

## **Mexico International AIDS Conference 2008 – Closing Plenary Speech by Justice Edward Cameron**

Edwin Cameron is Justice of the Supreme Court of Appeal of South Africa and author of the price winning memoir *Witness to AIDS* in 2005. He has received many honors and awards for his human rights work including work in the AIDS field. He has been living with HIV since 1986 and has been on antiretroviral therapy since 1997.

### **EDWIN CAMERON**

What I want to do is to ask you this morning to come on a journey with me. I want to give you information of the sort that Nafis has foreshadowed in her introduction. I want to invite you to engage your feelings about it. I want you to feel disquiet about what I am going to set up before you. But lastly, I want to take us back to what Dr. Chakaya told us, I want to engage your resolve to practical action today.

This conference cannot just be about talking about this issue. I want us this morning to think what we are going to do constructively about it. So I want to start by taking you to two very different places, three different places on the globe and we are going to start with Texas because it is just to our north here at the bordering state, north of Mexico.

Just three months ago, a homeless man was sent to jail while being arrested for drunkenly conduct. He was charged with committing a serious offense during that time. The offense was called harassing a public servant with a deadly weapon. Because of his past encounters with the law, the system ratcheted up the gravity of what he did and he ended up being sentenced to 35 years in jail. He must serve at least half of that before he can apply for parole. Well, you might say that is very sad, but what is our concern with the case? It is this. The man had HIV. The deadly weapon he was accused of using was his saliva. He was jailed because he spat at the officers arresting him. After sentencing, Officer Wallow is reported to have said, "I know it sounds cliché, but this is why you lock someone up. Without him out there, our streets are a safer place."

Well, let us note some facts about this case. First, according to the most assured scientific knowledge we have, nearly three decades into studying this virus very closely, we know that HIV has never been shown to result in the transmission of HIV.

So the deadly weapon this man was sent to jail for using was no more than a toy pistol and it was not even loaded. Ratcheting up the criminal law because the man had HIV was inappropriate, unscientific and plainly wrong. Secondly, the length of his sentence, whatever his past conduct in resisting arrest and fighting off the law, it stuns the mind that someone who has actually not harmed anyone, who has not actually damaged any property or otherwise spoiled the world could be locked away in these circumstances for 35 years. The inference that his HIV status played a pivotal role in sending him away is unavoidable. In short, the man was punished not for what he did, but for the virus he carried.

Let me take you away from Texas to Zimbabwe, violence wracked Zimbabwe, where a 26-year-old woman from a township near Buluwayo was arrested last year. The crime was having unprotected sex with her lover. Like the homeless Texan, she too was living with HIV and the crime of which she was convicted was deliberately infecting another person. The strange thing is her lover tested negative for HIV which is hardly surprising since the woman was on successful antiretroviral therapy. Before sentencing her however, the court tried to get another HIV test from her lover and he tested negative even after that test where he reportedly did not want to proceed with the prosecution at all. She was eventually sentenced to a suspended term of five years' imprisonment. The threat of imprisonment and the shame and ordeal of conviction will continue to hang over her for the immediate future.

Let me tell you about the statute under which she was convicted because it is important to understanding what is happening on my continent today. It is an extraordinary piece of legislation. It is not a crime under it merely for another person to infect another. It makes it a crime for anyone who realizes that there is a real risk or possibility that she might have HIV to do anything that she realizes involves the risk of infecting another person. In other words, although they call the crime deliberate transmission, this is a misnomer. You can commit the crime even if you do not transmit HIV. In fact, you can commit the crime even if you did not have HIV at all. You must merely be a risk possibility that you might transmit the virus to someone whatever your status.

Stranger upon stranger, the statute offers a way out to someone who really does have HIV, but because of the way it is drafted, if you do not have HIV, you cannot invoke that defense. In short, this law creates a crime of fear, a crime of effect, not

of effect and consequence, but a crime of fearful possibility. What is more, the wording of the Zimbabwe statute stretches wide enough to cover a pregnant woman who knows that she has or who fears that she may have HIV. If she does anything that involves the possibility of infecting another person, like giving birth or breastfeeding her baby, the law could make her guilty of that offense of deliberate transmission even if the baby is not infected. In all cases this Zimbabwe law prescribes imprisonment for 20 years.

