

JUDICIAL DIALOGUE ON HIV, HUMAN RIGHTS AND THE LAW

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NAIROBI



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1.0 Acknowledgements

The Secretariat of the Joint United Nations Programme on HIV / AIDS ('UNAIDS Secretariat'), the United Nations Development Programme ('UNDP') the Kenya Ethical and Legal Issues Network ('KELIN') and the Judiciary Training Institute, Kenya ('JTI') collectively referred to as "the co-organizers" – wish to thank participating judges, magistrates, senior government officials, civil society resource persons, and representatives of UN agencies, for contributing to the success of the Judicial Dialogue on HIV, Human Rights and the Law in Africa, by sharing their experiences and insights on HIV, human rights and the law. In particular, sincere thanks are extended to the representatives of communities of people living with HIV, men who have sex with men, sex workers and people who use drugs, who shared their personal experiences and perspectives on how the law and the judicial system affect their lives and health. The co-organizers would also like to express their special gratitude to Honorable Justice Edwin Cameron of the Constitutional Court of South Africa for sharing his inspiring and compelling experience as a judge on South Africa's highest court and as a person living with HIV. A special mention to Hon. Justice Ogaile Dingake-High Court of Botswana for sharing the Botswana experience on dealing with HIV using the law.

1.0 Executive Summary

In 1984, the first case of HIV was diagnosed in Kenya. More than three decades on, the HIV epidemic remains one of the leading causes of death, according to the WHO. Recognizing the magnitude of this epidemic globally and nationally, the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat), the United Nations Development Programme (UNDP), the Judiciary Training Institute (JTI) and KELIN organized a Judicial dialogue on HIV, Human Rights and the Law in Eastern and Southern Africa.

The Judicial dialogue was an opportunity for hands on experience-sharing between members of the Judiciary comprising of both Judges and Magistrates and representatives of judicial departments from 12 countries across Eastern and Southern Africa on the multifaceted legal and human rights issues raised by the HIV epidemic in Africa. The judicial dialogue uniquely benefited from the perspectives of a widow, orphan and key populations living with HIV, who included representatives of sex workers, men who have sex with men and injecting drug users.

The aim of the judicial dialogue was to:

- a) Provide a critical opportunity for discussion and experience-sharing between Judges and magistrates from Kenya and those from other African countries on the complex legal and human rights issues posed by the HIV epidemic.
- b) Provide an opportunity for judges' and magistrates' institutions to discuss effective strategies and programmes for judicial education and training so as to ensure the different judiciaries are able to make informed decisions on HIV-related human rights issues.

This report therefore presents a summary of the expert papers, discussions and engagements as well as lessons from the judicial dialogue under thematic areas as hereunder:

- HIV, the law and the judiciary
- Using the law to end HIV-related discrimination and other human rights violations

- Enabling legal environment in the context of women
- Enabling legal environment in the context of children and youth
- Enabling legal environment in the context of key and affected populations
- The role of criminal law in the epidemic
- Access to life saving treatment

Ms. Nardos Bekele-Thomas, the UNDP Resident Coordinator, while delivering her key note address during the session on HIV, the Law and the Judiciary, emphasized the need to advance legal protection globally, which can only be achieved through the support of the judiciary. She further added that this impetus from the judiciary would greatly boost efforts towards zero discrimination. Justice Edwin Cameron of the Constitutional Court in Africa, one of the most respected and astute judicial advocates for HIV globally, added his views to the dialogue and stressed that stigma and fear associated with HIV has been one of the biggest impediments in dealing effectively with the epidemic. He urged members of the judiciary present to assert their crucial role in advancing justice through use of evidence-based judgments.

Tenu Avafia, Policy Advisor UNDP, while presenting his paper during the session on Using the Law to end HIV-discrimination and other human rights violations, outlined the vital role the judiciary plays in offering legal protection to PLHIV. He illustrated that bad and ineffective laws and a poor legal framework fuel the spread of HIV in contrast to effective legislation and practices that protect human rights and curb the spread of HIV. In this regard, Hon. Justice Edwin Cameron during the same session outlined to the participants the key factors for consideration while adjudicating HIV related discrimination cases and stressed that criminalization of transmission is a major factor in discrimination cases. He emphasized that existing legislation and punitive measures on transmission of HIV have deterred persons from undergoing voluntary testing on their HIV status, thereby impeding efforts to address the epidemic.

Commissioner Winnie Lichuma, the Chairperson of the Gender Commission in Kenya, while

contributing to discussions on enabling legal environment in the context of women, elaborated on how the HIV epidemic had aggravated discrimination against women as their social and economic subordination increases their vulnerability to HIV infection. Commissioner Otiende Amollo, the Chairperson of the National Commission on Administration of Justice, while chairing the session on the role of criminal law in the epidemic, remarked that current legal provisions on intentional and reckless transmission of HIV remain controversial with a popular view that applicable criminal law should be confined to abnormal and outrageous actions of intentional transmission.

Prof. Walter Jaoko of the Kenya AIDS Vaccine Initiative while building into the discussion on deliberate transmission gave a scientific overview of the different strains of the HIV virus and indicated that for purposes of criminal prosecution for deliberate transmission, the various strains compound proof of wilful transmission. Susan Timberlake, Chief UNAIDS, added her view to the criminalization debate by elaborating that the standard of proof required for mental culpability in prosecuting intentional transmission should not be solely derived from knowledge of one's positive status or failure to disclose, but further the context in which the alleged deception occurred in addition to the mental state of the person living with HIV. Ambrose Rachier, the Chairperson of KELIN, noted that to date no evidence has been provided that criminalizing deliberate transmission of HIV will prevent new infections, whereas the role of criminal law should be to prevent new infections.

Judicial officers had a chance to listen to the life experiences of a sexworker, a gay man and injecting drug user on their interaction with the judicial system and the challenges they face. Through a question and answer session moderated by Mr. Allan Maleche, Executive Director of KELIN, the judicial officers were able to seek further clarification on the challenges they face, and the perception by society on their conduct.

Mr. Maleche, spoke on Access to Life Saving Treatment and the legal and practical challenges he and others faced in prosecuting the Anti-Counterfeit case in Kenya as a public interest matter and the lessons learnt from the same. Hon. Justice Mumbi

Ngugi, High Court of Kenya, gave an overview of the human rights approach in adjudicating public health cases. She further urged that the judiciary has the capacity to help transform society, and has the tool for it - the Constitution of Kenya 2010. It can help fight stigma, exclusion and discrimination by the decisions and relief/remedies that it grants in matters before court for all marginalized groups, particularly those living with HIV.

Overall the judicial dialogue achieved the following outcomes:

1. Increased awareness among Judges and magistrates on:
 - a) the role of the law and the courts in protecting the rights of people living with HIV and members of key populations;
 - b) the complex legal and human rights issues raised by the HIV epidemic in Africa and stronger ability required to address them, including through progressive judicial responses;
 - c) key limitations to access to justice for people living with HIV and members of key populations, and possible responses to them.
2. Increased understanding among participants of effective strategies for supporting the development of a new generation of judicial leaders, and engagement from representatives of judicial training institutions to undertake follow-up activities at national level, such as sensitization and experience-sharing workshops for members of the judiciary, and the integration of modules on HIV and the law into the formal training provided by judicial training institutions.
3. Awareness of and increased capacity to use/ apply guidance, principles and information materials contained in the Handbook on HIV, the law and human rights for the judiciary. (That was launched in June 2013)

In her concluding remarks, Ms Maya Harper, the UNAIDS Country Coordinator, noted that HIV, unlike any other health condition, raises major human rights issues of stigma, discrimination, gender inequality and gender based violence. She also reiterated the crucial experience sharing during the dialogue which was evidenced by the quality of the plenary discussions. She stressed the recognition that human rights and the law are cornerstones of an effective AIDS response.

