faced by men who have sex with men, are major barriers to access. There must be a sea change in how these barriers are addressed if universal access is to be achieved. But how is going to happen and what is UNAIDS role?

Standard-setting

Standard-setting regarding the rights of men having sex with men and sexual minorities has been done, but much more needs to be done. I want to highlight some of the key passages from the *International Guidelines on HIV/AIDS and Human Rights*, produced jointly by UNAIDS and the Office of the UN High Commissioner for Human Rights some ten years ago.² The Guidelines remain very much relevant. Importantly, they confirm that we have to look beyond health to human rights if we're going to be effective against AIDS. This is one of the key strengths of a human rights perspective - the indivisibility and the interconnectedness of all rights.

On criminal law and correctional systems, *Guideline 4* states that:

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

The commentary elaborates as follows:

"Criminal law prohibiting sexual acts (including adultery, sodomy, fornication and commercial sexual encounters) between consenting adults in private should be reviewed, with the aim of repeal. In any event, they should not be allowed to impede the provision of HIV/AIDS prevention and care services."

On anti-discrimination and protective laws, *Guideline 5* states in part that:

"States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors..."

The commentary provides that:

"Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men, including in the context of HIV/AIDS, in order, inter alia, to reduce the vulnerability of men who have sex with men to infection by HIV and to the impact of HIV/AIDS. These measures should include providing penalties for vilification of people who engage in same-sex relationships, giving legal recognition to same-sex marriages and/or relationships and governing such relationships with consistent property, divorce and inheritance provisions. The age of consent to sex and marriage should be consistent for

² Office of the UN High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (1998), *International Guidelines on HIV/AIDS and Human Rights*. New York and Geneva: United Nations. Outcome of the Second International Consultation on HIV/AIDS and Human Rights, Geneva, 23-25 September 1996.

heterosexual and homosexual relationships. Laws and police practices relating to assaults against men who have sex with men should be reviewed to ensure that adequate legal protection is given in these situations.”

Finally, on women, children and other vulnerable groups, *Guideline 8* states that:

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

The commentary notes that:

“States should support the implementation of specially designed prevention and care programmes for those who have less access to mainstream programmes due to social or legal marginalisation, including men who have sex with men.”

Some of this language is very far for the UN to go on this emotionally charged cultural and religious issue, and the *Guidelines* indeed are under periodic attack by those who do not agree that they accurately express either the content of human rights obligations or acceptable operational guidance. But with regard to men having sex with men, the *Guidelines* reflect the work of the UN human rights mechanisms that have stated, among other things, that sexual orientation is one of the prohibited grounds of discrimination. I refer to the *Toonen* decision of the UN Human Rights Committee (1994), where laws criminalizing homosexual activity were held to violate the right to privacy.³ Later, in 2003, in *Young v. Australia*, the Committee found a violation when the Government of Australia denied pension benefits to a surviving partner in a same-sex relationship when these were available to heterosexual non-married partners.⁴

The Human Rights Committee has also addressed sexual orientation when it has called on some governments to repeal laws criminalising same-sex sexual activity. This includes Chile (1999), Cyprus (1998), Egypt (2002), Lesotho (1999), Romania (1999), Sudan (1997), and the United States (1995).

The Committee on Economic, Social and Cultural Rights has cited sexual orientation as a prohibited ground of discrimination in its General Comment 14 on the right to health issued in 2000. The Committee stated that the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of, among other things, health status (including HIV/AIDS) and sexual orientation.⁵ The Committee points out that upholding non-

³ *International Covenant on Civil and Political Rights*, Article 17.

⁴ *Ibid*, Article 26 (equality before the law).

⁵ Committee on Economic, Social and Cultural Rights (2000), *General comment No. 14: The right to the highest attainable standard of health (art. 12)*, at para.18.

“By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption,

discrimination in this area is a relatively low-resource activity – in other words, States stand on thin ice if they argue limited capacity as a cover for inaction.

The UN Special Rapporteur on the right to the highest attainable standard of health, Paul Hunt, stated in his report to the Commission on Human Rights in 2004:

“Discrimination on the grounds of sexual orientation is impermissible under international human rights law. The legal prohibition of same-sex relations in many countries, in conjunction with a widespread lack of support or protection for sexual minorities against violence and discrimination, impedes the enjoyment of sexual and reproductive health by many people with lesbian, gay, bisexual and transgender identities or conduct.”⁶

So the UN has elaborated standards, but there is a countervailing push from countries and communities that disagree with these standards. In this context, UNAIDS argues for the protection of human rights of men who have sex with men and sexual minorities (and in fact everyone) as both the right thing to do, but also the way to achieve an effective response against AIDS. Peter Piot has said that there are at least four “non-negotiables” in our work. These are: (1) the promotion and protection of human rights; (2) equality between men and women; (3) that science is the basis of our policies and work; and (4) that we are accountable, not only to the funders who give us money, but to the people for whom we work.⁷

Dr Piot has also said that given the immediate agenda for action in the epidemic and the enormous scale of the long term challenges, the AIDS movement must embrace a much more diverse set of actors, or be doomed over time. In his words, “Activism is the key to holding all actors accountable, while the broader coalition is the key to sustaining action.” Peter Piot urges that while building this broad coalition, we agree on a common minimum programme first that is rooted in core values – namely, the preservation of life, and the dignity and value of every human being, and secondly, one that produces results. Thus, in order to support both activism and a broad coalition, UNAIDS tries to advocate for those most threatened by the epidemic, as well to unite and coordinate a very broad, inclusive and sustainable movement.⁸

There we are. UNAIDS sometimes may argue from a public health perspective when we should argue from a human rights point of view. Indeed, we may not be ideologically pure in human rights terms. But the reality is that, in order to stand up for those we are accountable to, and more importantly, obtain results for them in the epidemic, we must

modification or abrogation of legislation or the dissemination of information. The Committee recalls general comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.”