The third case that I want to highlight before you is Sierra Leone in West Africa. There they have avoided subtle lawyer's arguments like I have put out before you about the meaning of the law. They have simply enacted a statute that expressly removes all that by including pregnant women in it. The Sierra Leone also criminalizes exposure to HIV even without transmission. It requires a person with HIV who is aware of the fact to take all reasonable measures and precautions to prevent the transmission to other people expressly including a pregnant woman. It requires her to take reasonable measures to prevent transmitting HIV to her fetus. Now, ladies and gentlemen no one doubts a mother's will and duty to take reasonable steps to protect her baby, but this law will make it more difficult for her to do so. In addition, a person who has HIV who is aware of the fact must not knowingly or recklessly place another person at risk of becoming infected with HIV unless that person knew of the fact and voluntarily accepted the risk. This also applies to pregnant mothers. The provision criminalizes not merely actual transmission of HIV from mother to child, but makes it criminal of any pregnant woman who knows that she has HIV, but does not take reasonable measures to prevent transmission to her baby.

Well, I can continue giving other examples. In Egypt, men are being arrested merely for having HIV under Section 9c of the law of 1961 which criminalizes the habitual practice of debauchery. I am sure that is a term taken from the colonial time is the Arabic translation. It penalizes consensual homosexual conduct but it is being used this year, ladies and gentlemen, to arrest people who test positive for HIV because the inference being made is that they have indulged in debauchery.

In Singapore, a man with HIV has been sentenced to a year in prison for exposing a sexual partner to HIV even though the sexual partner whom he fellated was at almost no risk at all of acquiring HIV from him. In Bermuda, 10 years for a man who

had sex with his girlfriend even though she was not infected and in Switzerland, the Highest Court held that a man who did not think he had HIV, but knew that a previous sexual partner had it, was liable for infecting a subsequent sexual partner for negligence. These laws, ladies and gentlemen, are stunningly wide in their application and they are fearsome in their effects. They attack rational efforts to lessen the impact and spread of this epidemic with a sledge hammer. They represent a rash phenomenon that has taken place worldwide. In Africa, my own continent which carries the heaviest burden of HIV, at least a dozen countries have already adopted laws very similar to the law in Sierra Leone. They have done so with the joyful support of an American-funded organization, which is a grievous pity. I am glad to say that my country, South Africa, and our ambassadors here this morning, I am proud to say that our country considered this under the impulse of one of the lawmakers, and that was turned down. South Africa has not joined the drive to promote criminalisation.

Ladies and gentlemen, these laws are creating a crisis in HIV management and prevention efforts and they constitute as Nafis said in introducing me, one of the biggest issues in the epidemic right now. We have to understand however what lies behind this drive to using the criminal law in the epidemic. HIV is a fearsome virus, we know that. Its effects are potentially deadly. Public officials want to invoke any available and effective means to counter its spread. This they think includes statutes and prosecutions targeting HIV. What is more, in the abstract and from a distance from social reality, there seems a certain justice that criminal penalty should be applied against those who negligently, recklessly or deliberately pass on the virus even when there is only a risk of that happening, not when it is effectuated. African lawmakers and policy makers in particular have reason to look for strong remedies. Many African countries face a massive epidemic with agonizing social and economic costs. All effective means including the mechanisms of the criminal law and criminal prosecutions are seen to be [inaudible]. And I want to take you to a session that we had on Wednesday here at this conference, ladies and gentlemen, where we discussed criminalisation and someone from the lawyers collective in Mumba and India came to the microphone and she said that they have women who come to them reporting that they had been infected by their husbands and they are seeking justice, they are seeking retributive access through the law. What has to understand that many lawmakers are spurred especially by the plight of women. Many including very young women are infected by unwary or unscrupulous men. Lawmakers feel

that they in particular need a special protection and that a criminal statute might be useful to do this. Well that is what lies behind it. That my submission to you this morning is that these reasons are misdirected and they are bad. And I want to take you through 10 reasons why these criminal prosecutions and laws targeting HIV are so bad. We must counter them rationally, powerfully and systematically. Let us start here this morning by going through those reasons.

