GPA/DIR/95.5.b
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Distr.: Limited

GLOBAL PROGRAMME ON AIDS

BACKGROUND PAPER
PREPARATORY MEETING FOR A CONSULTATION ON LONG-TERM TRAVEL RESTRICTIONS AND HIV/AIDS

GENEVA
4-6 OCTOBER 1994

WORLD HEALTH ORGANIZATION

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CONTENTS

I. Introduction

This paper has been prepared as a background document for use in the development of World Health Organization (WHO) policy regarding restrictions on long-term travel imposed on people with HIV infection and/or AIDS. It is intended for internal WHO use and for persons involved in the formulation of WHO policy and guidance.

Various HIV/AIDS-related travel restrictions are imposed by different countries around the world. For example, a 1991 survey of 162 countries found that 86 had no restrictions, 41 had restrictions for some categories of migrants but not for short-term visitors[a], 21 had some provision for restrictions which were not usually applied in practice, seven applied restrictions to short-term visitors, and seven could not be classified because information was contradictory or unclear.[1] Recent compilations suggest that over fifty countries employ some form of travel restrictions.[2]

WHO has promulgated a policy on the non-sponsorship of international AIDS conferences in countries which impose short-term travel restrictions.[3] The issues related to long-term travel and permanent migration, however, are more complex than those affecting short-term travellers, and consequently the development of policy in this area is more difficult.

Policy on long-term travel restrictions should be considered in the context of WHO's existing policies, including opposition to all forms of *discrimination* against people with HIV/AIDS, the policy on short-term travel mentioned above, advocacy of the need to protect the human rights and dignity of people with HIV/AIDS,[4] and the Global AIDS Strategy which, among other things, seeks to prevent HIV infection and reduce the personal and social impact of HIV infection.[5]

The following are some of the specific issues that must be resolved in the development of policy. They are discussed in greater detail in the body of the paper but are set forth here in short-form for orientation purposes:

(a) Definition of long-term travel - Types of travel are usually defined by length of stay and/or by purpose of travel. The policy with regard to short-term travel restrictions defines short-term travel as travel for thirty days or less. Should long-term travel be defined as travel that is for more than thirty days and include the purposes of tourism, work, residence, study, asylum, and immigration?

(b) Types of Restrictions - The policy on short-term travel applies to "HIV/AIDS-specific legislation, regulations and/or written policies requiring any or all of the following in relation to short-term travellers: HIV-testing, self-declaration of HIV status, exclusion of persons known or suspected of having HIV infection or AIDS". Should the policy on long-term travel cover only these types of restrictions or should it also cover the application of non-HIV/AIDS-specific restrictions which are used in practice with regard to people with HIV/AIDS?

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[a] Based on each country's own definition of short term visitors.

(c) Purpose of restrictions - The efficacy of imposing travel restrictions on people with HIV/AIDS can only be assessed against their intended purposes. The purposes of travel restrictions are not always stated, but they are often intended to protect the public health by preventing the spread of HIV infection, and/or reduce economic costs that may be associated with the entry of HIV-positive non-nationals. Are there any valid public health arguments to restrict entry into a country for any of the categories of long term travellers? What is the rationale for restrictions to avoid economic costs associated with disease? In this respect, how does HIV/AIDS related disease compare to other chronic conditions?

(d) Validity of restrictions - The right to enter a State is confined to nationals of that State. International law and international human rights law do not establish a right to enter a State for aliens, and States have broad discretion to choose the grounds by which to exclude and expel aliens. However, the principles of non-discrimination, equality before the law, freedom of movement, the right to seek and enjoy asylum and other humanitarian principles do impose some limitations on this State prerogative. Given these principles, what long-term travel restrictions, if any, are valid and for what purpose?

II. Categories of travellers and migrants

Each country uses its own definitions in its regulations as to categories of travellers and migrants. International law distinguishes between people who are and are not nationals, e.g. citizens, aliens, immigrants, and recognises other specific categories, e.g. refugees, asylum-seekers, migrant workers. For the purpose of this paper, the terms "travellers" and "migrants" will include persons who are outside their country of nationality, or are crossing or seeking to cross an international border.

Different groups of travellers/migrants can be categorised according to the length of stay of the travel and/or its purpose. Some relevant categories would include legally admitted permanent residents/immigrants, legally admitted temporary migrants, illegal migrants, migrant workers, short-term visitors, tourists, returning nationals, refugees, asylum-seekers, students and diplomats. The classification of different groups of travellers/migrants is discussed further in Annex 1, which gives working definitions for some of the major categories.

Classification is also difficult since the status of people may change. Persons who originally visit another country for a short time and for one purpose may wish to extend that time and/or change the purpose. They may apply for immigration, or they may establish ties - homes, children, employment - that make it difficult and possibly objectionable on humanitarian grounds for the receiving country to deport them. They may claim asylum and thus the right to remain beyond their original visas. They may overstay, move from legal to illegal status, and remain "underground". Thus, when devising visa regulations or considering the issue of admission, States take into account not only the length and purpose of stay initially envisaged, but also the possibility of changes in status after people are admitted. There is concern that, if admitted, some people will ultimately become permanent immigrants, legally or illegally.

III. Migration patterns and trends

The global scale of medium and long-term migration is substantial, but is much less than that of short-term travel. Each year, over one million people emigrate permanently and nearly as many seek asylum. There are some tens of millions of people working abroad (legally or illegally), and about 20 million refugees outside their homelands. But if short-term visitors are included, there are over one billion international travellers every year. In some tourist destination countries, the annual number of short-term visitors exceeds the resident population.[6]

Migration patterns are influenced by a complex interplay of individual and family interests, government policies, and economic forces, e.g. demands for labour, trade and consumers. Short-term visitors and tourists are often encouraged because they benefit the host country's economy and may be a major source of foreign revenue.