2.0 Introduction & background

More than thirty years on, the HIV epidemic remains one of the leading causes of death globally.¹ It has confronted countries the world over with serious health, social, economic and human challenges. According to the UNAIDS 2012 global report² at least 34 million people are living with HIV, 7,400 are newly infected daily (2.5 million in 2011) and 1.7 million died in 2011 alone. Sub Saharan Africa accounts for 69% of the 34 million people living with HIV. Sub-Saharan Africa's epidemics vary significantly from country to country—with most appearing to have stabilized, although often at very high levels, particularly in Southern Africa. Though heterosexual sex remains the driving force for the new infections, studies have shown that sex workers, men who have sex with men and injecting drug users contribute to the new infections. The Kenyan epidemic is the fourth highest in the world in terms of the number of persons living with HIV after South Africa (5.6 million out of a population of 50 million), Nigeria (3.3 million out of a population of 163 million) and India (2.6 million out of a population of 1.2 billion). Kenya has 1.5 million out of a population of 41 million as at the year 2012.

An estimated 1.6 million Kenyans were living with HIV in 2011, approximately 6.2% of the adult population. Kenya's epidemic disproportionately affects women, who account for 59.1% of adults living with HIV. Since the epidemic began, HIV has claimed the lives of at least 1.7 million people in the country. In 2011, an estimated 49,126 people in Kenya died of AIDS-related causes. TB remains the leading cause of death among people living with HIV. Each year, roughly 0.5% of the Kenyan adult population (or 1 out of every 200) is newly infected. In 2011, more than 91,000 Kenyan adults became infected.

Understanding the rate and distribution of new HIV infections is critical to effective HIV prevention planning. According to Kenya's first-ever study³ to estimate new infections by modes of transmission, new infections derive from the following sources: Heterosexual sex within a union or regular partnership (44.1%); Casual heterosexual sex (20.3%); Sex workers and clients (14.1%); Men who have sex with men and prisoners (15.2%); Injecting drug use (3.8%); Health facility related (2.5%).

The HIV epidemic continues to raise new and complex legal and human rights issues and challenges that have confronted all arms of government, including the judiciary. Through its interpretation of national constitutions, legislation and international human rights treaties, the judiciary has developed jurisprudence that has sometimes had a transformative and beneficial impact on the national response to, and the public perception of HIV. There is indeed a clear link between HIV, health, human rights and the law, which has been demonstrated over a period of time. It is evident that the protection of human rights is essential to safeguard human dignity in the context of HIV. This will ensure an effective, rights-based response to HIV. An effective response requires the implementation of all human rights, civil and political, economic, social and cultural, and fundamental freedoms of all people, in accordance with existing international human rights standards.

Since 1984, when the first case of HIV was diagnosed in Kenya, the country has progressively developed its laws, policies and legal jurisprudence. The law and policy has evolved from the inclusion of a chapter on legal issues in The Sessional Paper No.4 of 1997⁴, to the establishment of a Taskforce on Legal Issues Relating to HIV & AIDS in June 2001, and to

¹HIV is the 6th leading cause of death in the world with 1.78 million deaths considered to be due to AIDS-related illnesses in 2008. See WHO "The top 10 causes of death" Fact sheet No 310, updated in June 2011, available at <http://www.who.int/mediacentre/factsheets/fs310/en/index.html>.

²Available at http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_en.pdf

³The Kenya HIV prevention response and modes of transmission study. Available at <http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1103037153392/KenyaMOT22March09Final.pdf>

⁴The Sessional paper No.4 of 1997 was developed to provide a policy framework within which AIDS prevention and control would be undertaken. The paper sought to give directions on how to handle controversial issues relating to HIV while taking into account prevailing circumstances and the social-cultural environment.

the launch of the report of the Taskforce in July 2002⁵, which consequently led to the drafting of The HIV & AIDS Prevention & Control Bill, 2002. The Bill was passed into law in December 2006 and became operational in February 2009. The promulgation of the Constitution (2010) on the 27th of August 2010 provided a new milestone in the field of HIV. Being the supreme law of the country, the Constitution sets standards that all other laws and policies must conform with. The constitutional provisions give backing to a majority of the provisions of the HIV & AIDS Prevention and Control Act, 2006. The Constitution has out rightly outlawed discrimination on the basis of one's health status; it has made provisions for a more expansive bill of rights which can be relied on by all; it has made provisions for the reliance on provisions of treaties that Kenya has ratified, and it has outlawed all customary practices that contravene the provisions of the Bill of rights.

The Judiciary over the years has consistently and progressively upheld the rights of PLHIV save for the case of Kenya AIDS Society v Arthur Obel [1997] LLR 598 (CAK), where the case was dismissed on technicalities. The Kenyan Courts have developed enabling jurisprudence on HIV-related issues, such as non-discrimination, autonomy on testing, confidentiality, right to liberty, and most recently access to affordable medicines. For example:

- a) Non-discrimination: The case of Midwa v Midwa [2000] 2 EA 453 where the husband petitioned for divorce after his wife tested HIV positive and brought proceedings to have his wife vacate their jointly-owned matrimonial home where they were living with their two children on the grounds that she posed a grave risk to his life and the life of the children. The wife was ordered to move to the servant's quarter. On appeal, the court considered the law of custody and the fact that the wife was still strong and healthy despite being HIV positive for some five years and ordered that the wife be put back in the matrimonial home.
- b) Testing, autonomy and confidentiality: The case of J. A. O. vs. Home Park Caterers &

Metropolitan Hospital HCC No. 38 of 2003 Nairobi. Where the court upheld the right to work, non-discrimination, autonomy, privacy and confidentiality by way of a consent judgment, in a case of a widow who was wrongfully dismissed from employment on the basis of her HIV status after she was tested without her consent and the results of her HIV status shared with her employer by the doctor without her consent.

- c) Right to liberty: The case of SMG vs. Republic Misc., CR, APP. NO. of 24 of 2011 HC. EMBU. Where the High Court in Embu reversed a criminal decision that had seen a 54 year old man living with HIV and suffering from TB being sentenced to eight months imprisonment for failing to adhere to his medical treatment.
- d) Access to affordable medicines: The recent case of P.A.O and 2 others vs. The Attorney General of Kenya Petition No. 409 of 2009 Nairobi. Where the high court upheld the right to health by declaring the provisions of Section 2 and 32 of the Anti-counterfeit Act unconstitutional. The judgment extensively discussed the issue of the right to health in the context of access to medicines.

All these cases demonstrate the willingness and the ability of the Kenyan Judiciary to create an enabling legal environment for PLHIV when the opportunity is provided to them. There have been progressive decisions from other African countries such as Botswana, Namibia, South Africa and Uganda.

Beyond the courts, members of the judiciary are leaders in their communities and societies. Their stance, attitudes and behavior towards HIV-related issues, people living with HIV and members of key populations at higher risk of HIV infection can help shape social attitudes towards these populations. Members of the judiciary can challenge stigma and discriminatory practices against people living with HIV and members of key populations inside the court and within the community at large.