First, criminalisation is ineffective. These laws and prosecutions do not stop the spread of HIV. In the majority of cases, the virus spreads when two people have consensual sex and neither of them knows that one of them has the virus. That will continue to happen no matter what criminal laws are enacted and no matter what criminal remedies are enforced. Criminal laws and liabilities will not stand in the way of the vast majority of HIV transmissions. Second, criminal laws and criminal prosecutions are a shoddy and misguided substitutes for measures that really protect those at risk of contracting HIV. You have just had a presentation from Bruno in which he sets out what we really can do. These laws are a side show. We know what we need in this epidemic and this conference has taken our knowledge further. After more than a quarter century, we know that we need effective prevention, protection against discrimination, reduced stigma, strong leadership, greater access to testing and most importantly, treatment, treatment for those who today, this morning, are unnecessarily dying of AIDS.

AIDS is now medically manageable condition. It is a virus, not a crime and we must reject interventions that suggest that it is a crime. I speak with passion about this, ladies and gentlemen, because it is nearly 11 years since I myself faced death from AIDS and was given access to life saving antiretroviral treatment and yet for all my joy in surviving for the last 11 years, I think that today in my continent, in Africa, in this hemisphere, people are dying unnecessarily of AIDS. We must focus on ending those deaths and ending stigma, on ending discrimination, on ending unnecessary suffering and on ending irrational, unhelpful and resource sapping measures like criminalisation.

For the uninfected, we need greater protection for women. We need more secure social and economic status for them, enhancing their capacity to negotiate safer sex and to protect them for predatory sexual partners. I speak of particular knowledge of that in Africa, ladies and gentlemen. When I go to meetings in my country, women

stand up at meeting after meeting, black women, saying we have not got the social par to negotiate social sex, to say when we will not have sex or to insist on using a condom. We must change the social circumstances that will empower those women to say no when they wish to and to insist on protection when they want to.

And this brings me to my next point, ladies and gentlemen, which is that I understand the impulse behind many of these lawmakers. Their impulse, and many of the lawmakers in Africa are men, their impulse is to protect women, but it is a grievously misguided impulse. Far from protecting women, criminalisation victimized, oppresses and endangers them. In Africa, most people who know their HIV status, about 61% of the minority of Africans, a very small minority of Africans who know that they have HIV are women. This is because most testing occurs at antenatal facilities. The result is inevitably is that most of those who will be prosecuted because they know or ought to know that they have HIV will be women. You only need to look to the Zimbabwean case that I highlighted to understand this. As the International Community of Women has pointed out, in a powerful consultation process that preceded our conference, many women cannot disclose their status to their partners because they fear violent assault or being thrown out of the home. If a woman in this position continues a sexual relationship, whether consensually or not, she now risks prosecution in up to 15 African countries that have adopted the moral law. This is a grievous and I believe shameful position. The material circumstances in which these women find themselves especially in Africa make it difficult and all too often impossible for them to negotiate safer sex or to discuss HIV at all. These circumstances include subordination, economic dependence, hereditary systems and traditional systems of property that make them dependent on men so that criminal law will hit them hardest. It would expose them to assault, to ostracism and to further stigma. They will become more vulnerable to HIV, not less vulnerable.