More complex considerations apply in the case of longer-term travel. These considerations often vary depending on the stage of national development. Newly industrialised States may welcome migrant workers. But at the same time, they may seek to prevent such workers from acquiring long-term settlement rights, so they can be sent home if they cease to be economically useful because of changing labour demands or because of age, illness or disability. Fixed-term employment contracts and work permits may be imposed on migrant workers to ensure that they provide the employer and host country with a "rotating stock of temporary labour".[7]

Some countries have traditionally welcomed permanent immigrant workers. However, in the post-industrial era there has been increasing reluctance to accept people wishing to immigrate for purely economic reasons. Thus, while the USA, Canada and Australia still accept large numbers of permanent immigrants, an increasing proportion of them are refugees, illegal migrants granted amnesty, relatives of earlier settlers arriving under family-reunion programmes, and some highly skilled workers.[8] Refugees may be selected according to health and qualifications.[9] The number of refugees accepted for resettlement by developed countries is small compared to the total number of refugees worldwide.[10]

Many States that are not considered countries of immigration nevertheless receive immigrants, especially from neighbouring regions, and may rely on migrants, sometimes illegal, to do low status work which is not accepted by their own nationals. For developed countries, immigration from developing countries may be perceived as a "problem" requiring strict controls, but movement between wealthy countries has been eased. For example, the European Community has achieved internal freedom of movement for its own nationals, but increasingly limits legal immigration from outside to asylum-seekers and families of existing residents.

Developing countries tend to be regarded primarily as senders rather than recipients of migrants, and in terms of long-distance migration, this is broadly true. Migration can be important to the national economy as earnings sent home by migrant workers provide revenue, while returning students and migrant workers bring in skills learned abroad. Labour migration may alleviate unemployment at home, although it may also drain away the most valuable and productive workers.

However, some developing countries also receive large numbers of within-region migrants. Traditional or modern patterns of seasonal and migrant labour, and displacement of populations by conflict, famine or disaster contribute to this. For example, most of the 20 million refugees worldwide are in the poorer countries of Africa, the Middle East and South Asia, often living in very adverse circumstances. Some developing countries also receive significant numbers of long-distance tourists from developed countries.

These trends are grossly over-simplified, but as a broad generalisation one can say that restrictions aimed at reducing or regulating in-migration are mainly imposed by countries that are either developed countries or at an intermediate stage of development, but may bear heavily upon the nationals of developing countries who are affected by them. It is clear that States, both receiving and sending, act in terms of various interests - economic, political or humanitarian - in the regulation of those crossing their borders. HIV/AIDS-related restrictions should be viewed against this general picture.

IV. Factors potentially affecting the HIV status of travellers and migrants

HIV infection can only be transmitted by sexual intercourse or through the exchange of blood or bodily fluids with an infected person. In the great majority of cases, it is the behaviour of individuals that determines the risk of infection. Thus, travel and migration in themselves do not cause HIV infection.

In terms of increased exposure due to risky behaviour among a population, the prevalence of HIV infection among migrant groups and travellers will partially reflect the prevalence in their countries of origin. Thus, migrants may have a higher prevalence than the population of the receiving country, or they may have a lower prevalence. Unfortunately, there is a tendency of receiving populations to "blame" foreigners for introducing or spreading HIV, even where the foreigner may be at greater risk of acquiring the infection in the host country. Moreover, specific aspects of travel and migration may increase vulnerability to HIV infection.

Migration patterns which disrupt family life

Migration often involves separation of families, e.g. a breadwinner travels to obtain work and sends remittances to support the family that remains behind. People thus separated from their regular partner and the social constraints of family and community life may be more likely to have sexual contact with other partners. In this regard, travel restrictions and economic barriers which make it harder for whole families to migrate together may indirectly contribute to the spread of HIV infection.

Differences of language and culture

Migrant groups may differ substantially from the population of the host country in language, religious beliefs and cultural background. They may thus be less receptive than nationals are to information disseminated about HIV/AIDS. Unless HIV prevention measures have been designed specifically to meet their needs, some migrants may be less able to assimilate and act upon them than nationals of the host country.

Legal, economic and social status

Migrants often occupy a disadvantaged legal, social and economic position relative to nationals of the host country. This can increase their vulnerability to HIV infection by making access to information, education, counselling and other prevention programmes more problematic. Asylum-seekers in particular have a precarious legal status, possibly being entitled neither to work nor to social security benefits. They may also feel that activities which involve contact with the authorities, e.g. seeking counselling about HIV, could be prejudicial to their asylum claim or otherwise threaten their ability to remain. Illegal migrants may have similar fears.

Sexual exploitation, abuse and rape

Sexual abuse can be among the factors leading someone to seek asylum or become a refugee. Persecution can take the form of rape; and in various conflicts, systematic rape as a means to instill terror and displace populations has been reported.[11] Refugees and asylum-seekers who have been raped may have been exposed to a risk of HIV infection. HIV/AIDS-related travel restrictions could thus deprive them of protection needed because of the nature of oppression they have suffered.

Some migrants, e.g. domestic workers, refugees and displaced persons, are especially vulnerable to sexual exploitation or abuse in the receiving country.[12] Illegal migrants may not seek protection from law enforcement personnel for fear of being discovered, deported and\or further abused.

