



Family Policy Brief

The International Guidelines on HIV/AIDS and Human Rights: A Troublesome Paradox for Containing the HIV/AIDS Epidemic

The International Guidelines on HIV/AIDS and Human Rights, sponsored by the joint United Nations program on HIV/AIDS (UNAIDS) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), were originally adopted in 1996. Since then they have been revised and expanded. The Guidelines note that they are intended to close the “dramatic gap” between professed policy and implementation.

The Guidelines are supposed to represent best practices drawn from various national or regional charters and declarations on the application of international human rights to the HIV/AIDS epidemic. It would seem, however, that every right known to man (more than 20 are specifically mentioned) is referred to in the Guidelines as relevant to containing the AIDS epidemic.

In fact, the Guidelines extend far beyond internationally recognized human rights and seek to impose controversial policies that would weaken the institution of the family. Ironically, the Guidelines recommend protecting behaviors that actually fuel the AIDS epidemic. Most troubling are the various new sexual rights and harmful practices that the Guidelines advance, specifically:

- A “right” to engage in prostitution (called “sex work”);
- A “right” for men to have sex with men;
- Legalized same-sex marriage;
- A “right” to abortion on demand; and
- Mandatory sex education for children without regard to religious and cultural values¹

The Guidelines also call for penalties for the “vilification of people who engage in same-sex relationships.”² Yet they do not define what is meant by “vilification,” which could include simply speaking out against homosexuality—well known to be a high risk lifestyle for AIDS.

On the push for mandatory sexual education, it is clear that there is no bar on how graphic it may be. Indeed, the Guidelines assert that children have a right to “seek, receive and impart information and ideas of *all* kinds,” which includes “*all* HIV-related information,” and that “[e]ducation materials which may necessarily involve detailed information about transmission risks and may target groups engaged in . . . sexual activity between the same sexes . . . *should not be wrongfully subject to censorship or obscenity laws.*”³ Moreover, the Guidelines conclude: “The provision of education and information to children should not be considered as promoting early sexual experimentation; rather, as studies indicate, it delays sexual activity.” However, only a

single study is referenced to support that general and critical conclusion.⁴ The Guidelines summarily dismiss the “reams of studies” that demonstrate “graphic sexual education programs do, in fact, increase sexual experimentation by children.”⁵ This entire discussion begs the question of what kind of sexual education programs should be promoted to children to prevent AIDS. UNESCO, *a partner and sponsor in the UNAIDS program*, recently released their “International Guidelines on Human Sexuality Education,” which focus on sexual pleasure rather than sexual restraint. In fact, among other deviant practices, the UNESCO Guidelines recommend teaching *nine year olds* “the relationship between excitement and vaginal lubrication, penile erection and ejaculation”; *children as young as five years old* to masturbate; and very young children to learn about and accept homosexual and bisexual behavior.⁶ (See FWI Policy Brief on UNESCO Guidelines on Human Sexuality Education by [clicking here](#).)

The HIV/AIDS Guidelines present a real paradox in the name of public health. They overreach in terms of protecting the infected at the risk of infecting more of the public at large. UNAIDS points out that early in the history of the epidemic some homosexuals saw certain HIV prevention practices (such as discouraging the high risk practice of sodomy) “as an infringement on their ‘right to have sex,’” which UNAIDS notes is “obviously a lay understanding of rights rather than a legalistic one, *but still relevant*.”⁷

In other words, rather than expressly advocating a broad “right to have sex” and raise the ire of many States opposed to mainstreaming homosexuality, the Guidelines get to the same result by claiming that any stigmatization or legal restraints on sexual activity will increase infection rates by driving high risk people into hiding and beyond the reach of HIV prevention and treatment efforts.⁸ This argument makes no sense, however, because the Guidelines already require States to provide (i) education on HIV transmission, counseling and treatment, and (ii) protection of homosexuals from being physically harmed, publicly stigmatized, discriminated against (both in public and private), or otherwise penalized for coming forward to take advantage of those benefits.