⁵The Taskforce on Legal Issues relating to HIV & AIDS was established on 22nd June 2001 vide gazette notice No. 4015 of 22nd June 2001. This was done by the Attorney General after the declaration of HIV as a national disaster and the establishment of the National AIDS Control Council. It was also established on the backdrop of the need to examine the legal and ethical questions that had arisen in the wake of HIV and AIDS

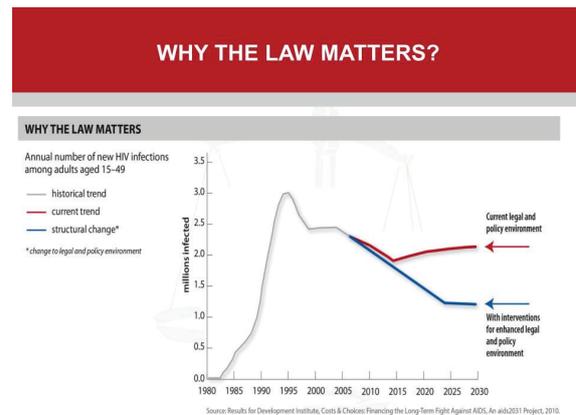
3.0 Justification

In the quickly evolving area of scientific, medical and legal issues related to HIV, there has been limited opportunity for members of the judiciary in Kenya and in Africa to take stock of epidemiological developments, as well as the evolving roles of the law and the judiciary in the response to HIV. In this context, the moral and societal role of members of the judiciary as agents of justice and protectors of human rights is yet to be fully explored or used to address vulnerability to HIV and ensure human rights protection for all. Moreover, judges in Africa who have contributed to create enabling legal environments for effective HIV responses and have upheld the rights of people living with HIV and key populations have not had the opportunity to share with their fellow judicial officers the lessons learned from these experiences, or to provide guidance on supporting and sustaining judicial excellence on HIV and the law.

The role of the law in dealing with issues of HIV was emphasized at the June 2011 High Level Meeting on AIDS, held in New York, which commemorated 30 years since the emergence of the global AIDS epidemic. World leaders reiterated their commitment to achieving universal access to HIV prevention, treatment, care and support by 2015, and eliminating discrimination against people living with HIV. In the 2011 Political Declaration on HIV/AIDS adopted at this meeting, governments including Kenya, committed specifically to address laws and policies that “adversely affect the successful, effective and equitable delivery of HIV services and consider their review”.⁶

The findings of the Global Commission on HIV and the Law⁷, in its July 2012 report *Risks, Rights & Health*, identify⁸ that the law alone cannot stop AIDS. Nor can the law alone be blamed when HIV responses are inadequate. But the legal environment can play a powerful role in the well-being of people living with, and those vulnerable to HIV. Good laws, fully resourced and rigorously enforced, can widen access to prevention and health care services, improve the quality of treatment, enhance social support for people affected by the epidemic, and protect human rights that are vital to survival and save the public money. The report also demonstrates that the law, if

well enforced, has the ability to reduce the number of new infections by 1 million as illustrated below.



With recent scientific breakthroughs relating to the prevention and treatment of HIV,⁹ addressing the legal barriers to effective HIV responses has become more important than ever as evidenced by study conducted by Global Commission on HIV & the Law and KELIN. The protection of human rights of people living with HIV and key populations is now recognized as critical to efforts to ensure access to HIV prevention, treatment, care and support for all.¹⁰

Realising Kenya’s commitment to implement human rights as enshrined in the Constitution¹¹ and to address laws and policies that adversely affect access to HIV services by those who need them, will require well-informed and sensitised members of the judiciary with in-depth understanding of the complex legal, human rights and societal issues raised by the HIV epidemic. Regional dialogues and experience sharing among the judiciary and the engagement of judicial training institutions in HIV and human rights programmes for the judiciary at a regional level is an effective way to support the positive role of the judiciary in the response to HIV.

A dialogue between judicial officers from Kenya and their counterparts in other African countries will provide a unique opportunity for the judges and magistrates of Kenya to achieve their strategic objective of providing equitable access to justice for all under pillar one (people-focused delivery of justice¹²) of the Judiciary transformation framework.

⁶United Nations General Assembly Political Declaration on HIV/AIDS: Intensifying our efforts to eliminate HIV/AIDS, June 2011, A/RES/65/277. Available at http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/06/20110610_UN_A-RES-65-277_en.pdf.

⁷<http://www.hivlawcommission.org/>

⁸The Global Commission on HIV and the Law was launched in June 2010 to develop actionable, evidence-informed and human rights based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV. The report is available at <http://kelinkenya.org/wp-content/uploads/2010/10/FinalReport-RisksRightsHealth-EN.pdf>

⁹See for instance, UNAIDS, “Groundbreaking trial results confirm HIV treatment prevents transmission of HIV”, 2011, available at <http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2011/may/20110512pstrialresults/>.

¹⁰See Schwarländer B et al “Towards an improved investment approach for an effective response to HIV/AIDS” The Lancet, 2011, Vol 377, Iss 9782, pp 2031-2041.

¹¹These include Treaties that Kenya has ratified as provided for under Article 2(6) of the Constitution of Kenya 2010.

¹²Under this pillar, the Judiciary will pursue strategies aimed at creating a legal system which ensures equality of all before the law and an equitable legal process. Source: Judiciary Transformation Framework 2012 – 2016.

4.0 Strategic objectives

The Judicial dialogue aims to provide

- a) A critical opportunity for discussion and experience-sharing between Judges and magistrates from Kenya and those from other African Countries on the complex legal and human rights issues posed by the HIV epidemic.
- b) An opportunity for judges and magistrates Institutions to discuss effective strategies and programmes for judicial education and training so as to help ensure the different judiciaries are able to make informed decisions on HIV-related human rights issues.

5.0 Outcomes

5.1 Increased awareness among Judges and magistrates on:

- a) The role of the law and the courts in protecting the rights of people living with HIV and members of key populations;
- b) The complex legal and human rights issues raised by the HIV epidemic in Africa and stronger ability to addressing them, including through progressive judicial responses;
- c) Key limitations to access to justice for people living with HIV and members of key populations and possible responses to them.

5.2 Increased understanding among participants of effective strategies for supporting the development of a new generation of judicial leaders, and engagement from representatives of judicial training institutions to undertake follow-up activities at national level, such as sensitization and experience-sharing workshops for members of the judiciary, and the integration of modules on HIV and the law into the formal training provided by judicial training institutions

5.3 Awareness of, and increased capacity to use/ apply guidance, principles and information materials contained in the Handbook on HIV, the Law and Human Rights for the Judiciary, which was launched in June 2012

6.0 Methodology

KELIN and UNDP-Kenya worked in a participatory manner and in this project, they worked in close consultation with the relevant partners. These include the Judiciary Training Institute and UNAIDS. The following methodologies were utilized to facilitate information sharing:

- a) PowerPoint presentation from national and regional experts;
- b) Panel discussions of representatives of persons living with HIV, legal experts, law enforcement officers with experience in using the law to protect and promote the human rights of people living with HIV and members of key populations;
- c) Video sessions;
- d) Moderated discussions on topical issues identified in the various compendiums and reports;
- e) All reading and reference material will be provided on a flash disk and where necessary hard copies will be provided.¹³

7.0 Participants

The workshop attracted a total of 83 participants these included, judges, magistrates and representatives from the supporting partners- JTI, UNDP, UNAIDS and KELIN. Specific efforts were made to secure participation of Judges and magistrates with experience in rendering decisions on HIV-related cases that are consonant with human rights principles and seen as advancing HIV jurisprudence and HIV responses at national level and beyond. Representatives of networks of people living with HIV as well as civil society organisations with experience in using the law to protect and promote human rights of people living with HIV and members of key populations.