V. Review of restrictions

Restrictions based on general health status/communicable disease

Nearly all countries have some legal provision to exclude travellers on health grounds. This could be directed against those with "infectious" or "communicable" diseases, terms which may not be clearly defined. Barring entry of persons with diseases which are highly infectious or easily spread serves to protect nationals from being unknowingly exposed to infection. However, inclusion of HIV/AIDs among such diseases is problematic in that infection does not occur through everyday contact and can be avoided by the non-infected if s/he does not engage in risk behaviour. Furthermore, some infectious/communicable diseases are also diseases which can be cured. In such cases, application of a restriction results in a temporary bar to entry. Application of such restrictions in the case of HIV/AIDS results in a permanent bar.

Nevertheless, HIV/AIDS may be classified as an infectious or communicable disease, either explicitly as a matter of policy or at the discretion of individual officials. For example, doctors conducting medical examinations of immigrants may be instructed to include testing for HIV infection or this may be left to their discretion. Unless clear guidance has been published about how such laws should be interpreted, and is followed in practice, it is difficult to know whether or not they pose a barrier to travellers and migrants with HIV.[13]

Restrictions specific to HIV/AIDS

Restrictions specifically related to HIV/AIDS can take various forms. Travellers/migrants may be required to undergo an HIV test conducted in the sending country or in the receiving country. They may be required to present a certificate of a negative HIV/AIDS test result. They may be asked to declare their status or be asked whether they know themselves to be infected. Alternatively, they may not be questioned or tested but may be liable to exclusion or deportation if they are discovered to be infected.

Some countries apply these restrictions to all travellers, only to long-term travellers, and/or to specific groups, such as refugees, students and performing artists. Some countries sending students test them before granting scholarships or authorization to travel. A few countries have considered imposing reciprocal restrictions as a form of retaliation, affecting only the nationals of countries which themselves impose HIV/AIDS-related travel restrictions.

Imposition of restrictions

The national government may impose the restrictions, or other agencies may do so. These would include local authorities where these are responsible for issuance of residence permits, and employers and educational/training institutions, which effectively control the movements of migrant workers and students respectively.

Availability of waivers

Some countries provide for waivers for some travellers/migrants who would otherwise fall within the scope of the restriction. In order to obtain a waiver and enter the country legally, people still need to comply with the requirements of the restriction, e.g. be tested or declare their HIV status. The waiver procedure will then exempt certain persons from application of the restriction due to certain grounds, e.g. the need to attend a conference or visit a family member. Some people might be eligible for a waiver but do not apply for one, because they are unaware of their infection, have chosen to conceal it or do not understand the waiver procedure. If subsequently discovered to be infected, these people may be liable to exclusion or deportation.

The WHO Policy on Non-Sponsorship of International Conferences on AIDS in Countries with HIV/AIDS-Specific Short Term Travel Restrictions states that "discretionary waivers of such restrictions for short-term travellers with HIV infection or AIDS do not represent an acceptable limitation of such discriminatory and exclusionary policies".

The effect of restrictions on people with HIV/AIDS

A policy of screening travellers/migrants does not automatically mean that those with HIV/AIDS will be excluded, deported or denied permission to remain. For example, in one country scholarship students from some countries are screened but allowed to remain if found to be HIV-positive, while those from other countries are screened before arrival and refused entry if infected.[14] Other persons with HIV/AIDS who are scheduled for deportation may not actually be deported as deportation of illegal aliens is expensive and difficult to implement. These persons may remain as illegal migrants.

Some countries screen their own returning nationals. Though these countries do not exclude those found positive, they may impose other measures on these people once in the country, including restricting their freedom of movement.

VI. Purposes of restrictions

The efficacy of imposing travel restrictions on people with HIV/AIDS can only be assessed against their intended purposes. The purposes of travel restrictions are not always stated, but they are often intended to : (1) protect the public health by preventing the spread of HIV infection, and/or (2) reduce economic costs that may be associated with the entry of HIV-positive non-nationals. Unfortunately, travel restrictions may be based on ignorance about the disease and/or prejudice against foreigners, e.g. that HIV/AIDS is a "foreign" problem that can be controlled as long as "diseased" or "sexually promiscuous" foreigners are controlled. This erroneous view can retard prevention efforts among national populations.

Prevention of HIV transmission

Because HIV is not transmissible through everyday contact, travel and migration of infected individuals do not in themselves entail a risk to public health. Nevertheless, travel, including international travel, has undoubtedly contributed to the spread of HIV infection, as people exposed to infection in one country or area have subsequently engaged in high risk behaviour in another. However, there are a number of reasons why travel restrictions are unlikely to be effective in preventing the spread of HIV.

Countries cannot legitimately prevent their own nationals from leaving and returning or restrict their internal freedom of movement after return. Yet HIV infection can be introduced and spread by returning nationals who have acquired it abroad, as well as by entering non-nationals.

For most countries, short-term visitors far outnumber longer-term migrants. This means that absolute exclusion of HIV-infected non-nationals cannot be achieved without closing borders almost entirely. No country requires HIV testing of all entering non-nationals. To do so would present major practical difficulties at borders. Even if all entering non-nationals could be tested, some infected individuals would escape detection because of the "window" period between becoming infected and developing antibodies.

Partial exclusion of HIV infected non-nationals can be achieved by selective testing of some groups of travellers, e.g. those staying longer than a certain time, or by asking about people's HIV status and excluding those who declare that they are infected. However, such measures are potentially harmful to public health in the host country, because many people will not realise that they do no exclude infection completely. Thus, they create a misleading perception that HIV/AIDS is a foreign problem which can be controlled by border restrictions. This may undermine efforts to promote safer behaviour among people within the country, possibly accelerating the spread of HIV infection.

