Human Rights and the Treatment Agenda

Discussion Paper

Context
At its 14th meeting (in December 2012), the Reference Group said that treatment expansion is the human rights imperative of the epidemic.1 At its 15th meeting (in December 2013), the Reference Group expressed its concern about the looming crisis in treatment sustainability, as ever more people need to take up effective treatments for HIV, tuberculosis and hepatitis C.2 Now, at its 16th meeting (in December 2014), the Reference Group is questioning whether in fact the human right to treatment is being fulfilled and is working to identify key entry points by UNAIDS (the Secretariat and co-sponsors) to make concrete progress towards universal treatment access.

New treatment targets in 2014
In 2014, UNAIDS articulated bold new treatment-related targets. These are different in character than earlier treatment targets in that they are now characterized as essential to bringing about the end of the AIDS epidemic, as opposed to achieving incremental progress. According to UNAIDS, modelling suggests that achieving these targets by 2020 will be necessary to enable to world to end the AIDS epidemic by 2030.3

Parallel to some degree recent discussions of the “treatment cascade,” in which there is a drop-off of population reached at each stage of the testing-treatment-care continuum, the new treatment targets are being discussed as the “90-90-90” goals, referring to the linked goals of:

- 90% of all people living with HIV will know their HIV status (90% diagnosed);
- 90% of all people with diagnosed HIV infection will receive sustained antiretroviral therapy (90% on treatment); and
- 90% of all people receiving antiretroviral therapy will achieve full viral suppression (90% virally suppressed).4

The Fast-Track report released in November 2014 provides further insight into UNAIDS’ vision of treatment scale-up. The premise of this report is that “HIV infections may not disappear in the foreseeable future, but the AIDS epidemic can be ended as a global health threat.”5 The Fast-Track report proposes accelerating treatment roll out towards the 90-90-

---

2 UNAIDS Reference Group on HIV and Human Rights, Fifteenth Meeting | 4–6 December 2013 Summary and Recommendations, p. 3.
90 targets, especially among key populations in the next 6 years and with a priority focus on those countries:

If the world is to end the AIDS epidemic by 2030, rapid progress must be made by 2020. Quickening the pace for essential HIV prevention and treatment approaches will limit the epidemic to more manageable levels and enable countries to move towards the elimination phase. If the response is too slow, the AIDS epidemic will continue to grow, with a heavy human and financial toll from increasing demand for antiretroviral therapy and expanding costs for HIV prevention and treatment.

UNAIDS-commissioned modelling has confirmed this finding (2). Quickening the pace over the next six years is pivotal to global prospects for bringing the AIDS epidemic to an end. If the world reaches the 2020 targets only by 2030, there would be 3 million more new HIV infections and 3 million additional AIDS-related deaths between 2020 and 2030.6

UNAIDS identifies that achieving this target involves a comprehensive, inclusive and transformative approach. Moreover, UNAIDS acknowledges that “[t]he only way to achieve this ambitious target is through approaches grounded in principles of human rights, mutual respect and inclusion. Coercive approaches not only violate fundamental human rights norms, but they will also hamper hopes for ending the AIDS epidemic.”7 It is important, therefore, to consider the 90-90-90 targets in conjunction with The Gap Report, released earlier by UNAIDS in July 2014.8 Drawing upon extensive data, that report identifies twelve populations at risk of being left behind in the HIV response: people living with HIV; adolescent girls and young women; prisoners; migrants; people who inject drugs; sex workers; gay men and other men who have sex with men; children and pregnant women living with HIV; displaced persons; people with disabilities; and people aged 50 and older. For each population the report provides suggestions on how to “close the gap.” For example, for gay men and other men who have sex with men, the report identifies the following four gap-closing mechanisms: protective social and legal environments, including decriminalization; access to quality, discrimination-free health services; data collection on HIV and gay men and other men who have sex with men; and strengthening community systems.9

Questions posed by the Reference Group over the years remain relevant within this new treatment framework. For example:

- Do or should the treatment guidelines and targets articulated by UNAIDS inform our understanding of the content of the access-to-medicines element of the human right to health? How should they be taken up in other fora, including human rights fora (e.g., comments or concluding observations by the UN Committee on Economic, Social and Cultural Rights)?
- Is there a human right to treatment regardless of clinical stage of infection (e.g., if a person has a CD4 count above that current WHO guidelines for initiating treatment)?