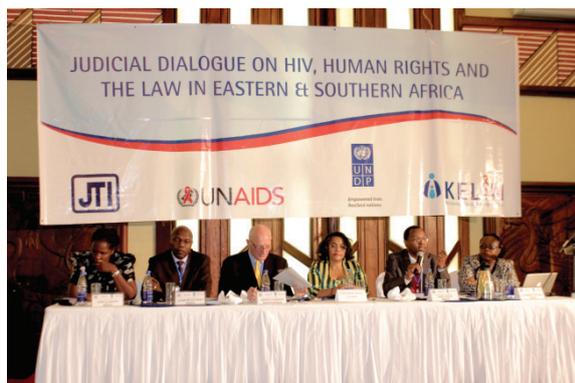
¹³This will include links to useful website that will have updated decisions on socio-economic rights <http://www.globalhealthrights.org/>

Reception Cocktail and dissemination of judicial handbook

The judicial dialogue began with a reception cocktail, on the 28th of October 2013, where there was a dissemination of 'Judging During the Epidemic'- A judicial handbook on HIV, Human Rights and the Law. Participants heard remarks from Prof Joel Ngugi, Director Judiciary Training Institute, Mr. Alfredo Teixeira, UNDP Deputy Country Director, Patricia Asero, a Petitioner in the Anti- counterfeit case as well as Ms. Susan Timberlake Chief, Human Rights and Law Division UNAIDS. The key note address was delivered by Hon. Justice Edwin Cameron of the Constitutional Court of South Africa.

Session one – HIV, the Law and the Judiciary: Introducing the Issues

Hon. Professor Joel Ngugi, Head of the Judiciary Training Institute



Justice Ngugi makes the opening remarks alongside the other panelists.

Hon. Professor Ngugi chaired session one and emphasized the need to promote and protect the rights of PLHIV. He reiterated that the judiciary is a focal point in HIV related protection and enforcement of HIV related human rights and hence the forum was of great importance to all the participants. He noted that the Courts have not been witnessing HIV related claims as a result of stigma. Most people whose rights have been violated come for advice but when going to court is required they shy away for fear of discrimination. He hoped that the dialogue would be fruitful, beneficial to the participants and would offer a learning experience and understanding on the issues relating to HIV.

KEYNOTE ADDRESS, Ms. Nardos Bekele-Thomas, UNDP Resident Representative/UN Resident Coordinator

Ms. Nardos Bekele-Thomas officially opened the dialogue with her key note speech, in which she pointed out that HIV remained a leading cause of death. She emphasized that there was further need to reduce the statistics, despite the steps made to date. She stated that 54% of those affected in low income countries have access to life saving medication, and the same numbers have access to the ARVs and are therefore living longer as a direct consequence.

She emphasized the need to advance legal protection globally with the assistance of the judiciary. She stressed on the importance of the judicial dialogue in advancing 'zero discrimination'. She further added that dialogues of this nature open space and platforms for knowledge sharing and exchange of ideas to make the much needed zero discrimination a reality. She noted that a road map was established in 2012 that allocated shared responsibilities to member states for solutions of combating the epidemic by the year 2015.

Commissioner Catherine Mumma, Commission on Implementation of the Constitution

Commissioner Mumma noted that HIV still remains the greatest public challenge, and the global response to the epidemic has yielded some good results, with a decline in the infections as compared to the late 90s and early 2000. There are more people accessing ARVS. She stressed that the social-cultural reaction towards those infected with HIV is usually associated with death, associated with promiscuity and drug use.

She illustrated that as a consequence of stigma, those infected with HIV were previously buried in polythene bags and some even thrown in the forests. The families of the deceased were shunned and women infected with HIV are usually not allowed to inherit property. Many die of stigma of HIV and not of anything related to HIV. She noted that the violations occur despite the passing of a number of laws and policies.

In conclusion she challenged the members of the judiciary to listen and understand the issues around HIV so as to make sound judgments. She reiterated that the Judiciary was not being asked to make biased judgments but to make sound judgments based on facts and equality premised on a sound understanding and backdrop of issues touching on HIV. She emphasized that Article 10 of the Kenyan Constitution obligates every state servant to apply the rule of law, democracy, equity, social justice, inclusivity and protection of the marginalized.

Regina Ombam, Head of Policy and Strategy on behalf of the Ag Director, National AIDS Control Council (NACC), Kenya

Regina Ombam noted that HIV has opened the democratic space for people to talk about health, well-being, human rights and the law. She further challenged the legal profession on dealing with the epidemic on the premise that other arms, including economics and science, have taken a positive step in the right direction. She also stated that the prison population in the country is a big reservoir for transmission. Prison inmates are infected with HIV and upon the completion of their jail terms or release; they are at risk of infecting others. He posed to the members of the judiciary present crucial questions for instance; are we questioning whether once the inmates leave prison they are not infecting others? In his conclusion, he stated that whereas numerous efforts have been undertaken to minimize transmission of HIV much more can be achieved by changing our attitudes in fighting HIV, ending discrimination and stigma.

Ms. Maya Harper UNAIDS Country Coordinator

Ms. Harper began her presentation by disseminating a statistical overview of the HIV epidemic in the Eastern and Southern African region. She highlighted the UN Political declaration for achievable and concrete goals for 2015. She also stated the importance of reaching those left behind in the context of transmission of HIV among men who have sex with men (MSM) and female sex workers (FSW). She noted that in Kenya the infection rate amongst MSM was at

18% and 28% in FSW. The bulk of new infections are in heterosexual unions (44%), MSM and prisons account for 15% while 30% are women in age group 15-24. However the transmission reduced in Mombasa and Kilifi counties where clean needles were being supplied to the injecting drug users reducing the risk associated with shared needles.

In conclusion she noted that there had been great progress in the region with a decline in AIDS deaths and in TB deaths, decline in new adult and child HIV infection, significant increase in ART and PMTCT coverage and increased focus on improving effectiveness and efficiency of the response

Hon. Justice Edwin Cameron- Constitutional Court of South Africa

Hon. Justice Cameron began by narrating an account of his personal life and the years he has lived with HIV, having been diagnosed in December 1986. He stated that he has been on ARVs for the last 16 years and has an almost zero count hence a living testimony of the effectiveness of ARVs and living a robust life. He asserted that it is stigma that impedes rational conduct. He stated that we don't have the social power and assertiveness to prevent transmission. He noted that PLHIV do not speak publicly about HIV especially those of high standing in society due to the shame and fear that is associated with HIV.

He further challenged the forum on how judges, magistrates and lawyers deal with an epidemic where the fear and shame is of large magnitude. He stressed that the institutional role of the judiciary is to bear the light of reason and apply the methodology of evidence based judgments on reasoned evidence.

Plenary Discussions

Plenary discussions focused on women's infection rates. It was noted that the statistics depicted the social and economic disparities between the sexes. It was noted that men would ordinarily not go for tests, and were financially more empowered than the women. It was also highlighted that women's inaccessibility to

health services due to stigma is also a reason. Women want to access family planning services, but are unable to due to stigma, discrimination and violence

The issue of marital rape was one that raised serious concerns within the forum. Very few countries have any form of legislation on marital rape and proving the same within such a setting had proven to be very difficult. However, in South Africa and Swaziland, it was confirmed that the same was an offence and was punishable under law.

Plenary discussions also focused on the role of the judiciary in dealing with the epidemic. It was highlighted that there is an opportunity now to engage the judiciary, since it is a secure office and has not been politically sensitized: investing more in the judiciary will close the gap on lofty dialogues without enforcement. Article 159 also provides for Alternate Dispute Resolution Mechanisms, which the judiciary should embrace.

Session two: Using the Law to end HIV Related Discrimination and other Human Rights Violations

Mr. Justice Gatembu Kairu chaired this session of the judicial dialogue

Nelson Otwoma - Coordinator (NEPHAK)

Mr. Otwoma gave a brief narration of his experience as the Co-coordinator of NEPHAK, especially on discrimination and stigma experienced by PLHIV. He noted that children and education was an important issue that needed to be addressed where HIV was concerned due to their vulnerability and the subsequent stigma they face.