⁶ The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report of the Special Rapporteur, Paul Hunt, to the sixtieth session of the UN Commission on Human Rights. UN Document E/CN.4/2004/49, at para. 38.

⁷ Speech by Peter Piot, “The Status of the Response: What will it take to turn the epidemic around?” 3rd IAS Conference on HIV Pathogenesis and Treatment, Rio de Janeiro, 27 July 2005.

⁸ Speech by Peter Piot, “Diverse Voices, Common Ground: Uniting the World against AIDS”, Georgetown University, 7 March 2006.

continue to work with all those who have the power to produce those results. Even those on the other side of critical human rights debates are partners in the response.

Political commitment

A recent report published by the Government of Sweden is unequivocal about the UN's record when it comes to taking on LGBT issues:

“Insofar as LGBT aspects are discussed in connection with the UN's operational activities, it is almost always with reference to homosexual men and the fight against HIV/AIDS.”⁹

It is true that many of the human rights and realities of men having sex with men have been “ghettoized” in the HIV world, and beyond this world, there simply hasn't been sufficient attention to the human rights or health of sexual minorities. But the HIV epidemic has also provided an incredible platform for greater political and programmatic commitment to these issues. I do not mean to minimize our full awareness that, while we work, there continue to be egregious cases of human rights violations, and I would define these broadly to include not only homophobic murder, torture, impunity, and imprisonment, but also denial of life-saving health services, commodities and treatment. But when using pragmatic and public health-based advocacy, in tandem with human rights advocacy, we focus on the public health imperative as a starting point for dialogue for what will become meaningful, enduring change – engaging the public health logic while building toward the imperative to realise the human rights of all as a matter of urgency and justice.

Right now we have more funding than ever for HIV and tremendous political commitment in the move toward universal access. If the health needs of men having sex with men can be met in this context, then we will have gone much further down the road to address their human rights. Just as AIDS has made access to HIV treatment a human right, so the epidemic continues to provide one powerful way to bring men having sex with men out of the shadows of denial and discrimination. But we need to work together – with you, the activists who push the envelope of what's necessary, with the UN human rights system which expands the perspective beyond health to human rights, with governments who hold both the ability and the obligation to find and implement pragmatic, programmatic and human rights solutions in the context of their political and cultural realities. I invite your ideas on how we can engage more people beyond the HIV world to get serious about the health and human rights of sexual minorities, because it is the right thing to do, and because it is essential to building the type of environment that enables people to avoid infection, and live successfully with HIV if infected.

Programming

As we move forward on human rights, we need to move forward with the programmatic agenda. This agenda needs to compel action, deliver the resources necessary, and build in accountability for the results. We should never forget that programme delivery of HIV prevention, treatment, care and support are human rights being

⁹ Gerd Johnsson-Latham (2005), *Patriarchal violence – an attack on human security; A broad survey of measures to combat patriarchal violence and oppression, particularly acts committed in the name of honour directed at women, homosexuals, bisexuals and transgender persons*. Stockholm: Government Office of Sweden (Ministry of Justice, Ministry for Foreign Affairs), at p.32.

delivered. Such programming makes rights real on the ground. The trick is to make them real for all who need them, not a select few who benefit from small-scale, “under the radar” and under-funded projects.

Important programmatic work is happening in a lot of places – largely because of the great work of men who have sex with men themselves who work either as activists that push for action and accountability and/or as actual service providers. Twenty five years into the epidemic, we see, even in places where same-sex sex is criminalized or highly stigmatized, modest successes in making health services available to sexual minorities, or at least more widespread tolerance for the actions of those delivering services. For example, in some countries where sodomy is a crime, governments are purchasing and distributing condoms to men who have sex with men. In these same sorts of places, ministries of health are working with police so that NGOs have the space to do their outreach work; and in some places, campaigns against homophobia are being mounted in heavily patriarchal and machismo societies.

In programmatic terms, UNAIDS is pursuing four fronts. These are: (1) following up on the Declaration of Commitment which provided that by 2003 countries should have enacted legislation, regulations and other measures to eliminate all forms of discrimination against and ensure the full enjoyment of all human rights...by members of vulnerable groups; (2) implementing the UNAIDS action plan on the UNAIDS policy position paper on *Intensifying HIV Prevention* which states that “All HIV prevention efforts/programmes must have as their fundamental basis the promotion, protection and respect of human rights...”; (3) working with governments on their plans to move toward universal access in terms of the programmatic shifts they have identified (e.g. gathering baseline data on men having sex with men, changing attitudes of services providers, reviewing existing targets and coverage regarding men having sex with men, and improving laws and enforcement to protect at risk groups while scaling up pilot projects for these groups; and (4) making sure that the Three Ones (one national HIV strategic framework, one national coordinating authority and one national monitoring and evaluation system) adequately address men having sex with men, and whenever possible, include their participation and representation.

Martin Luther King, Jr, said that “Judicial decrees may not change the heart, but they can restrain the heartless.” Restraining the heartless in many places is an essential and urgently-needed first step in any human rights protection, including for men having sex with men. But we are also talking about succeeding against the world’s most killing epidemic, and doing it before it kills more men having sex with men, among millions of others. UNAIDS needs partnership, support and constant goading to push the health and human rights agenda of men having sex with men and sexual minorities. At the same time, we need to be both purists and pragmatists, fighting for human rights while saving lives on the ground. We know that the two fights are not mutually exclusive but in fact are mutually dependent. On that basis we will continue to promote human rights, public health, pragmatism, and indeed, simple compassion, to get results for men having sex with men and all the other marginalized, criminalized people facing this epidemic.

Thank you.