Ironically, UNAIDS has recognized that there have been “examples where [alleged] violations or derogations of human rights may well be associated with effective HIV prevention.”⁹ Indeed, as a result of significant criticism of the UN’s rights-based approach rather than a healthcare approach, UNAIDS has (i) acknowledged that “we need better evidence of the positive difference that promoting and protecting human rights can make for HIV/AIDS work”; (ii) asserted that due to the lack of supporting social data, their unconventional and unfounded “moral and legal arguments” are “valid justifications *in and of themselves* for [alleged and overbroad] human rights to remain central to the response to the epidemic”; yet (iii) admitted that “[t]here is no obvious consensus on what constitutes a human rights approach.”¹⁰ These are significant admissions.

In fact, an expert advisory body to UNAIDS reported that “the lack of general understanding of human rights (what they include, what they do not, how they operate, etc.) is an impediment in bringing human rights into HIV/AIDS work.” The same expert body also remarked that “the lack of evidence and documentation (whether epidemiological, social, or legal) of the value of integrating human rights in the response to HIV/AIDS is increasingly proving to be an obstacle in ensuring the integration of human rights in governmental and UN HIV/AIDS efforts.”¹¹

That lack of supporting evidence, however, has not stopped UN agencies and other activists from attempting to promulgate the controversial sexual rights in the Guidelines. As noted below, in

2001 a number of UN Member States explicitly rejected a proposal to refer to the HIV/AIDS Guidelines and some of its sexual rights language in the draft of a UN consensus document, the Declaration of Commitment on HIV/AIDS. Moreover, the Guidelines advocate a broad right to abortion, but several UN treaties explicitly reject such a right for family planning purposes.¹²

Flaws in the Guidelines’ “Moral” Arguments for a Human Rights Approach to AIDS

The use of “moral grounds” by UNAIDS to legalize and promote in the Guidelines what is considered immoral behavior in most cultures is part of the paradox. The question of what is appropriate prevention pervades the Guidelines, which do not look kindly on religious or conventional moral influence. The real moral question is how society should balance the interests of those who choose a lifestyle that increases infection risks with the interests of others who do not.

To be sure, as a matter of human dignity, groups of people who are infected or at risk of infection – e.g., men having sex with men, sex workers, drug users, etc. – should have access to accurate information on AIDS transmission and the best treatment available. As noted earlier, human rights concerns that led to the Guidelines were developed in large part out of a fear that coercive or discriminatory approaches would “drive risk groups underground.”

The UN solution to such fears, however, far exceeds the task of ensuring that high risk groups have access to information about AIDS transmission and providing adequate treatment where needed. Ironically, one of the clear objectives of the drafters of the Guidelines is to legitimize and mainstream the very same sexual behaviors that caused and continue to contribute to the AIDS epidemic. As noted earlier, the Guidelines ask Member States to legalize prostitution, same-sex marriage and abortion; repeal criminal laws prohibiting promiscuity and unfaithfulness; penalize people who criticize homosexuality; and mandate AIDS/HIV sex education *regardless of religious, moral and cultural traditions*.

Social science data overwhelmingly affirms that sexual relations outside of a faithful marriage—whether it be premarital, extramarital heterosexual or homosexual—increases the prevalence of AIDS and a number of other social ills.¹³ That is why societies generally have had laws restricting sexual behavior and do not recognize a right to sex without restraint. There is no evidence that removing the social deterrence inherent in laws prohibiting illicit sexual behaviors, which reflect moral decisions by national legislators, will in fact contain the HIV/AIDS epidemic.

Isn’t there a better way to recognize the human dignity of those who choose to have sex outside of marriage than to make it easier for them to do so by removing all negative consequences?

