

INTERACTIVE DIALOGUE WITH SPECIAL RAPPORTEUR ON HEALTH
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Statement by:
CANADIAN HIV/AIDS LEGAL NETWORK & INTERNATIONAL COMMISSION OF JURISTS
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Thank you Mr. President, distinguished delegates,

We welcome the focus of the Special Rapporteur on Health on issues of decriminalisation, in relation to same-sex conduct, sex work and HIV transmission. We share his view that criminal laws in these areas are counterproductive and incompatible with the right to health.

While these are sensitive issues for many States, the recommendations of the Special Rapporteur are entirely consistent with the principles of international human rights law, and fall squarely within the health mandate.

These **International Guidelines on HIV/AIDS and Human Rights** themselves call for decriminalisation in each of these areas and acknowledge that “some of the recommendations for ... law reform, particularly those concerning the status of women, drug use, sex work and the status of men having sex with men, might be controversial in particular national, cultural and religious contexts” but go on to note that they are “based on existing international human rights standards and designed to achieve a pragmatic approach to public health goals relative to HIV”.

Some have urged the Rapporteur to bring increased focus to the **MDGs**, particularly in advance of the World Summit. MDG 6 specifically relates to measures to halt the spread of HIV and AIDS. UNAIDS, UNDP and others have repeatedly emphasized that public health goals are undermined by the criminalisation of marginalised communities and of unintentional HIV transmission, which drives those affected underground, and may cause them to avoid testing or seeking access to health services, with an impact upon marginalized communities and also upon the broader population.

Some States have suggested that issues related to sexual orientation and sex work are not recognised in international human rights law. No-one is suggesting that there is some cluster of special rights, uniquely applicable to sex workers, men who have sex with men or anyone else. Instead the principle at stake is no less than universality: the right of all human beings to enjoy all their rights. The ICESCR recognises the right of “everyone” to the enjoyment of the highest attainable standard of physical and mental health. What part of “everyone” would exclude gays, lesbians, transgender people or sex workers? Can anyone seriously argue that the right to health does not apply to groups that are marginalised or unpopular?

The **UN Human Rights Committee** has confirmed that laws criminalizing consensual same-sex activity violate international rights to privacy and non-discrimination and noted that such laws “run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention” by driving marginalised communities underground, a point affirmed by the **UN Committee on Economic, Social and Cultural Rights** specifically in relation to the right to health.

The **High Commissioner for Human Rights** has affirmed the Special Rapporteur’s position, noting that many such laws are “relics of the colonial era” and are “inconsistent with international law”. **UN Secretary-General Ban Ki-Moon** also emphasized recently: “It is unfortunate that laws that criminalise people on the basis of their sexual orientation exist in some countries. They should be reformed.”

There are many **positive experiences** to draw upon. Courts in societies as diverse as South Africa, the United States and India have ruled that criminalisation of consensual adult sexual conduct is incompatible with human rights, including the right to health. In Brazil the absence of criminal laws has enabled sex workers to collaborate closely with the State response to HIV, and the decriminalisation of prostitution in New Zealand has provided sex workers with an opportunity to affirm their rights to health and security.

I would like to conclude with an appeal for mutual respect. We regret that some States, instead of engaging with the issues on their merits, instead chose to attack the mandate-holder. If anyone were to use the exact same language to describe the position of States – calling some State positions for example shallow, subjective, biased or unprofessional – one can just imagine the forest of flags that would be raised. Surely Special Procedures are entitled to be treated with the same respect that States demand for themselves? It is also time to end the practice of misusing the Code of Conduct as a tool to intimidate Special Rapporteurs simply because there is disagreement with the positions they advance. The independence of Special Procedures would be worth little if they only had the independence to present positions with which we all agree.

We therefore commend the Special Rapporteur for his willingness to engage the Council in discussion of challenging topics that need to be urgently addressed.

However sensitive, this Council has a responsibility to constructively approach these issues from a health and human rights perspective. As former **UN Secretary-General Kofi Annan** emphasised in the context of the five-year review of the UNGASS Declaration of Commitment on HIV/AIDS:

“You cannot deal with a problem without confronting the issue of the most vulnerable who need assistance most. It's counter-productive. It's like putting your head in the sand and saying I don't want to know.”

If this Council is to fulfil its mandate, it cannot shy away from sensitive discussions, and it is only through constructive dialogue that we can seek to identify common ground and positive solutions in our shared commitment to human rights.

The bottom line is that, in the context of HIV, criminal laws targeting marginalised populations do not work. They increase stigma and discrimination, undermine the health of those impacted, and drive underground the very populations we most need to reach. **We would ask the Special Rapporteur:** what measures States can take to implement these recommendations, and how those States in which the issues may be sensitive can best open up a constructive dialogue with a view to possible reform?