The efficacy of HIV/AIDS-related travel restrictions as a means of preventing the spread of HIV infection has been previously examined by a WHO expert consultation which concluded that restrictions would be difficult to justify on such grounds. Thus, the 1987 Statement on Screening of International Travellers for Infection with Human Immunodeficiency Virus states:

"No screening programme of international travellers can prevent the introduction and spread of HIV infection.

"HIV screening programmes for international travellers would, at best and at great cost, retard only briefly the dissemination of HIV both globally and with respect to any particular country.

"The diversion of resources towards HIV screening of international travellers and away from educational programmes, protection of the blood supply and other measures to prevent prenatal and perinatal transmission, will be difficult to justify in view of the epidemiological, legal, economic, political, cultural and ethical factors mitigating against adoption of such a policy."

In conclusion, there is no public health rationale that would justify the imposition of travel restrictions. The public health goal of preventing the spread of infection is not served by restrictions on entrance of non-nationals into any country and in fact may be negatively affected in terms of the misuse of resources and the creation of misconceptions of the nature of the problem. Public health, however, is not the only consideration of governments. Economic concerns also come into play.

Economic Costs Associated with Long-term Travel

States may impose HIV/AIDS-related travel restrictions in order to avoid costs associated with persons with HIV/AIDS. Costs may include (1) treatment, care and support to people with HIV-related disease; (2) support of remaining dependents if the breadwinner falls ill or dies; (3) investment in a student or professional trainee whose professional life expectancy is likely to be shorter than average.

For permanent immigrants and long-term temporary migrants entitled to use public services, costs of care and treatment as well as cost of support of dependents are undeniably real. The likelihood of costs being encountered by the State due to health status will depend on the state of health of the traveller/migrant upon entry, his/her financial resources, and the length of stay envisioned. Thus, in order to be rational and proportional, the application of any restrictions should be tailored to these three elements. For example, with regard to an asymptomatic migrant applying for temporary residence and/or work permits, it would be rational for the State to enquire as to financial arrangements made to cover costs in case of sickness arising from any condition. Where such financial arrangements cannot be demonstrated, general health restrictions, including those applicable to HIV\AIDS, might be applied. However, the State need not enquire as to HIV status. For a person applying for permanent immigration, it might be more justifiable for a State to request HIV-testing, as a part of a general health assessment directed at screening for conditions which are likely to have serious future economic consequences.

HIV infection is only one of several chronic conditions which may ultimately lead to illness and disability requiring treatment and social support. The economic burden represented by HIV/AIDS must thus be compared with that of other prevalent diseases for which immigrants may or may not be screened, so as to develop a policy that is rational, practical and fair. Unfortunately, little data are available to make informed policy decisions in this regard. In one study, N. Gilmore et al compared the health care costs of HIV-related disease and of coronary heart disease (CHD) among people immigrating to Canada in 1988, assuming that those with a prior *clinical* history of AIDS or CHD had been excluded. After

discounting, they estimated that the economic impact over the next ten years of immigrants with HIV infection would be similar to that for CHD (Can$18.5 and Can$21.6 million respectively).[15] The same group had previously estimated that screening these immigrants for HIV infection would have cost Can$3.3-3.4 million.[16] The cost of screening is thus not negligible, although small relative to overall health care costs.

Some countries imposing travel restrictions require the cost of screening to be borne by the intending traveller/immigrant, or his/her country of origin, and may thus assume that they can exclude infected people at no cost. However, this neglects possible intangible costs, such as administration of waiver procedures, political controversy, litigation, and encouragement of public prejudice and misconceptions.

In some developing countries, requirements for HIV testing of intending travellers can place a substantial burden on the infrastructure of these sending countries and may adversely affect public health by diverting testing kits away from screening of blood for transfusion or from voluntary testing programmes.

Testing of students and professional trainees for eligibility for scholarships and studies abroad is based on the perception that investment in those with a potentially shorter productive and professional life span is a misuse of resources. However, persons with HIV are living longer and longer as drugs and treatment improve. Furthermore, a person's HIV status may be subordinate to his/her other qualifications when determining the value of training him/her in a particular discipline, especially one requiring skills or qualities which are in short supply. In addition, a negative HIV test at the start of the study period offers no protection against future infection and disease. Finally, HIV/AIDS should not be singled out as the only disease that should form the basis of restrictions imposed against students and trainees because of concerns of reduced life span. Diseases with comparable consequences should be assessed in the same terms.

In conclusion, governments may have a valid concern when they consider the economic costs that may be associated with the entry and long-term stay of persons with HIV/AIDS. Other conditions, however, may give rise to comparable costs. If governments wish to avoid such costs they should do so in a rational and fair manner which includes conditions comparable to HIV/AIDS. Much more work needs to be done to determine which conditions give rise to costs, the nature and extent of these costs (including the costs of screening for these conditions) and the best means by which to address the cost issues that will have the least disruptive effect on travel, mobility and freedom of movement.

VII. Human rights and humanitarian principles in relation to travel, migration and HIV/AIDS

The paper has so far examined types of HIV/AIDS long-term travel restrictions and the purposes of these restrictions from the point of view of public health (prevention) and avoidance of economic costs. A third and essential consideration is the validity of these restrictions in terms of international human rights. The human rights that are applicable in this area are freedom of movement, non-discrimination, equality before the law, the right to privacy, protection of the family, the right to seek and enjoy asylum, the principle of non-refoulement, and the rights of migrant workers. Before turning to these, however, it is necessary to consider State sovereignty in terms of the right of States to regulate the entry and stay of aliens.