He further noted that stigma and discrimination is a cross cutting issue especially on matters of employment, noting that several cases have been filed in court. He singled out a case from Kapsabet where a young man having successfully undergone the rigorous military recruitment exercise was locked out after his status was discovered. A clear case of stigma and discrimination as his status had not in

any way been a problem in the recruitment process. Similar cases on issues of TB were also discussed vis-a vis the Public Health Act and the imprisonment of persons who had refused to take their medication. He cited NEPHAK and KELIN were playing a crucial role in getting the affected persons released from jail. He shared that gender based disparities also led to discrimination against women when acquiring land titles as a result of their HIV status. He noted that a great number of widows had been disinherited as a result of their status. He also noted that criminalizing and prosecuting men who have sex with men, sex workers or injecting drug users does not help contain the virus: it just enhances the discrimination thereto.

Tenu Avafia - Policy Advisor, United Nations Development Program

Mr. Avafia detailed the role of the judiciary in offering legal protection to PLHIV. He outlined the utilization of the law and best practices and further how these laws impede or sustain HIV. He stated that poor laws fuel the spread of HIV. In contrast he noted that good laws and practices protect human rights and curb the transmission of the virus. Mr. Avafia also highlighted the role of the Global Commission on HIV & the Law, and the 2015 targets, which also include lobbying to ensure halving the countries with punitive laws and practices around the issue of HIV transmissions.

In conclusion he opined that we should propagate evidence and rights based laws as opposed to stigma and myth. In the long run, that would address the issue of stigma and discrimination.

Plenary discussions

The plenary discussions from this session focused on various issues. Marital rape was discussed at length and it was noted that there was a very high risk of infection in marriages as compared to other liaisons. Married women, it was noted, are more at risk as compared to female sex workers who were empowered in their own respect for the use of protection at the point of engaging in coitus.

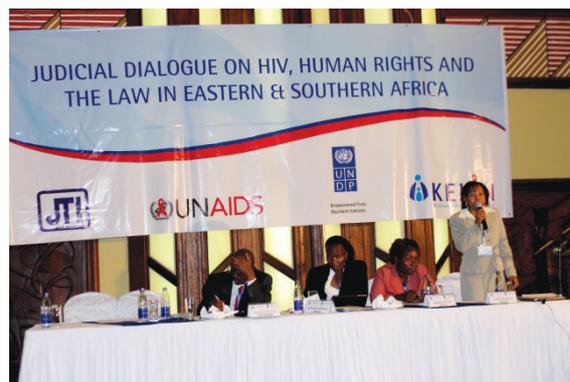
There were plenary discussions on employment of domestic helps/workers and HIV testing. The issues raised herein touched on their attitudes, particularly when dealing with infants under their care, especially where they know that they are HIV positive. The principles of the law were noted and its trite law that consent when testing them is paramount. Further Section 46 of the Employment Act of Kenya is also very clear that dismissal of an employee by virtue of their status is illegal. The forum was referred to the ILO, 2013, HIV and AIDS and Labour Rights Handbook for guidance on HIV and labour rights. It was stated that rather than dismiss them from employment we should facilitate for counseling, allow them to have access to clinics and treatments and encourage them to lead and keep a healthy lifestyle both nutritionally and physically.

Hon. Justice Edwin Cameron-Constitutional Court Of South Africa

Hon. Justice Cameron addressed the issue of criminalization through his presentation. He has been a strong proponent on why criminalization related to infection was bad law. He premised his argument on why it is that we should pin point it to HIV whereas there are other laws that can adequately deal with such violations. He shared his view that if a person knew that he would be prosecuted due to his HIV status then s/he would opt not to get tested and as such lose out on the benefit of enjoying the fullness of life the virus notwithstanding. Further he advocated for non-criminalization on the premise that once one tested positive then s/he would operate with the notion of being a criminal, and the title hanging on his/her head. It has been argued that criminal law should not be used and or applied where there is no significant risk of HIV transmission or where the accused did not know they were HIV positive or did not understand how HIV is transmitted and or took reasonable measures to prevent transmission.

Session Three: Enabling Legal Environment in the Context of Women

Hon. Justice Agnes Murgor chaired session three of the judicial dialogue which commenced with the screening of a video on forced sterilization of women living with HIV in Namibia.



Justice Murgor chairs session three alongside the panelists.

Rhoda Nafula – Widow’s testimony

Rhoda shared that she is a widow living with HIV, having lost her husband in 2002. Upon her husband’s demise, her in laws immediately turned against her and demanded that she be inherited by one of her in laws (likely a brother of her deceased husband). She resisted the same as she didn’t want to infect any other person having known of her status. One day she found her house demolished for reasons that she was a bad omen - she was forced to go rent a place elsewhere. She opted to go back home to her own parents but was told that she needed to return her children, therefore decided to stay in the rented place.

My children and I experienced the worst kind of treatment as a result of my health status as we were frequently abused and physically attacked by my in laws. The church I attended started building a house for me. I was not allowed to take my things from my matrimonial home. I had to play hide and seek where I was staying

because of the persecution. I would run away and forget my ARVs, and would return to find my children beaten. My CD count started dropping, and then a lady from KELIN came in saying that she was there to help widows who have been disinherited. I got the help and today I am healthy and staying with my children in my compound.' Rhoda shares.

Hon. Justice Ogaile Dingake-High Court of Botswana

Hon. Justice Dingake in his presentation emphasized that the judges did in their own respect make laws and equally safeguarded the laws they make through its independence. He stated that justice does not reside in the law books but in the hearts of men and women of good will, and added that if it indeed dies in the heart, then neither law nor constitution can save it. He proceeded to make reference to the case of Unity versus the AG of Botswana, which dealt with sections of the Citizenship Act; where female citizens could not confer citizenship to their spouses. It was held by the Court of Appeal that it was impermissible to discriminate on the basis of gender. He concluded that the law must come to the aid of vulnerable people and work to their advantage, to prevent gross miscarriages of justice.

Plenary discussion

The plenary discussions in this session largely centered on disinheritance. The universality of human rights was brought into the fore and further the role of the judiciary in enhancing and promoting the rights of PLHIV. The provisions of the law are usually very clear, the folly being that the victims herein get discriminated upon even when lodging their complaints. Judges can make a difference on how to read the law and interpret it.

Commissioner Winnie Lichuma- Chairperson Gender & Equality Commission

Commissioner Lichuma in her presentation highlighted that gender inequality and violations of women's human rights are pervasive with respect to family and property law issues that are decisively linked to HIV epidemic. She further stated that proponents of criminalization

of HIV-non-disclosure often assert that criminal law promotes public health by deterring and punishing behavior that exposes others to the risk of HIV transmission. Violence against women and girls is recognized as a human rights violation and a form of discrimination against women. This has been prohibited in many international instruments including the Convention on elimination of all Forms of Violence against Women CEDAW, Convention against Torture CAT.

On women's rights with respect to Family and Property law she stated that inequalities in marriage, divorce and inheritance laws and practices are not new issues, but the HIV epidemic has dramatically aggravated their discriminatory effects. Because their legal, social and economic subordination renders women vulnerable to HIV infection, protecting and promoting the human rights of women is critical to an effective response to the HIV epidemic.

Session four - Enabling Legal Environment in the Context of Children and Youth Hon. Justice Grace Ngenye chaired this session.

Dorcas Kawira- Youth Living with and Affected by HIV in Kenya

Ms. Kawira took the forum through her experience of being a youth living and affected by HIV. She stated that she was orphaned at the age of eight years and tested around the same time. She was raised by her relatives who also had their prejudices as her fees wasn't ordinarily paid on time and faced with the option of educating her siblings or buying her the much needed Antiretroviral her relatives were more comfortable with the former. They had passed a death sentence on her and thought it a waste of time to educate her as she was bound to die anyway. She gave her experience whilst in high school and how she had to hide whilst taking her medication for fear of stigma from her fellow students and she further had to really hide the said drugs from her friends. She says through exposure and education she has been able to live a full and vibrant life and was currently studying to be a lawyer.