---

From a human rights perspective, how do we formulate a definition of “universal access” that could be used as a treatment target? Is 90% diagnosed, 90% on treatment, and 90% with viral suppression (which amounts to 73% of all people living with HIV achieving viral suppression) fulfilment of the right to health?

Moreover, the new articulation of the approach to HIV treatment raises other questions. For example:

- If success is defined as ending the AIDS epidemic as a global health threat, what will the future of HIV be? Will it become an illness of the poor and marginalized only? As this is not satisfactory from a human rights perspective, what is required – including of UNAIDS – to ensure that talk of “the end of AIDS” goes beyond simply an assessment of whether it remains a significant threat, on the global scale, to public health?
- Furthermore, if key populations at higher risk of acquiring HIV are not currently benefitting equally from prevention and treatment gains, then in order to follow through on the stated UNAIDS commitment not to leave people and populations behind in the HIV response, what new initiatives will address the barriers faced by key marginalized populations, including criminalization, stigma and the acceptability of the interventions?
- UNAIDS has three top-level targets: zero new infections, zero deaths and “zero discrimination.” Human rights are relevant to all of these, yet often the “zero discrimination” target is understood as the human rights target. But a goal of achieving zero discrimination is not the same as a broader commitment to basing HIV responses on human rights. What of the broader set of other rights that are not being considered under the discrimination rubric but are also highly relevant to a human rights-based response to HIV, such as the right to health, freedom from torture, cruel, inhuman and degrading treatment or punishment, security of the person, freedoms of expression and assembly, etc.? These human rights are relevant to the HIV response on multiple levels, including the achievement of the new treatment targets.

A specific concern for the treatment agenda: the Intellectual Property Rights Challenge

As discussed by the Reference Group at the 15th meeting, the current intellectual property rights (IP) regime – meaning both the norms widely adopted at the global level (e.g. the WTO’s TRIPS Agreement and various regional or bilateral treaties) and the legislation or regulations at national level that largely reflect, with some important variations by country, the protection of private intellectual property claims in pharmaceuticals rather than affordable, equitable access to health goods and services - is an impediment to expanding treatment access and thereby realizing the human right to health. Even where they may exist on paper, the existing flexibilities (e.g., under TRIPS) are insufficient and seldom used despite clear evidence of need and of benefit to be achieved in improving the goal of access to medicines for all (as unanimously affirmed by WTO Members in the 2001 Doha Declaration on the TRIPS Agreement and Public Health).  

---

10 Declaration on the TRIPS agreement and public health, WT/MIN(01)/DEC/2, 20 November 2001, online: http://www.wto.org/english/tratop_e/trip_e/dh_trips_e.htm.
The Reference Group was therefore supportive, at its 15th meeting in December 2014, of a “re-think” of the current regime for pharmaceutical products, in favour of a system that is consistent with international human rights law and public health requirements, while safeguarding the justifiable rights of inventors – as recommended by the Global Commission on HIV and the Law as follows:

6.1. The UN Secretary-General must convene a neutral, high-level body to review and assess proposals and recommend a new intellectual property regime for pharmaceutical products. Such a regime should be consistent with international human rights law and public health requirements, while safeguarding the justifiable rights of inventors. Such a body should include representation from the High Commissioner on Human Rights, WHO, WTO, UNDP, UNAIDS and WIPO, as well as the Special Rapporteur on the Right to Health, key technical agencies and experts, and private sector and civil society representatives, including people living with HIV. This re-evaluation, based on human rights, should take into account and build on efforts underway at WHO, such as its Global Strategy and Plan of Action on Public Health, Innovation, and Intellectual Property and the work of its Consultative Expert Working Group. Pending this review, the WTO Members must suspend TRIPS as it relates to essential pharmaceutical products for low- and middle-income countries.  

It should also be noted that the NGO Delegation to the UNAIDS Programme Coordinating Board has submitted an extensive report to the PCB’s 35th meeting (in December 2014) on the issue of IP policy and its impact on access to HIV treatment, which puts forward a number of recommendations for action by the PCB and the UNAIDS Secretariat.  