The answer is yes! When Member States negotiated the 2001 Declaration of Commitment on HIV/AIDS, they emphasized “the important role of cultural, family, ethical and religious factors in the prevention of the epidemic....” Member States also affirmed “the key role played by the family in prevention, care, support and treatment of persons affected and infected by HIV/AIDS....” The role of “sexual abstinence and fidelity” also was recognized as important to reducing risk-

taking behavior and encouraging responsible sexual behavior. Member States were specifically asked to “develop and/or strengthen strategies, policies and programmes which recognize the importance of the family in reducing vulnerability,” including in the education and guiding of children, and have such policies take into account cultural, religious and ethical values.¹⁴ Some of this pro-family language also is in other UN consensus documents dealing with AIDS.¹⁵

In contrast, the Guidelines (developed largely by sexual rights advocates) hardly mention the family and give very little weight to abstinence and fidelity, the only approach that definitively prevents the spread of the deadly AIDS virus. Why such a stark difference? The Declaration on HIV/AIDS was negotiated among UN member states; the Guidelines were drafted by activists.

Interventions mentioned in the Guidelines that can prevent AIDS include a very brief note on pledges of teenagers to maintain virginity thrown into the mix of other interventions, including ensuring availability of condoms, eroticizing condom use, making it macho to challenge gender roles and stereotypes, sexual health education in schools, and skills building for sex workers in how to get clients to ejaculate whilst avoiding penetrating sex. In other words, to protect the alleged sexual rights of such groups as men having sex with men, drug users and prostitutes, the Guidelines promote the modification of behavior to reduce risk of infection, rather than the complete elimination of promiscuous behavior that puts individuals at risk of contracting the virus.

Glaringly absent from the Guidelines is any discussion on the treatment of homosexuals for unwanted same-sex attraction (SSA) or gender identity disorders. This omission further undermines the credibility of the Guidelines because a wealth of research shows that, while thousands of people suffer from SSA, many of those have been treated successfully for this condition.¹⁶ Any credible prevention effort would both recognize and request that such treatment be given.

There is a real issue as to whether the perceived benefits of many of the recommendations in the Guidelines outweigh their actual costs. For instance, does requiring private employers to provide “Adequate supplies of condoms available free to workers at the workplace” really reduce the rate of infection?¹⁷ Or do such practices encourage promiscuity and subsequent infections by providing a method of prevention at no cost that is known to have a significant failure rate?

Flaws in the Guidelines’ “Legal” Arguments for a Human Rights Approach to AIDS

Despite the Guidelines’ repeated assertion that they are based on international human rights,¹⁸ no officially negotiated UN documents (let alone binding UN treaties) call for legalization of same-sex marriage, sexual conduct outside of marriage, prostitution, and abortion. UNAIDS itself admits, for example, that “International law is very unclear on the rights and health of people engaged in sex work which may contribute to their HIV/AIDS related vulnerability.”¹⁹

Indeed, UNAIDS has raised the question before whether a human rights-based approach should be based on “*agreed upon* international human rights” or “*evolving* understandings” of such rights.²⁰ While recognizing their controversial nature, however, UNAIDS and OHCHR still argue that the extensive requirements and recommendations in the Guidelines are based on obligatory international human rights standards:

It is recognized that some of the recommendations for law and 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. However, these Guidelines are *recommendations to States: they are based on existing international human rights standards* and designed to achieve a pragmatic approach to public health goals relative to HIV. It is the *obligation of States to establish how they can best meet their international human rights obligations and protect the public health* within their political, cultural and religious contexts.²¹

This commentary, of course, is an attempt to undermine well established rights to national sovereignty; national laws that uphold and protect the institution of the family (which according to international standards is entitled to protection by the State); and respect for cultural, moral and religious values, all of which conflict with some of the recommendations in the Guidelines.

The Guidelines stress that a multitude of general rights found in various UN treaties are relevant to the HIV/AIDS epidemic (e.g., right to life, privacy, equality, health, freedom of association and expression, etc.) However, rather than showing how specific treaty language supports their recommendations, UNAIDS and OHCHR rely on treaty monitoring bodies for their expansive readings of the relevant treaties. That's because they have no other choice.

For example, the Guidelines cite to the statement by the Human Rights Commission (HCR) that "other status" in non-discrimination provisions of certain treaties is to be interpreted to include health status, including HIV/AIDS, even though that interpretation was never discussed by the signatories.²² Similarly, the Guidelines cite the HCR's determination that "sex" in the International Covenant on Civil and Political Rights (ICCPR) includes "sexual orientation" which, despite the rejection of such an interpretation by a majority of States, somehow magically is supposed to mean that States cannot criminalize sex outside of marriage between consenting adults.²³ The lack of support in international treaties for many controversial "human rights" interpretations by treaty monitoring bodies that exceed their mandate is well known in other family policy areas, and is now prevalent in the HIV/AIDS context.