How can the judiciary help give the children living and affected with HIV a voice? She asked the forum. She also sought the assurance that the government, stakeholders and donors will not stop funding free access to treatment as the same if stopped would be greatly detrimental to their way of life.

**Sister Mary Owens- Executive Director,
Children of God Relief Institute, Nyumbani,
Kenya**

Sister Mary Owens shared that the key struggle they experience with regard to their Children's home was the denial of birth certificates to children in the home: they were abandoned, and therefore cannot meet the requirements to apply for birth certificates. She narrated that this struggle begun in 1996, and that most of their children passed away without having been recognized as Kenyans for lack of the requisite identification papers. Through strong lobbying and raising awareness, they were able to make significant inroads and in 2010 the Principal Registrar gave guidelines for registration of children from charitable children's homes. Though they have made progress, they still experience a lot of challenges as the letters from the children's department are hard to come by, and when they do they take too long.

She shared their challenges with regard to access to education. Having been denied this basic human right, they filed a suit against the government of Kenya with the help of the Chambers of Justice. They won the case in January 2004. "This is a landmark case not only for our children but for all children who can experience discrimination", she said.

On the right to basic health care, she pointed out that only 33% of the children have access. A lot of lobbying is going on in this regard, especially on the 3rd line ART treatment which has been elusive in Kenya.

She concluded her presentation by reiterating that HIV is a treatable medical condition. The condition is stigmatized because its transmission in adults is largely associated with sexuality. It is deplorable and a grave violation of their rights that children who inherit HIV are stigmatized.

Plenary discussion

The discussion in plenary mainly focused on the issue of prevention and treatment being addressed for children who have come of age and are sexually active. It was stated that the best mode of dealing with the issue was a counseling approach on prevention and transmission, ensuring that the youth were actively involved in the decision making regarding their destiny, and allowing them to be independent. Justice Edwin Cameron shared a South African case where a nursery school had denied admission to a child living with HIV because of the fear that the child would infect others. He emphasised the need for judicial officers to be aware of such cases and to act on them with the deserved urgency, and in the best interest of the child.

Session five – The Role of Criminal Law in the Epidemic

This session was chaired by Commissioner

Otiende Amollo. He introduced the session by stating that the provisions of reckless and intentional transmission of HIV still remain controversial and the wider view is that criminal law should be confined to abnormal and outrageous actions of intentional transmission. It is equally arguable whether new HIV specific criminal laws are needed to curb intentional transmission or whether criminalization should be within the context of existing criminal laws: and in any event, how do you address the traditional evidentiary burdens of proof of criminal offences i.e. *actus reus* and *mens rea*?

These, the chair remarked, are controversial issues that must be boldly discussed and tackled for effective management of the pandemic, based on human rights.

Prof. Walter Jaoko- Deputy Programme Director, Kenya AIDS Vaccine Initiative

Prof. Walter Jaoko provided the much needed demystification of the science of the HIV virus and its mode of transmission in humans. In brief, he provided the following background on the science of the virus:

HIV means Human Immunodeficiency Virus, meaning that it only affects humans naturally. Other animals have their version of the virus called the SIV. There are two main types of

the virus: HIV-1 & HIV-2, but the most widely spread and aggressive type is HIV-1. HIV 1 is further divided into strain/subtypes A, B, C, D, F, G, with multiple strains found in every geographical area, with the most prevalent strains varying in regions. For example in North America/Europe the common strain is B, South Africa C, Kenya A, Russia A, and Ethiopia C. AIDS on the other hand means Acquired Immunodeficiency Syndrome. It is 'acquired' because it has to be transmitted from an outside source and is not genetically inherited.

HIV progresses into AIDS gradually and an early HIV infection would usually go undetected for some time, but even when it is eventually detected, the infected person can be asymptomatic for some time. When the virus levels in blood are very high, HIV destroys body defenses leading to low immunity, measured by CD4 cell numbers which decrease with time. Low CD4 count then leads to weight loss, diarrhea, skin infections, TB, meningitis and this then signifies the Acquired immunodeficiency syndrome.

In history, HIV was first discovered in 1981 and since then at least 34 million people are living with HIV; 7,400 are newly infected daily, with 2.5 million people infected in 2011 alone. Sub-Saharan Africa bears the highest disease burden with 69% of the world's HIV population. The disease has many social effects and in most African countries it has been declared a national disaster.

With regard to proof of transmission for the purpose of criminal prosecution, Prof. Jaoko stated that if partners have different strains, then transmission cannot be said to be from one partner but, if the partners have the same HIV strain then it is possible infection is from one partner. However, this does not conclusively prove transmission. If partners have the same strain but there is no information on previous HIV status of each, it may be possible to make an intelligent guess of who transmitted infection but this cannot prove transmission within the confines of the law.

Ms. Susan Timberlake, Chief, Human Rights and Law Division, UNAIDS

Ms. Timberlake expressed her concerns over the overall impact of an overly broad criminalization

in the fight against the HIV pandemic. She submitted that the issue of criminalization of HIV non-disclosure, exposure and transmission, has been debated since 1981 and despite the UNDP and UNAIDS issuing guidelines on the same, it still remains contentious. In her view, narrow criminalization is not so much the problem. The following remarks aptly capture the crux of Ms. Timberlake's presentation; "There will be calls for 'law and order' and a 'war on AIDS.' Beware of those who cry out for simple solutions, for [in] combating HIV/AIDS there are none. In particular, do not put faith in the enlargement of the criminal law."

—Justice Michael Kirby, High Court of Australia, "The Ten Commandments," [Australian] National AIDS Bulletin, March 1991.

Ms. Timberlake stated that prosecutions for acts that represent no risk of HIV transmission, e.g. of people who use condoms or other prevention strategies; singling out HIV for prosecution vis-à-vis other STIs; disproportionate penalties imposed for HIV prosecutions; failure to apply standard legal requirements of intent; mental culpability; causation and proof; media coverage that fuels misunderstanding and stigma; and selective prosecution, all undermine strategies to get people tested and take up treatment because of fear.

Ms. Timberlake emphasized on the standard of proof required for mental culpability in prosecuting intentional transmission, stating that in addition to proof of a culpable mental state, intent to harm should not be solely derived from knowledge of positive status and/or failure to disclose but active deception should be an element in establishing required the state of mind. The context in which the alleged deception occurred, including the mental state of the person living with HIV, should be taken into consideration.

In general, no prosecution should proceed where the accused;

- Did not know s/he was HIV-positive;
- Did not understand how HIV is transmitted;
- Disclosed his/her HIV-positive status to person at risk
- Did not disclose because of fear of violence or other serious negative consequences;
- Took reasonable measures to reduce risk of transmission (condoms, safer sex);

- Agreed on level of mutually acceptable risk with the other person; or
- Believed that his/her treatment and/or low viral load greatly reduced the risk of HIV transmission.

On the other hand, the best scientific evidence and legal principles available should be taken as good defenses to a criminal charge for intentional transmission including the following;

- Use of condoms, safer sex, as well as effective HIV treatment and/or low viral load
- Disclosure, in the various forms it may take
- Informed consent to sexual acts
- No blanket requirement for disclosure of positive HIV status
- No prosecution based on non-disclosure alone

Where a conviction is secured, the best scientific evidence and legal principles available should guide the imposition of penalties. As such:

- Penalties should be proportionate to state of mind, nature of conduct, actual harm caused.
- Assessment of harm should be based on scientific and medical facts
- Penalties should be similar to those provided for like harms under criminal law.
- Alternatives to imprisonment (e.g. fines, restitution, community service and probation) should be considered.