A basic rule of international law, derived from notions of State sovereignty and territorial jurisdiction, is that States have exclusive control over persons in their territory, including broad discretion to exclude, admit, place conditions on entry, and/or expel non-nationals. Thus, in establishing HIV/AIDS related travel restrictions, States are exercising a traditional aspect of State sovereignty.

Some commentators are beginning to challenge this aspect of sovereignty, calling for a reassessment of immigration law to take account of broader theoretical developments in international law "which have tended to place a greater emphasis on cooperation between States rather than just on their right to sovereignty", and suggesting that whereas a presumption of exclusion, unless certain conditions are met, may be justifiable for permanent immigrants, for visitors"[b] a rebuttable presumption of admissibility may be more appropriate".[17]

Nevertheless, in the context of long-term travel and migration, the issue presents itself as to what limits, if any, there are on this exercise of sovereignty. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live recognises the right of "any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens". However, it goes on to say that "such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights". The following paragraphs analyze the human rights principles that may limit or direct States as they promulgate laws and regulations that affect entry and stay, including travel restrictions.

Freedom of movement

Article 12 of the International Covenant on Civil and Political Rights establishes the right to freedom of movement and residence within the border of a State and the right of nationals to leave and return to their own country (emphasis added). In international law, however, there is no right of aliens to enter a country. Thus, aliens cannot claim such a right when faced with HIV/AIDS-related travel restrictions.

With regard to the right to return to one's own country, some States have required testing of their own returning nationals, including repatriating refugees. Based on the principles of freedom of movement and those governing relations between States, no State can refuse entry of HIV-positive returning nationals. Nevertheless, there may be human rights consequences upon return for nationals who test positive.

With regard to the right to leave a country, including one's own, this right can be restricted only in limited circumstances, such as reasons of national security or to apprehend fugitives from justice.

Thus, with regard to restrictions on freedom of movement, international law does not create a right of aliens to enter a country not their own nor a legal obligation of States to receive them. Though there is no legal obligation created, it should, however, be recognized that freedom of movement, including international freedom of movement, is a general good

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[b] Not defined, but may refer to both temporary migrants and short term visitors as defined in this paper.

in terms of individual liberty, communication, exchange of ideas, open societies, commerce, etc. Therefore, restrictions on freedom of movement should be avoided as far as possible, and where imposed, should have a rational basis.

In addition, Article 13 of the International Covenant on Civil and Political Rights states that "an alien lawfully in the territory of a State ... may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall ... be allowed to submit the reasons against his expulsion and have his case reviewed ... and be represented". This implies that clear grounds are needed for expelling or deporting aliens. Deportation and expulsion solely on grounds of HIV status could be regarded as arbitrary and unjustified.

Non-discrimination

International law prohibits discrimination in the enjoyment and exercise of recognized human rights and fundamental freedoms on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities has stated in its last session that "other status", includes health, including HIV/AIDS.[18]

These prohibitions apply to discrimination that curtails the exercise or enjoyment of a recognized human right. As stated above, there is no recognized right of an alien to enter a country that is not his or her own. Thus, it is not clear that the principle of non-discrimination in itself limits State sovereignty in the imposition of HIV/AIDS-related travel restrictions on aliens.

Equality before the law

Article 26 of the International Covenant on Civil and Political Rights provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In its General Comment No. 18 of November 1989, the Human Rights Committee commented that:

> "While article 2 (non-discrimination) limits the scope of the right to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the publication therefore. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant."[19]

Commenting on the right to equal protection of the law, the report of the International Consultation on AIDS and Human Rights states that:

> "this right derives from the principle of equal protection of the law without discrimination and prohibition of discrimination in law or in practice in any field regulated and protected by public authorities. It is thus concerned with the obligations imposed on States in regard to their legislation and application therefore.
>
> There could be circumstances in which a law which discriminated against people with AIDS or HIV, or which gave them less protection than it gives to others, could constitute a violation of this right even if no other human right of the persons concerned were being denied or abridged as a result (original emphasis).
>
> It follows that an individual with AIDS or HIV may only be subjected to differential treatment in any field regulated and protected by law if it can be established that the distinction has a legitimate aim (i.e. an objective and reasonable justification) and that the means employed are proportionate to that aim.

The only imaginable legitimate aim could be the protection of public health. However, public health experts throughout the world are on record as saying that this aim is best pursued by not discriminating against those who are infected with HIV, or people with AIDS".[20]

From the above-quoted analysis, it would appear that the principle of equality before the law limits States' sovereignty to exclude and expel aliens by prohibiting discrimination in the imposition of travel restrictions which affect entry, deportation or expulsion. Nevertheless, it remains problematic how Article 26 in fact limits States' sovereignty in this area.

Where these restrictions limit the principle of equality before the law, a State would have to justify the limitation according to the traditional justifications imposed by human rights instruments - that the restrictions have a legitimate aim as specified in the instruments (e.g. public order, public health or morals or the rights and freedoms of others) and are proportionate. From the discussion in paragraphs above, States cannot claim that restrictions promote in a rational or proportional way the public health goal of prevention.

With regard to potential costs associated with persons with HIV/AIDS, particularly costs of care, it is not clear if States can claim that the avoidance of such costs is a "legitimate" justification for such restrictions. However, if the restrictions can be justified on this basis, then it would seem discriminatory to single out HIV/AIDS for such restrictions without also including other conditions which produce comparable costs.