The Guidelines also note that Member States often cite public health as a basis for restricting human rights in the context of HIV, and recognize that States may impose restrictions on some rights in narrowly defined circumstances "if such restrictions are necessary to achieve overriding goals, such as public health, the rights of others, morality, public order, the general welfare in a democratic society and national security." But, after citing problematic examples of mandatory testing and differential treatment with regard to access to education, employment, health care, travel, housing, etc., the Guidelines assert that a "public health exception is . . . *seldom* a legitimate basis for restrictions on human rights in the context of HIV."²⁴ The Guidelines' reasoning on this matter not only is internally inconsistent, it is dangerous.

The policy goal of general public health, the rights of others, morality, religious values, public order and the society's general welfare *all* justify longstanding restrictions on same-sex marriage, sex outside of marriage, prostitution, abortion and inappropriate sexual education of minors. The data supporting these restrictions as beneficial to society's general welfare and the integrity of families are clear, and their benefits extend far beyond AIDS prevention.²⁵

Lastly, as noted earlier, the voting record of UN Member States themselves provide the most persuasive argument for why the dangerous sexual rights advanced in the Guidelines are not consistent with international law. None of the outcome documents from prior UN negotiating sessions include a right to homosexual sex, same-sex marriage, prostitution or abortion on demand.

Moreover, on the last day of the 2001 Special Session of the UN General Assembly on HIV/AIDS, the next-to-last draft of the Declaration on HIV/AIDS that was being negotiated called upon nations to enforce, by 2005, the HIV/AIDS Guidelines drafted by UNAIDS and OHCHR with the help of sexual rights activists. Among other nations, the entire 60-nation bloc comprising the Organization of Islamic Conference refused to accede to this proposal because the Guidelines were “offensive to religious and cultural sensitivities.”²⁶ The Guidelines were explicitly rejected by many UN members, did not become part of the UN Declaration on HIV/AIDS, and are thus not UN consensus language. Accordingly, the Guidelines cannot create new international human rights. Indeed, as noted earlier, language in the Declaration on HIV/AIDS that is supportive of the family, abstinence and sexual fidelity directly contradicts some of the recommends in the Guidelines.²⁷

Effective Responses to the Guidelines

Much of the content of the Guidelines is appropriate and needed. But unless the troublesome provisions promoting controversial sexual rights are removed, these Guidelines should be rejected by those UN Member States that want to protect their families, culture, health and religious and moral values—the very things that make for strong nations and would be effective in containing HIV/AIDS. This approach seems drastic, but the reach of the Guidelines is intended to be very broad, as UNAIDS and OHCHR request that (i) the UN Secretary-General disseminate the Guidelines to all UN agencies for consideration in their programmes; and (ii) States implement the Guidelines through their national judicial and legislative systems.²⁸

Earlier in 2009, pro-family UN delegates successfully limited a UN resolution that addressed HIV/AIDS issues so that it referenced just the high level text of the actual 12 guidelines or principles in the Guidelines document, and thus excluded the anti-family commentary associated with the 12 guidelines that specifically defines the scope and meaning of the rights and recommendations referred to in such text. While helpful, the problem with this approach is that it only provides temporary relief. Moreover, the commentary in the Guidelines already has been widely circulated and used by various entities, including UN treaty monitoring bodies, to push their interpretation of the human rights specified in the 12 guidelines themselves.