In summary, Ms Timberlake called on judicial officers to exercise judgement based on the best scientific evidence and legal principles available that measure up to human rights standards and to avoid overly broad and special criminalization of HIV exposure and transmission in a way that is counterproductive to reducing the prevalence of the virus.

Hon. Justice Edwin Cameron, Constitutional Court of South Africa

Justice Cameron stressed that HIV is a uniquely stigmatized epidemic and disease and that the idea that criminal law can be used to curb infections is highly misguided. He stated the fundamental position that most HIV

transmissions occur between people who do not know their HIV status and therefore placing emphasis on criminal law prosecution on the parameters created by section 24 of the Kenya HAPCA only enhances stigma, stops voluntary testing and thereby enhances the HIV pandemic.

It is Justice Cameron's view that though criminal law has a role to play, this role must be subordinate to public health policy of ensuring voluntary testing and increased access to treatment. Criminalization of intentional transmission based on knowledge of HIV status only serves to increase stigmatization and increase infection. The law applicable to HIV prosecutions should not be separately legislated otherwise it de-normalizes HIV and stifles prevention interventions.

He also noted that in any event, criminalization of HIV exposure mainly affects women as they are seen as receptacles and conveyors of the virus. For example, in South Africa the first person to be prosecuted for intentional transmission was a woman. They are the most vulnerable and stigmatized members of society.

Ambrose Rachier-Chairperson KELIN

Mr. Rachier acknowledged that there has been a lot of debate on the role of criminal law in the prevention and control of the spread of the virus after it has entered a person's system. He noted that there are 63 countries that have criminalized HIV intentional transmission and exposure through HIV specific legislations which have created specific related offences or using existing criminal laws to deal with intentional transmission. In Canada for instance, the offence of transmission is punished under the charge of sexual assault, in the UK: reckless infliction of grievous bodily harm, in New Zealand: criminal nuisance, in France: administration of a noxious substance and in the US: attempted homicide. Mr. Rachier however lamented that there is no evidence that criminalization of HIV will prevent new infections and yet the role of criminal law ought to be to prevent new infections. In this regard, he stated that judicial officers should consider the science of HIV transmission, even where the strains and subtypes are similar

because there is still a problem in proving who infected who.

Proof of actual transmission, he noted, is still a big adjudication challenge globally. In England and Wales there has been an attempt to use phylogenetics; however, this may still not prove direction of HIV transmission. Scientific evidence therefore, should be used with limitations on accuracy. Mr. Rachier submitted that judicial officers should consider the culpability of an accused person and satisfy themselves as to whether the person knew, and whether transmission was purposed. In particular, the prosecution must lead evidence beyond reasonable doubt to show that the accused knew they had HIV and they understood how it is transmitted,¹⁴ and whether any measures were taken to prevent transmission to the partner e.g. use of condoms. No presumptions should be made on intentional exposure on the basis that a person living with HIV engaged in unprotected sex.

On the other hand, the prosecution should also consider as good defenses consent to sex by the sexual partner of the HIV+ person,¹⁵ that the accused used reasonable precaution to protect the parties from HIV infection, and the fear of violence, abandonment or abuse especially to women in abusive relationships as a possible inhibitor.

In the event of conviction, based on the foregoing parameters, judicial officers need to take into account the negative impact that imprisonment may have on the health of person living with HIV when sentencing. In Canada for instance,¹⁶ a court gave a 12 month conditional sentence to a woman who had been charged for failing to disclose her HIV status. The sentence was to be served in the community as her health was deteriorating.

Commissioner. Otiende Amollo then gave an overview of the presentations with a brief history of the enactment of the controversial section 24 of the HIV and AIDS Prevention and Control

Act ('HAPCA'). The history is well explained in the Report of the Task Force on legal issues relating to HIV and AIDS, but three important considerations arise. The taskforce's work was inspired by the need to deal with willful neglect of a responsibility at a time in Kenya when the political mood was highly charged against PLHIV. The question the taskforce had to grapple with then was whether to use existing criminal laws to tackle intentional and reckless transmission. Existing provisions were however found inadequate for the HIV situation and at the time, HIV transmission was used just as an aggravating factor by the prosecution in rape and defilement cases to hand harsher sentences though it was unsupported by the law.

Session Six - Enabling Legal Environment in the Context Of Key And Affected Populations



Mr Maleche introduces members of the panel

This session was chaired by Mr. Allan Maleche, the Executive Director of KELIN.

The agenda as set out by Professor Walter Jaoko was a deliberation on Public Health versus Human Rights with emphasis on key and affected populations. He identified and defined what public health was. There was a focus on the difficulties of enforcing public health issues due to the conflict that would always arise between the community and the individuals. The WHO guidelines for key populations were also highlighted: they will help in alleviating stigma and discrimination in the long run. The legal framework governing and/or dealing with key

¹⁴Neal v. The Queen [2011] VSCA 172 (Australian case)

¹⁵(R v. Dica [2004] EWCA Crim 1103, CA (England and Wales)

¹⁶R v. D.G (July 8 2008) Longueli 505.

populations was also highlighted: it includes the Constitution the Penal Code and their effects in ensuring compliance.

The 2nd phase of the session primarily dealt with the perspectives of members of Key and Affected Populations, with the panel comprising of an MSM, a FSW and an IDU. The common issue that came out of their testimonies was that discrimination was still rampant as their lifestyles were frowned upon by society and yet all they sought were an element of equality, their lifestyles and dispensation notwithstanding. They challenged the members of the judiciary to reconsider their cases once presented before them and adjudicate them with an open mind, without necessarily labeling them by their lifestyles or sexual orientation.

A challenge was also made to the judiciary on imposition of sentences prescribed, and whether they would have an effect in the change of lifestyle; and the effect of imprisonment on drug addicts. They also requested for follow up on orders for medical care/attention to prisoners once requested in court, as the wardens never acted on them as ordered.

Session Seven – Access To Life Saving Treatment

Ms. Patricia Asero,-Petitioner in the Anti-Counterfeit Case

Ms. Patricia Asero shared her experience as a PLHIV on access to medicines in Kenya. She noted that in the year 2001, she did not have access to ARV's because they were then very expensive and in limited supply in Kenya. However, because of increased production of generic drugs over time, her access has drastically improved and given her a new lease of life.

In this regard, she noted that the law can be used either to provide or take away access. She was aware that the Trade Related aspects of Intellectual Property rights (TRIPS) flexibilities could be used by developing countries to improve production of essential medicines through governmental use, voluntary licensing

and parallel importation of generics and it was through these flexibilities that Medical Sans Frontiers (MSF) was able to import generic ARVs that normalized her life. To date, 90% of Kenyans use generic drugs.

She noted that access to medicine is a collateral right embedded in the right to health. In 2008 the Anti-Counterfeit Act Cap 130A of the laws of Kenya was going to fetter this right and limit her access through sections 2, 32 and 34 which construed generics as counterfeit goods and thereby criminalized their manufacture and importation, empowered police to ban and burn them and only allowed branded medication into the country. This would have severely denied many PLHIV access to medicines, thereby affecting the right to health hence her decision to petition the High Court to declare the said sections unconstitutional, null and void.

She noted that the process was tedious and cumbersome, but the decision provided great relief for her and millions of other Kenyans dependent on generic drugs as their only chance for survival.

She urged judges and magistrates to be extra vigilant, because the law can give and take away in equal measure.

Umunyana Rugege - Attorney Section 27, Allan Maleche - Executive Director, KELIN and Tenu Avafia - Policy Advisor, UNDP

Mr. Tenu gave an overview of the competing needs of inventors and producers of technology, and the users of the technology. He noted that the majority of producers of technology are from the North, and are strong proponents of IP protection. In 2002 for instance, 312,000 patents were granted around the world and more than a third of these were granted in Japan, just under a third were granted in the United States. Over the last 10 years however, china has joined the Patenting greats but predominantly, owners of IP are rich countries.