Entry points for UNAIDS and the Reference Group

There are multiple entry points into the human rights issue of IP policy as it relates to access to medications. UNAIDS has been involved in a number of related initiatives, such as:

- a 2013 consultation on access to HIV medications in middle incomes countries (organized by UNAIDS, UNITAID, WHO and the Brazilian government in collaboration with the Medicines Patent Pool, WTO and WIPO);
- a BRICS (Brazil, Russia, India, China and South Africa) side event during the World Health Assembly in May 2014 on access to medicines of the member; and
- the annual ARV forecasting meeting with pharmaceutical companies (organized by WHO and UNAIDS).

In addition, UNDP provides technical support to countries on TRIPS flexibilities (e.g., Uganda, Kyrgyzstan, Swaziland, Myanmar and Cambodia), supports capacity-building workshops on using TRIPS flexibilities; and has produced numerous knowledge products (i.e., discussion papers, issue briefs, good practice guide).\textsuperscript{14}

The Reference Group will recall as well that, as discussed at its 15\textsuperscript{th} meeting in December 2013, the UNAIDS Executive Director and UNDP Administrator have also asked the UN Secretary General to act on the Global Commission’s recommendation (above) to convene a high-level body to elaborate a global approach to intellectual property that is consistent with human rights and public health needs. A decision is anticipated by the end of 2014 or in early 2015.

Given the urgency of the IP issue to the treatment and human rights agendas of UNAIDS, the Reference Group should at its 16\textsuperscript{th} Meeting formulate key messaging and concrete actions to recommend to the UNAIDS Executive Director and Secretariat in order to begin removing IP barriers to treatment and move towards a human rights-based approach to pharmaceutical development, sale and distribution.

\textbf{Potential key messages and recommendations}

- Should the UN Secretary General decide to act on the recommendation of the Global Commission on HIV and the Law to convene a high-level body to review IP policy, it is important that UNAIDS be an active, contributing participant. The Reference Group could play a role here in supporting UNAIDS’ engagement.

- In addition, a commitment to achieving the new global HIV treatment targets should also be reflected in, and supported by, the articulation of new “Sustainable Development Goals” (SDGs) that will succeed the Millennium Development Goals after 2015. And, of course, they must feature prominently in the outcomes document from the anticipated UN High Level Meeting on HIV in 2016, which is expected to complement the SDGs with a greater degree of HIV specificity. UNAIDS should be actively engaged in building political support from Member States for this.

- In order to inform the outcomes of the processes just mentioned (high-level body; the SDG process; the HLM on HIV), UNAIDS (Secretariat and co-sponsors) could, as recommended by the NGO Delegation to the UNAIDS PCB, conduct an analysis of the impact of current IP frameworks (including the TRIPS Agreement and existing or proposed provisions in trade/investment agreements) on the availability, affordability and accessibility of treatments and diagnostics for HIV and co-infections in low- and middle-income countries. This analysis could form the basis for ongoing advocacy by UNAIDS (Secretariat and co-sponsors) for necessary reforms, globally and at country-level, to make IP laws and policies more consistent with human rights requirements and public health objectives.

\textsuperscript{14} IP & Access to Medications Sub-Committee of the UNAIDS Reference Group on HIV and Human Rights, Conference call Notes, November 4, 2014, pp. 4-5.
As also recommended to the PCB by the NGO Delegation, UNAIDS could incorporate and strengthen indicators in its Unified Budget, Results and Accountability Framework (UBRAF) regarding the IP policy environment, and the use of flexibilities under existing IP regimes, as part of monitoring progress toward achieving treatment targets.

It is also worth recalling the following recommendations adopted by the Reference Group at its 15th meeting (in December 2013) that still seem relevant:

Recommendation 1.3: UNAIDS, UNDP and OHCHR should actively support human rights-based initiatives to implement the recommendations of the Global Commission on HIV and the Law and should co-convene a meeting of human rights experts in 2014, including at least two Reference Group members, to further explore avenues to advance the intellectual property recommendations of the Global Commission in human rights institutions.

Recommendation 1.4: UNAIDS should provide funding for human rights and IP experts to work on this issue.

Recommendation 1.7: UNAIDS and its Co-sponsors should put in place means of gathering data that will identify and chart the crisis in the costs of pharmaceuticals and to give proper publicity to these data.