To the degree that equality before the law does prohibit discrimination, it would prohibit it with regard to legislation, administrative regulations and practices by public authorities. Thus, this prohibition would apply to HIV/AIDS-specific restrictions as well as to general health restrictions which are systematically or non-systematically applied to HIV/AIDS, without this being explicitly stated. Furthermore, this prohibition would also apply to situations where there is scope for discretion in dealing with individual cases.

The Right to Privacy

Article 17.1 of the International Covenant on Civil and Political Rights protects individuals from arbitrary or unlawful interference with their privacy, family, home and correspondence. A requirement to be tested for HIV or to disclose one's HIV status interferes with privacy, since personal health information is generally recognised as private and confidential. This implies that since HIV-related travel restrictions limit the right to privacy there must also be shown a legitimate aim and proportionality in the use of such restrictions.

Protection of the Family

Article 23 of the International Covenant on Civil and Political Rights states that : "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". This entails a duty for States to promote family unity wherever possible. Article 5.4 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live states: "Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien. "The International Convention on the Rights of All Migrant Workers and Members of their Families was adopted by the UN General Assembly in 1990, but has not yet been ratified by enough states for it to come into force. Article 44 of that Convention states that .."the State shall take appropriate measures to ensure the protection of the unity of the families of migrant workers". Thus, compelling reasons would be needed before travel or visa restrictions which prevent spouses from living together or which separate children from their parents could be justified.

Some states take into account wider family relationships, e.g. between adult siblings or parents and adult offspring, in their laws and policy, for example by setting a quota for permanent residence permits to be granted to relatives of existing residents. Granting of such permits may be subject to discretionary criteria based on individual circumstances. However, as stated above, the principle of equality before the law applies to discretionary decisions by public authorities.

Right to seek and enjoy Asylum and the Principle of Non-refoulement

HIV/AIDS-related travel restrictions can impact on asylum-seekers and refugees in two ways: (1) the refugee with HIV/AIDS may be denied admission to an asylum country and/or denied asylum in that country; (2) the refugee may be forcibly returned home (refoulement) or expelled by the asylum country.

Article 14 of the Universal Declaration of Human Rights recognizes the "right to seek and to enjoy asylum". But international law does not establish a right to be granted asylum or an obligation of States to grant asylum. However, under the 1951 Convention relating to the Status of Refugees, countries are expected to facilitate the assimilation and naturalisation of refugees as far as possible, and various General Assembly resolutions have urged States to render assistance and protection to refugees and to promote durable solutions to their plight.[21] Thus, States do not have a legal obligation to grant asylum but do have an exhortatory obligation to be liberal in their grant of asylum.

States do have a legal obligation not to return refugees forcibly to any country where they would likely face persecution. This is the principle on non-refoulement[c]. Refugees who decide to return voluntarily to their countries of origin have, like all nationals, a right to do so.

Where, however, there are reasonable grounds for regarding the refugee as a danger to the security of the country in which s/he is, the State can return a refugee[d]. Furthermore, States can expel a refugee lawfully in its territory on grounds of national security or public order. Such decisions to expel should only be reached with due process where the refugee can submit evidence, appeal and be represented[e]. There is no mention of public health as a ground for refoulement or expulsion.

Where refugees have temporary asylum in one country, there is a danger that if they are screened for HIV infection as a pre-condition for resettlement in another country, then rejected because of a positive result, they may be expelled by the country of temporary asylum, and perhaps forced to return to persecution in their home countries.

Application of HIV/AIDS-related travel restrictions to refugees may lead to other human rights violations, such as being held in detention without adequate access to medical care.[22] Furthermore, it has long been recognised that international support for refugees must include provision for the costs of care of those who are physically or mentally disabled.[23] Refusal of a grant of asylum to HIV-positive refugees on grounds of their potential future need for treatment and support would be inconsistent with this principle.

Rights of migrant workers

Article 64 of the International Convention on the Protection of the Rights of All Migrant Workers requires States to consult and co-operate as appropriate "with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families ... In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned".

However, the Convention explicitly states that this article should be without prejudice to Article 79 which acknowledges the right of States to "establish the criteria governing admission of migrant workers and members of their families".

Right to Development

The laws and policies of one country with regard to international travellers necessarily have an impact on other countries and on development. Article 3 of the Declaration on the Right to Development states that: "States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development".

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[c] Convention relation to the Status of Refugees, July 1951, Article 33.

[d] Ibid., Article 33(2)

[e] Ibid., Article 32(2)

Therefore, it is desirable for States to avoid immigration/travel restrictions which may interfere with development in other countries.

Travel restrictions barring the travel of students, professional trainees and migrant workers might impede the acquisition of skills and their subsequent dissemination in these groups' home countries, as well as the remittance of substantial revenue to the home countries.

Thus, various human rights must be taken into account in the assessment of the legitimacy, validity and desirability of HIV/AIDS-related travel restrictions. The rights of individuals and the humanitarian concerns involved in some instances limit State action in the imposition of restrictions and in others instances increase the burden on States to justify the legitimacy and proportionality of the restrictions.

VIII. Provisional conclusions

Although travel has contributed to the spread of HIV infection across the globe, travel restrictions are ineffective in preventing the spread of HIV/AIDS, at best only marginally and briefly retarding the spread in some circumstances. Thus, there is no public health rationale for HIV/AIDS-related restrictions.

Though States have broad discretion in imposing regulations regarding the entry and the right of aliens to remain in their territories, the principle of equality before the law appears to limit State competence in this area and prohibit discrimination on the basis of health, including HIV/AIDS. The exact nature of the limitations on State sovereignty in this regard needs further clarification.

