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RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND ALL FORMS OF DISCRIMINATION:

HIV/AIDS, SEXUAL ORIENTATION, GENDER IDENTITY AND NON-DISCRIMINATION

Written statement submitted by Canadian HIV/AIDS Legal Network,
a non-governmental organization in special consultative status

[February 2, 2004]

A. Introduction/Overview

1. The Canadian HIV/AIDS Legal Network (“the Network”) affirms the principles of the Vienna Declaration and Program of Action that human rights are universal, indivisible, interdependent and interrelated, and welcomes the work of the UN Commission on Human Rights in recognizing the importance of the protection of human rights in the context of HIV and AIDS.
2. The Network affirms the importance of non-discrimination in protecting the human rights of all vulnerable groups, but wishes to place particular emphasis in this written statement on the human rights of gays, lesbians, bisexuals and transgendered people.
3. This statement first examines the connection between non-discrimination and effective responses to HIV/AIDS, and then sets out existing language by UN Treaty Bodies and Special Procedures which confirms that the right of lesbians, gays, bisexuals and transgendered people to be protected from discrimination is already established in international human rights law.
4. Finally, we underline the importance of gender identity inclusion, and conclude with concrete recommendations that the Commission on Human Rights adopt resolutions affirming the right of lesbians, gays, bisexuals and transgendered people to be protected from discrimination, and calling for a study by the Office of the High Commissioner for Human Rights on human rights violations based on sexual orientation and gender identity.

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The Canadian HIV/AIDS Legal Network is a partner organization of the AIDS Law Project, South Africa and an NGO in Special Consultative Status with the Economic and Social Council of the United Nations. Le Réseau juridique canadien VIH/sida est un partenaire actif du AIDS Law Project de l'Afrique du Sud et ONG doté de statut consultatif spécial auprès du Conseil économique et social des Nations Unies.

B. Importance of Non-Discrimination in Addressing HIV/AIDS

5. The Network shares the Commission's expression of concern in CHR resolution 2003/47 that "in many countries, many people infected and affected by HIV, as well as those presumed to be infected, continue to be discriminated against in law, policy and practice". The Network welcomes the resolution's recognition that stigma and discrimination continue to be "obstacles to an effective HIV/AIDS response" as well as the Commission's call for States to "take all necessary measures to eliminate stigmatization of and discrimination against those infected and affected by HIV/AIDS, especially for women, children and vulnerable groups".

6. As the International Guidelines on HIV/AIDS and Human Rights (further recognized in CHR resolution 2003/29) make clear, the protection of human rights is essential to safeguard human dignity and ensure an effective, rights-based response to HIV/AIDS.¹

7. Similarly, the UNGASS Declaration of Commitment on HIV/AIDS² notes that "stigma, silence, discrimination and denial ... undermine prevention, care and treatment efforts" and commits States, by 2003, to adopt "measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups."

8. While the Network emphasizes the importance of eliminating discrimination against all vulnerable groups affected by HIV and AIDS – including women, children, those living in poverty, minorities, indigenous people, migrants, refugees and internally displaced persons, people with disabilities, prisoners, sex workers, men who have sex with men and injecting drug users – the focus of this written statement is on the elimination of discrimination against gays, lesbians, bisexuals and transgendered people. We recognize also that different grounds of vulnerability intersect and that gays, lesbians, bisexuals and transgendered people experience the world differently depending on their sex, race, age, class, socio-economic status, dis/ability, culture, religion, language and other factors.

9. The Network recognizes that preventing the transmission of HIV is complex, and requires the creation of an environment in which people are free to acknowledge their sexual identity, to seek information and get information, to experience the support of peers and role models, to receive services that fit (rather than exclude) their experiences, to see themselves written into (rather than out of) culture, knowledge, and society. For gays, lesbians, bisexuals and transgendered people, preventing HIV transmission requires eliminating discrimination based on sexual orientation and gender identity.

¹ Guideline 5, Second International Consultation on HIV/AIDS and Human Rights (E/CN.4/1997/37, annex I), September 1996.

² Adopted by the General Assembly: S-26/2, 27 June, 2001.

C. Recognition by UN Mechanisms of Non-Discrimination on Grounds of Sexual Orientation and Gender Identity

10. In recent years, there has been an increasing recognition by the UN Treaty Bodies and Special Procedures of the ongoing violations of the human rights of gays, lesbians, bisexuals and transgendered people, and the importance of measures to address these rights violations.

11. In 2001, the interim³ and final⁴ reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment detailed specific allegations of abuses perpetrated against lesbians, gays, bisexuals and transgendered people, including rape by police or prison authorities, forcible confinement in medical institutions, electroshock treatment, and threats by authorities to disclose sexual orientation or gender identity as a means of intimidation.

12. The Special Rapporteur on violence against women, its causes and consequences has also affirmed⁵ the principle of non-discrimination on the ground of sexual orientation and noted that the Office of the United Nations High Commissioner for Refugees has recognized that lesbians and gay men constitute "members of a particular social group" for the purposes of refugee recognition. This has been recognized in the domestic law of numerous States.