Fourth, criminalisation is often unfairly and selectively enforced. Prosecutions and laws single out already vulnerable groups like sex workers, men who have sex with men, and in European countries, black males, women who are already marginalize such as sex workers and drug users are placed at risk of further targeting by government officials and agencies under the use of these laws. It is made more acute by the fact that so far paradoxically, these laws have been very rarely applied. There has not been a rash of cases applying them. It is the mere existence which

puts people at risk, but those rare prosecutions have resulted from sometimes idiosyncratic decisions by particular police officers and prosecutors. The fact is that if we leave aside cases of deliberate transmission of HIV, the behavior that is prosecuted namely sex between two consenting adults is common. I hope it is common. The prosecutions there have therefore been necessarily arbitrary. I think when a lawyer makes a joke he has to signal it more clearly, ladies and gentlemen. [Laughter] I will point it out next time I make a joke. [Laughter] Should I do so? This lady got the joke.

Ladies and gentlemen, let me move on to the fifth issue. Criminalisation, this is a delicate thing to discuss and I want to discuss it with some attempt at delicacy. It places blame on one person instead of responsibility on two and I come from a continent, that is true, it is true that I say it from the background of a continent in which we cannot say that women are equal partners too often. Too often they are not equal partners in the transaction of sex. Nevertheless, HIV has been around for nearly three decades. For nearly three decades the universal public information message has been that no one is exempt from it. So the risk of getting HIV or any sexually transmitted infection must now be seen as an inescapable facet of sex. We cannot pretend that the person with HIV is the person who should be held responsible for introducing that risk into an otherwise safe encounter.

The risk is part of the environment and practical responsibility for safer sex rests on everyone who is able to exercise autonomy in deciding to have sex with another partner. The person who passes on the virus may be more guilty than the person who acquires it, but criminalisation unfairly and inappropriately places all the blame on the person with HIV. It is true as I have just said that the subordinate position of many women makes it impossible for them to negotiate safer sex. When a woman has no choice about sex and gets infected, her partner unquestionably deserves blame. But the fact is that criminalisation does not help that woman. It simply places that woman at greater risk of victimization. Criminalisation singles out one sexual partner and too often, because of her greater vulnerability, it will be the woman. It compounds the evil of sexual subordination of women in Africa rather than combating it.

Ladies and gentlemen, six, these laws are difficult in degrading to apply, this is because they intrude on intimacy and the privacy of consensual sex. I am not talking

about non-consensual sex. If a woman is raped, the perpetrator should be prosecuted with the full might of the law. But where sex is between two consenting adult partners, the operators of proof, the necessary methodology of prosecution, they degrade the status of both parties and they debase the law. Just think of the Zimbabwean woman that I mentioned whose lover did not even want to proceed with the prosecution, whose lover was subjected to a second HIV test because the Magistrate wanted to find out if he was HIV positive when he no longer wanted to proceed. That is a blight on the law as well as a blight on HIV prevention and treatment efforts. Where there is deliberate intention to pass on the virus and the person succeeds in passing it on, there can be no difficulty about prosecuting such a person and no objection to it, but we do not need HIV specific statutes for that. In cases where there is no deliberate intention, the categories and distinction of the law become fuzzy. They become incapable of clear guidance either to those affected by the laws or to the prosecutors. Those laws that target reckless, or negligent or inadvertent transmission of HIV only introduce uncertainty into an area that is already difficult to police. We have an HIV epidemic because the reasonable person all too often does have unprotected sex with partners of unknown sexual history and in spite of the fact that the risks are known. That is why interventions to increase safe sex as Bruno said are so important. The potent elements of need, want, trust, passion, shame, fear, risk and heedlessness, normal and reasonable people simply do not always follow public health guidelines. With the best of intentions, they may make assumptions and avoid issues or just hope for the best. HIV is a risk, but if it is balanced in both parties' minds by the possibility of pleasure, excitement, closeness, or even material or social gain, sex will proceed. That is what most people do, ladies and gentlemen. And that is not a joke this time. But importantly, we look back with a clinical harshness of the lawyer's eye on the complexities of these transactions and I do not believe that it is proper for the law to do so. It is simply unfair to judge people particularly a moralist arbitrarily selected segment of the population by the legal standards of sexual behavior that bear little relation to what we do in real life.