As a limitation on the principle of equality before the law, travel restrictions based solely on HIV/AIDS should be justified in terms of achieving a legitimate aim and should be proportional to that aim. They cannot be imposed on the basis of the presence of HIV/AIDS alone. As stated above, travel restrictions do not serve a public health purpose.

Any travel restrictions based on avoidance of costs, including those associated with HIV/AIDS, should be based on specific laws or regulations which are necessary and proportional in achieving the purpose of avoiding costs.

Restrictions based on avoidance of economic costs associated with health conditions which may require costly treatment and care, should not single out HIV/AIDS as opposed to other conditions with comparable requirements for treatment and care.

Imposition of restrictions for the purpose of avoiding costs should not preclude exemptions where necessary to protect human rights, e.g. non-refoulement, or take into account other humanitarian grounds, e.g. family unification.

With regard to students and professional trainees, the above-described considerations apply. However, restrictions should not be applied solely because of perceptions of a possibly shorter professional life-span.

Annex 1: Classification of travellers and migrants

Legally-admitted permanent residents/immigrants

These are non-nationals entitled to reside indefinitely in a host country, and to leave (for short periods at least) and return at will. They may or may not be expected to become nationals of the host country. They may have been admitted or permitted to remain as permanent immigrants either because of their individual circumstances, e.g. marriage to a national of the host country, or because of some general policy or agreement, e.g. reciprocal treaty obligations. They include refugees or asylum-seekers whose claims have been accepted and who have been granted the right of *permanent* settlement (see below).

Legally-admitted temporary migrants

In this paper, legally-admitted temporary migrants are defined as non-nationals seeking lawful entry to, or lawfully present in, a country who do not have the right to stay indefinitely and who are not short-term visitors as defined below. Temporary migrants often remain in a host country for many years, by seeking regular renewal of their residence and/or work permits.They form a diverse group, including students, refugees granted temporary asylum, and many migrant workers and accompanying families.

Regulations affecting temporary migrants often relate both to the length of their stay in the host country and its purpose. For example, migrant workers may need to have a job and a work permit in order to remain, but others such as students may be prohibited from working.

National legislation varies as to the entitlements of different categories of migrants to public benefits including health care and social security, and their corresponding obligations, e.g. payment of host country taxes. There are corresponding variations in the entry and residence restrictions countries impose to reduce the costs of providing such services.

Short-term visitors

It is difficult to draw a clear distinction between short-term visitors such as tourists, business travellers, conference-goers, and temporary migrants. Short-term visitors are not regarded as residents of the host country, even temporarily, but countries apply varying definitions of visitor status. In addition to restrictions on length of stay, stipulations may include prohibitions on seeking employment in the host country and may restrict access to public services, e.g. limiting this to emergency health care only, unless provided for under a reciprocal agreement between the host country and country of origin.

For the purpose of the WHO Policy on Non-Sponsorship of International Conferences on AIDS in Countries with HIV/AIDS-Specific Short-Term Travel Restrictions, short-term travel was narrowly defined on the basis of a length of stay of 30 days or less. The main reason for choosing this narrow definition was to avoid inconsistencies in the application of the non-sponsorship policy arising from the fact that different countries apply varying definitions of short-term travel.However, this paper is aimed at promoting broadly sound national policy recommendations, rather than defining a strict "cut-off" beyond which WHO will take specific action.

Illegal migrants

Illegal migrants include people who have entered the host country legally but remained after expiry of their visa/permit or in breach of its conditions, as well as those who have entered covertly. Some governments tolerate a degree of illegal migration if it suits their purposes, e.g. by providing cheap labour. In some countries, there are large numbers of long standing established residents who lack legal status and recognition. Illegal migrants are generally liable to deportation if they are discovered, though for humanitarian reasons individual circumstances are sometimes taken into account. Some countries have amnesty programmes under which illegal migrants can apply to become legal immigrants. However, individuals who have not taken advantage of such schemes may be more likely to be deported if they are subsequently discovered.

Returning nationals

A returning national is anyone entering a country of which he or she is a national. They include migrant and seasonal workers or students who have completed their work or study abroad, people who have been deported or denied permission to remain in another country, former refugees seeking voluntary repatriation, former emigrants who have changed their plans, and short-term visitors returning home.

Leaving travellers

A person seeking to enter one country will nearly always also be seeking to leave another, of which he or she may or may not be a national. Restrictions affecting leaving travellers are rare.

Refugees

Refugees are a recognised group with special status in international law. The 1951 Convention relating to the Status of Refugees defines a refugee as a person who, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality (or habitual residence, if stateless) and is unable or, owing to such fear, is unwilling to avail him/herself of its protection. Recognition as a refugee can be granted by the host country, in accepting an asylum seeker's claim, or by the UN High Commissioner for Refugees.

Under the 1951 Convention definition refugee status depends on a well founded fear of persecution on specific grounds. People who flee their home country for other pressing reasons, e.g. famine, may not be recognized under the 1951 Convention but may be granted temporary status under other provisions. In practice, States and international organisations "also acknowledge, at least for certain purposes, ... a broader class ... who may be described ... as refugees and displaced persons of concern to the international community", comprising people who are outside their country of origin and unable to avail themselves of its protection.[24]

Similarly, people who are displaced within a country do not qualify as refugees. Their situation is beyond the scope of the present paper, which is concerned only with international travel.