13. Building on successive reports of the Special Rapporteur on extra-judicial, summary or arbitrary executions, the Commission on Human Rights has three times adopted resolutions⁶ which affirm the right to life of all persons, including on the ground of sexual orientation.

14. The Committee on Economic, Social and Cultural Rights has affirmed the principle of non-discrimination on grounds including sexual orientation,⁷ as has the Committee on the Rights of the Child.⁸

15. The UN Human Rights Committee has found that "... the criminalization of homosexual practices ... by driving underground many of the people at risk of infection ... would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS

³ A/56/156, 3 July 2001.

⁴ E/CN.4/2002/76, 27 December 2001.

⁵ E/CN.4/1999/68, 10 March 1999; *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, UNCHR ESCOR, 59th Sess., Annex, Agenda Item 12(a), UN Doc. E/CN.4/2003/75 (2003).

⁶ CHR resolutions 2000/31, 2002/36 and 2003/56.

⁷ General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, 11 August 2000.

⁸ General Comment No. 3: HIV/AIDS and the Rights of the Children, CRC/GC/2003/3, 17 March 2003.

prevention".⁹ The Committee noted that the term "sex" in article 26 of the Covenant includes "sexual orientation".

16. As noted by the Working Group on Arbitrary Detention,¹⁰ the Committee subsequently called on States not only to repeal laws criminalizing homosexuality, but also to include in their constitutions the prohibition of any discrimination based on sexual orientation.¹¹

17. In a communication involving a claim by a surviving gay partner to equal recognition under pension legislation, the Committee affirmed that the obligation of non-discrimination in the ICCPR extends to sexual orientation.¹²

18. On January 20, 2004, the Secretary-General issued a Bulletin¹³ providing that partnership benefits extend to UN employees in a legally-recognized domestic partnership in their country of origin.

D. Importance of "Gender Identity" Inclusion

19. The Network also wishes to draw particular attention to the importance of affirming the principle of non-discrimination on the ground of gender identity. Transgendered people face particularly severe human rights violations in countries around the world. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has noted cases in which:¹⁴

- male-to-female transsexual women have been beaten intentionally, causing implants to burst and releasing toxic substances into their bodies;
- ill-treatment against sexual minorities is believed to have also been used in 'social cleansing' campaigns;
- members of sexual minorities have received inadequate medical treatment in public hospitals on grounds of their gender identity. Prisoners diagnosed as suffering from gender dysphoria are often said to be denied medical treatment for gender dysphoria, such as hormone therapy;
- Transsexual and transgendered persons, especially male-to-female transsexual inmates, are said to be at great risk of physical and sexual abuse by prison guards and fellow prisoners if placed within the general prison population in men's prisons.

⁹ Communication No. 488/1992: Australia. 04/04/94. CCPR/C/50/D/488/1992. (Toonen, v. Australia, Date of communication: 25 December 1991).

¹⁰ Working Group on Arbitrary Detention, E/CN.4/2003/8/Add.1, 24 January 2003; Opinion 7/2002.

¹¹ Concluding observations of the Human Rights Committee (Poland), 29 July 1999 (CCPR/C/79/Add.110, para. 23).

¹² Communication No 941/2000: Australia. 18/09/2003, CCPR/C/78/D/941/2000. Young v. Australia, Communication 941/2000 (29 June 1999).

¹³ ST/SGB/2004/4.

¹⁴ A/56/156, 3 July 2001; E/CN.4/2002/76, 27 December 2001.

20. Despite many similarities in the abuse experienced by lesbians, gays and bisexuals, and by transgendered people, the language of “sexual orientation” is insufficient to protect transgendered people. Different language is necessary to adequately ensure recognition and protection on the basis of each of these different grounds.

E. Recommendations:

21. The Canadian HIV/AIDS Legal Network urges the Commission on Human Rights:

- a) to adopt a resolution recognizing that lesbians, gays, bisexuals and transgendered people are entitled to the full enjoyment of their human rights and fundamental freedoms without discrimination;
 - b) given that the principle of non-discrimination applies to the equal enjoyment of all human rights, to incorporate language affirming non-discrimination on the grounds of sexual orientation and gender identity throughout relevant resolutions under consideration by the Commission across a range of agenda items;
 - c) to support resolution E/CN.4/2003/L.92 on human rights and sexual orientation, which was deferred from the 59th session of the Commission on Human Rights, and which affirms the basic principle that lesbians, gays and bisexuals are entitled to enjoy the same human rights as other human beings;
 - d) to explicitly affirm the principle of non-discrimination on the ground of gender identity;
 - e) to request that the Office of the High Commissioner for Human Rights gather information concerning human rights violations based on sexual orientation and gender identity, and make recommendations concerning the obligations of States to promote and protect human rights on these grounds.
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