Ladies and gentlemen, seventh, many of these laws are extremely poorly drafted. I will merely give you one example. The Sierra Leone and Kenyan laws said that you have to inform a partner in advance of any sexual contact if you have HIV, does not say what sexual contact is, is it holding hands, is it kissing, is it fondling, is it actual, any intercourse, the law does not actually say. It does not say what in advance is either. The model law would not pass muster in any constitutional state

where the rule of law applies. The rule of law requires clarity in advance on the meaning of a criminal provision. We hope that there will be challenges to these laws in some of the West African countries, but in the meantime, the way that they have invoked the criminal law, I think bears a relation to the lack of clarity in their conception and the lack of public health rationale for their existence. If you think purely through an intervention of this epidemic, you are going to come up with a poorly drafted statute.

Eight, ladies and gentlemen, most painfully for those of us living with HIV and tying in again with Bruno's presentation, HIV criminalisation increases stigma. From the first diagnosis of AIDS 27 years ago, AIDS has carried a mountainous burden of stigma. This has been for an overriding reason which is that it is sexually transmitted. No other infectious disease is viewed with as much fear and repugnance as HIV is. Because of this, stigma lies at the heart of the experience of every person who lives with HIV. It is stigma that I believe lies behind the enactment of these bad laws. HIV criminalisation increases stigma. From the first diagnosis of AIDS 27 years ago, AIDS has carried a mountainous burden of stigma. This has been for an overriding reason which is that it is sexually transmitted. No other infectious disease is viewed with as much fear and repugnance as HIV is. Because of this, stigma lies at the heart of the experience of every person who lives with HIV. That is an elementary and all important fact and lawmakers must not overlook it. To go back to Bruno's presentation again, the need for more and expanded diversified forms of testing, criminalisation is a blatant disincentive to it. Why would a woman in Kenya want to go for an HIV test when she knows that it will expose her to seven years in jail? And yet without diagnosis, as Bruno showed us, the risk of transmission in the early stages of infection is very high and without diagnosis, even more tragically, we expose that woman to the risk of death from AIDS. The International Community of Women has rightly described these laws as a war on women, but they are a war on all people with HIV and they are an assault on civil liberties.

And this brings me to my last reason, ladies and gentlemen, which is an important point. It is about belief and it is about hope which are words all too seldom heard in this epidemic. Criminalisation assumes the worst about people with HIV. And in doing so, it punishes their vulnerability. The human rights approach assumes the best about people with HIV and it supports empowerment. The prevention of HIV is not just a technical challenge for public health. It is a challenge to all humanity to

create a world in which behaving safely is truly feasible in which it is safe for both sexual partners and which it is genuinely rewarding. When condoms are available, when women have the power to use them, when those with HIV or the risk of it can get testing and treatment, when we are not afraid of stigma and ostracism, then we are far more likely to be able to act consistently for our own safety and for that of others. The global consensus on human rights and the enabling environment captures this positive vision of HIV prevention. When compared with a punitive and angry approach embodied in criminalisation, that approach reemphasized this week in the UNAIDS policy brief on criminalisation is now more important than ever. The principal effect of criminalisation is to enhance stigma, to enhance fear, isolation, the dread of persecution and ostracism that drives people away from testing and treatment. Let us use [inaudible] this morning, in conclusion, ladies and gentlemen, to send out a firm and clear message. Criminalisation is a [inaudible] for regulating HIV transmission and behavior. There is no public health rationale for invoking it. The sole rationale is the criminal goal of retribution and punishment which is a poor and distorted aim for public health. In other cases we are left with the sad burdens, but also the hopeful initiatives that are available to us in this epidemic.

Let us start, each of us today, in this plenary, let us go back to our countries, let us go back to the quote that Jeremiah quoted. Let us do. Let us take away from this conference the start of a campaign against criminalisation. Let one of the conference outcomes be a major international pushback against misguided criminal laws and prosecutions. Let us return to our countries determined to persuade lawmakers and prosecuting authorities of the folly and distraction of criminalisation and let us return strengthened in our resolve to fight against stigma, against discrimination, and against criminalisation in this epidemic. Thank you very much.

**XVII International AIDS Conference**  
**8 August 2008**