Asylum-seekers

Asylum-seekers are people who have entered a country or are seeking to enter, and have appealed to the authorities of that country to be recognised as refugees and allowed to remain temporarily or permanently. Their numbers are increasing, especially in Europe. This has led to controversy with concerns on the one hand that genuine applicants are being denied protection from persecution by increasingly tight restrictions, and on the other hand that large numbers of spurious claimants are abusing the system.[25]

Processing of asylum applications can take months or years, during which time the asylum-seeker's status may be precarious and uncertain - some are detained. In Europe more than 90% of asylum claims are refused. However, occasionally the decision takes so long that by the time a person is refused asylum s/he has developed sufficient ties to the host country to be able to appeal successfully for exceptional permission to stay. People refused asylum may become illegal immigrants, may seek asylum in another country or may return to their home country.

Students

For the purposes of this paper, students are migrants who have travelled to or been granted permission to stay in a foreign country for the specific purpose of completing a programme or course of study or training. Their permission to remain in the country may be conditional on continuing with this programme or course. Of particular interest are persons coming from developing countries to which they are expected to return on completion of their studies, financed through scholarships awarded by a government or NGO (often in the host country) as a means of promoting development in the country of origin by increasing its supply of skilled or professional workers.

Migrant workers

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[f] defines a migrant worker as any "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" except the following: people sent or employed by international organisations or States to perform official functions whose status is regulated by international law or agreements, e.g. diplomats; people sent or employed by States to participate in development programmes or other co-operation programmes with the agreement of the host State; people taking up residence abroad as investors; most refugees and stateless persons; students and trainees; seafarers and offshore workers who have not been admitted to reside and work in the host state.

This broad definition encompasses not only legal temporary migrants, but also some short-term visitors, permanent immigrants and illegal migrants. For the purpose of this paper, the main group of concern is medium or long-term temporary migrant workers seeking renewal of their residence and/or work permits. There are large numbers of such workers who are potentially vulnerable to loss of livelihood and settled existence if refused permission to remain in the host country because of HIV infection or AIDS. They are also potentially subject to discrimination after being sent home.

Diplomats

Diplomats are a special group because they are customarily exempted from travel and visa restrictions. Most countries allow similar exemptions for UN system personnel.

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[f] Not yet in force.

Annex 2: Extract from Background Document for International Consultation on AIDS and Human Rights, Geneva, 26-28 July 1989, organized by the UN Centre for Human Rights with the technical and financial support of the World Health Organization Global Programme on AIDS

C. The right to freedom of movement

8.40. Freedom of movement comprises an interrelated cluster of issues: entry into a country; abode and movement within a territory; expulsion from a country and leaving a country. Each of these is regulated differently as between nationals of the State concerned and aliens (i.e. non-nationals).

8.41. The present text deals with the first three in order to assess the extent to which, if at all, a State might legitimately impose controls on entry into its territory of those who are HIV infected, restrict their movement within the country, or permit or require their expulsion from it.

8.42. The right to enter a country is confined to nationals of the State concerned; nowhere in any international human rights treaty has any State accepted an express obligation to allow aliens to enter its territory.

8.43. For nationals, the right to enter is absolute and not subject to any restrictions. It would not, therefore, be legitimate for a State to make the entry into the country of its own returning nationals conditional on their taking an HIV test, let alone on obtaining a negative result.

8.44. By contrast, States enjoy a wide discretion over the entry of aliens. The choice of grounds for exclusion is largely a matter for decision by each State. This does not, however, mean that there are no restrictions on a State's ability to control entry for purposes of work, travel, or immigration. Rules of general international law have made a limited impact on this broad power, in particular by affirming the principle of non-discrimination.

8.45. For States, further restrictions are derived from specific treaty obligations, as for example in health matters under WHO International Health Regulations or, more generally, in respect of other rights guaranteed under other aspects of international human rights law, such as respect for family life.

8.46. It is not the case, therefore, that the entry of *all* aliens into a country could be made contingent upon production of a certificate of freedom from HIV infection, or submission to an HIV test. Such a requirement could only be imposed where the State could establish that it was necessary for the protection of public health.

8.47. WHO has stated:

> Since HIV infection is already present in every region and in virtually every major city in the world, even total exclusion of all travellers (foreigners and citizens travelling abroad) cannot prevent the introduction and spread of HIV.[g]
>
> *Hundreds of millions* of persons cross international borders each year, by boat, air, rail, motor vehicle and foot, and any screening programme for international travellers would present immense problems.

8.48. The freedom to choose a residence within the territory of a State and to move about freely within that State is guaranteed to nationals and aliens alike, but may be restricted on the usual grounds, including public health. It complements the protection afforded by the right to liberty of the person.

8.49. Any such restriction would have to be strictly justified as being necessary in a democratic society for the protection of public health. However, public health experts have counselled against the introduction of such measures, and thereby their necessity has been called into question.

8.50. The protection against expulsion from a country afforded by international human rights law is more limited and differs in certain significant respects between the various instruments. As regards the protection afforded to aliens, most provide that an alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with the law.

8.51. Under the provisions of the Covenant on Civil and Political Rights, the alien must be given the opportunity to submit reasons against his or her expulsion and have his or her case competently reviewed, the public health exception not being a reason for the non-application of these safeguards.

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9. The UN High Commissioner for Refugees has said that international solidarity will not be a reality until the refugee burden is shared by all and that states protected from direct influx must not simply select the most desirable and qualified refugees to admit. European Seminar on the Social and Economic Aspects of Refugee Integration: Sigtuna, Sweden, 27 April - 7 May 1960. UN HCR European Office of the Technical Assistance Office. CDR REC/EUR/68 B.

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