Policy Implications

UN delegates could consider taking one or more of the following steps to ensure the AIDS epidemic is not used to further advance individual sexual rights at the expense of the family, which is recognized by the UNDHR as entitled to special protection from society and the state:

1. Sponsor or co-sponsor a resolution to the UN General Assembly stating that, counter to claims in the Guidelines, the following are not recognized as human rights under any UN treaties:
 - A “right” to engage in prostitution;
 - A “right” for men to have sex with men;
 - Legalized same-sex marriage;

- A “right” to abortion on demand; and
 - Mandatory sexual education for children without regard to religious and cultural values
2. When negotiating UN documents, (i) oppose any reference to the Guidelines until such as time as they are appropriately revised to delete the sexual rights provisions, and (ii) submit a formal reservation if, despite the opposition, a UN document is approved referencing the Guidelines.
 3. In statements of objection, reinforce the point that laws restricting sexual activity outside of marriage are based on the general welfare of society and the right of others (including children brought into families) to public health and public order.
 4. On a longer term basis, ensure that any UN generated documents that impose obligations based on international human rights standards are negotiated by consensus.

Excerpts from the International Guidelines on HIV/AIDS and Human Rights

([Click here](#) to access the full text of the HIV/AIDS Guidelines)

Legalizing Illicit Sex (Pages 29-30)

21(b) -- **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.**

Legalizing Prostitution (Page 30)

21(c) -- With regard to **adult sex work** that involves no victimization, **criminal law should be reviewed with the aim of decriminalizing . . .**

Legalizing Abortion (Page 35)

22(f) -- **Laws should also be enacted to ensure women's reproductive and sexual rights,** including the right of independent access to reproductive and STD health information and services and means of contraception, **including safe and legal abortion . . .**

Legalizing Same-sex marriage and Penalizing Criticism of Homosexuality (Page 36)

22(h) -- 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 . . . 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 . . .**

Mandatory HIV/AIDS Sex Education Regardless of Religious/Cultural Traditions (Page 96)

136 -- It is the State's obligation to ensure, in every cultural and religious tradition, that appropriate means are found so that effective HIV information is included in educational programmes inside and outside schools. **The provision of education and information to children should not be considered as promoting early sexual experimentation; rather, as studies indicate, it delays sexual activity.**

Endnotes

¹ International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version (UNAIDS/OHCHR), p. 30, 35, 36, 96, 136 [hereinafter “Guidelines”].

² Guidelines, p. 36, par. 22(h).

³ Guidelines, p. 88, par. 117 & p. 97, par. 138 (emphasis added).

⁴ See Guidelines, p. 96, par. 136.

⁵ Richard G. Wilkins, International AIDS Guidelines and Their Implications for Traditional Morality and Religious Liberty, contained in Susan Royslance, *Defending Marriage and Family* (2004), p. 95 (citations omitted).

⁶ International Guidelines on Sexuality Education: An evidence informed approach to effective sex, relationships and HIV/STI education (UNESCO June 2009), pp. 44, 48, 49.

⁷ Issue Paper: *Review and Assessment of HIV/AIDS Strategies that Explicitly Include Attention to Rights -- Prevention*, 4th Meeting, 23-25 August 2004 (UNAIDS) (emphasis added).

⁸ See Annex 1, “History of the Recognition of the Importance of Human Rights in the Context of HIV/AIDS, International Guidelines on HIV/AIDS and Human Rights, UNAIDS/OHCHR, 1998.

⁹ One of the examples cited refers to mandatory testing of identified rapists to enable victims to choose whether or not to utilize post exposure prevention methods. See *supra*, note 7, p. 5.

¹⁰ Issue Paper: *What Constitutes a Rights-based Approach? Determining Rationale, Objectives and Areas of Focus for Our Work*, 4th Meeting, 23-25 August 2004 (UNAIDS).

¹¹ Public Report – First Meeting of the UNAIDS Global Reference Group on HIV/AIDS and Human Rights, January 23-24, 2003 (Geneva, Switzerland), pp. 6, 7.

¹² The International Conference on Population and Development (ICPD) clearly specifies that “[i]n no case should abortion be promoted as a method of family planning.” ICPD (2004), par. 8.25. See also *id.* par. 7.24; Fourth World Conference on Women, par. 106-k; ICPD + 5 (1999), par. 63 (i, ii, iii).

¹³ See Sharon Slater, Chapter 3: The Case for the Traditional Family, *Stand for the Family* (Ingleston Publishing 2009).

¹⁴ Global Crisis – Global Action, Declaration of Commitment on HIV/AIDS, United Nations General Assembly Special Session on HIV/AIDS, 25-27 June 2001, p. 11, par. 20; p. 13, par. 31; p. 20, par. 52; p. 27, par. 63.

¹⁵ The role that abstinence and fidelity has in preventing HIV/AIDS was first mentioned in the International Conference on Population and Development (1994), par. 7.44(a) and also was reaffirmed in the Political Declaration on HIV/AIDS, A/RES/60/262 (2006), par. 22. The Political Declaration on HIV/AIDS resulted from an in-depth review of the progress achieved on the UN Member State commitments set forth in the Declaration of Commitment on HIV/AIDS.

¹⁶ See *What Research Shows: NARTH's Response to the American Psychological Association's Claims on Homosexuality*, Journal of Human Sexuality, 1-128 (2009); summary available at <http://narth.com/docs/journalsummary.html>.

¹⁷ Guidelines, p. 34, par. 22(d)(viii).

¹⁸ See, e.g., Guidelines, p. 13, par. 3 (“The purpose of these Guidelines is to assist States in translating international human rights norms into practical observance in the context of HIV.”) and p. 20, par. 10 (“These Guidelines are firmly anchored within a framework of existing international human rights norms. . . .”)

¹⁹ Issue Paper: *Sex Work and HIV/AIDS*, 2nd Meeting, 25-27 August 2003 (UNAIDS).

²⁰ Issue Paper: *What Constitutes a Rights-Based Approach? Definitions, Methods, and Practices*, 4th Meeting, 23-25 August 2004 (UNAIDS).

²¹ Guidelines, p. 51, par. 58. Ironically, the Guidelines also recommend that States empower people living with AIDS to draft and disseminate their own charters/declarations of legal and human rights.” *Id.* p. 49, par. 55(c).

²² *Id.* p. 84, par. 108. Notably, in December of 2009, the UN General Assembly rejected a provision in a resolution, entitled International Covenants on Human Rights, which took note of General Comment 20 of the ICESCR monitoring committee that added “sexual orientation and gender identity” to the list of classes protected from discrimination. This latest development clearly shows that Member States have rejected attempts by sexual rights activists to create an international human right to sexual orientation, which would include the right for men to have sex with men – a sexual right that the Guidelines erroneously assert is already protected.

²³ In addition, the Guidelines note that the HCR “has found that the right to privacy under Article 17 of the ICCPR is violated by laws which criminalize private homosexual acts between consenting adults.” The Guidelines also cite an HCR communication on a very controversial case, *Toonan v. Australia*, which noted that “the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS.” The opinion in *Toonan* was based largely on the assumption that stigmatizing people at risk of infection “would appear to run counter to the implementation of effective education programs [for] HIV/AIDS prevention,” and not on any express language in a UN treaty. Making a request to States to repeal critical laws protective of the family based on “appearances” obviously is not good social policy. See Guidelines, pp. 84 & 91-92, par. 108, 123-24 (citing Commission on Human Rights resolutions 1995/44 of 3 March 1995 and 1996/43 of 19 April 1996 and Human Rights Committee Communication No. 488/1991, *Toonan v. Australia*, views adopted on 31 March 1994, 50th Session).

²⁴ Guidelines, pp. 81-83, par. 104-05 (emphasis added).

²⁵ See supra note 13.

²⁶ See supra note 5, p. 93.

²⁷ It is also noteworthy that five years after the Declaration on HIV/AIDS was made, UN Member States approved another UN consensus document -- the 2006 Political Declaration on HIV/AIDS -- which repeated some of the same pro-family language in the Declaration without advancing the sexual rights contained in the HIV/AIDS Guidelines. See supra note 15. More recently, at the 53rd Session of the UN Commission on the Status of Women held in New York in early 2009, Family Watch was instrumental in uncovering an attempt by activists to subtly include a reference to the HIV/AIDS Guidelines in a resolution on HIV/AIDS that was being negotiated. The reference was deleted from the UN resolution once pro-family UN delegates were made aware of it.

²⁸ Guidelines, p. 71, par. 80-81 and p. 72, par. 83-84.