There has since 2002 been a 25 fold increase in treatment levels and as at the end of 2010, 6,650,000 PLHIV were receiving treatment

globally. At present almost 10million are receiving ART globally but treatment levels for children is still low and less than 50% of PLHIV in need of treatment globally are receiving it¹⁷.

Mr. Avafia gave an overview of the nature of patent rights aptly captured thus;

“Protection always was extended to an inventor, provided that his invention was recognized as useful; that the patent term was limited; and that it was subject to a compulsory license in favor of the state, that a patent was forfeited by failure to use it within certain term and that it failed in cases of prior knowledge within the territory”¹⁷

He gave an overview of the WTO and a background of the TRIPS and the TRIPS flexibilities. TRIPS prescribes minimum standards for IP protection & enforcement of copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits and protection of undisclosed information. Article 33 requires WTO Members to provide a 20 year minimum period of patent protection but TRIPS contains exceptions to patent rights and flexibilities for use by countries to reduce medicine prices e.g. compulsory licensing.

In the context of treatment of HIV, Mr Tenu stated that most people on ART are still on first generation treatment but with time, due to resistance, switch to second generation ARVs, some of which are still under patent and are 3.4x times more expensive, with 3rd generation up to 23.4 times more expensive. He stated that TRIPS flexibilities can reduce cost of treatment and strongly recommended that countries should adopt and utilize the TRIPS public health flexibilities and explore new TRIPS flexibilities and modalities e.g. South-South co-operation He noted that TRIPS Agreement in Articles 6,

8(2), 31(k), 40 also offers remedies to address anti-competitive behavior and a broader range of interested parties, including civil society/ patient groups, NGOs and generic producing companies can use competition law to curb such anti-competitive behavior¹⁹ and price controls another option (different from tiered pricing).²⁰

He however expressed concern that the proliferation of free trade agreements, may impact negatively on manufacture of ARVs as most Free Trade Agreements (FTAs) involving US, EU & EFTA have IP chapters exceeding minimum standards contained in TRIPS Agreement (TRIPS Plus).²¹ Similarly, proliferation of anti- counterfeiting legislation may also hamper initiatives to use TRIPS Flexibilities.²²

He concluded by emphasizing that Judges have a key role in implementing key rights in the context of human rights, including ensuring all barriers to proper access to essential medicines are removed.

a) Mr. Allan Maleche

Mr. Maleche gave a four part, succinct overview of the nature of the Anti-counterfeit case in **Patricia Asero & Others v. Attorney General**²³, the legal and practical challenges he and others faced in prosecuting the Anti-Counterfeit case in Kenya and general observations on the outcome of the case He highlighted the facts of the cases being three petitioners who were Kenyan citizens living with HIV and are all on 1st line generic anti-retroviral treatment. They argued that their right to life, right to human dignity and right to the highest attainable standard of health were threatened by the enactment of the Anti-Counterfeit Act, 2008, specifically sections 2, 32 and 34. The enforcement of the provisions would affect their ability to access their lifelong need

¹⁷WHO revised guidelines of 350 CD4

¹⁸Giulio Mandich (1950), referring to Venetian statute of 1474

¹⁹South Africa treatment activists for instance successfully employed competition law in 2003, 2005, 2007 to decrease ARV prices

²⁰South Africa government for instance reduced expenditure on ARVs by 53% or USD 680 million from 2011-2012

²¹For instance, the US has concluded and signed FTAs with 17 countries, some bilateral, others regional, EU has concluded or is negotiating FTAs with MERCOSUR, Andean countries, Central America, India, Korea, ASEAN and several others.

²²In Tanzania, Subsidiary Merchandise Marks Act, 2008; Kenya, Anti-Counterfeiting Act, 2008, and whose offending sections were later declared unconstitutional, Uganda, is discussing a Counterfeit Goods Bill since 2008, Revived in Parliament in late 2011 and there are reports of Legislation being deliberated in some southern African countries. There is also a draft EAC Anti-counterfeit Act being discussed.

²³High Court Petition No. 409 of 2009

for generic anti-retroviral (ARVs). They argued that the definition of the term Counterfeit was so broad as to exclude manufacture and importation of generic drugs. They further argued that it was improper to use intellectual property rights laws to control sub-standard medicines yet legislation exists to deal with substandard medicines. The Attorney General was sued on behalf of the state. The AIDS Law Project (ALP) and The United Nations Special Rapporteur for Health, Mr. Anand Grover were enjoined onto the court case as interested parties.

The prayers sought included a declaration that the fundamental right to life, human dignity and health as protected and envisaged by Articles 26(1), 28 and 43 of the Constitution encompasses access to affordable and essential drugs and medicines including generic drugs and medicines. A declaration that in so far as the Anti-Counterfeit Act, 2008 severely limits access to affordable and essential drugs and medicines including generic medicines for HIV and AIDS, it infringes on the petitioners' right to life, human dignity and health, guaranteed under Articles 26(1), 28 and 43 of the Constitution. A declaration that enforcement of the Anti-Counterfeit Act, 2008 in so far as it affects access to affordable and essential drugs and medication particularly generic drugs is a breach of the petitioner's right to life, human dignity and health guaranteed under the Constitution. The case was filed in March 2009 and concluded on 20th April 2012 with the court granting all the prayers by the petitioner.

b) Ms. Umunyana Rugege (Section 27)

Ms. Rugege gave an overview of the handicaps as encountered at Section 27 and the important role they play in provision of legal services especially when they enjoin themselves as amicus curiae in public interest matters. She outlined their role in advocating for access to medicine and more particularly the hurdles with matters of intellectual property.

She emphasized the need for medicines in South Africa with 87% of people dependent on public health services. 5.5 million people were living with HIV and almost 2 million are receiving

treatment.

While South Africa now has some of the lowest international prices for ARVs, the high number of patents granted drives up the cost of medicines for Non- communicable diseases and other diseases, as well as newer ARVs. Patents provide companies with a 20 year exclusivity on their intellectual property. There is need for a quid quo pro- appropriate balance of rights between the patentee that has a statutory monopoly and the constitutional rights of those who require access for their health to ensure that society derives a general benefit from their medical innovation.

She highlighted their role as amicus in the leading South African case of *Aventis Sanofi v Cipla Medpro* and the invaluable input and advice they rendered to the court in highlighting the importance of the element of public interest that eventually assisted the court in rendering its decision.

Hon. Justice Mumbi Ngugi, High Court of Kenya
Hon. Justice Mumbi gave an overview of the human rights approach in adjudicating public health cases. She noted that though instances of discrimination and stigma often arise in cases involving succession/ inheritance, child custody, marriage and divorce, domestic/other forms of violence in the criminal justice system, employment/education, access to health care/ essential medicine/intellectual property, the courts should be extra vigilant to watch out for, and when necessary apply human rights based approaches in commercial cases as well, which may have public health implications in the long term.

A human rights approach presupposes certain inalienable entitlements to every person by the mere fact of being human. These include the right to life, inherent dignity, equality and non-discrimination, right to health, and right to reproductive health services. These rights are interconnected, interdependent and most importantly indivisible. It must therefore always be considered that taking away one right may, and in most cases will, affect the enjoyment

of another right. These rights are recognized in various international and municipal laws around the World.

In the context of access to medicines, Article 43 of the Kenya Constitution as read together with Articles 2(5) and 2(6) of the Constitution and the International Covenant on Economic, Social & Cultural Rights (ICESCR) recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

She however noted that there are still instances of discrimination of persons living with HIV on various grounds which in most cases are geared towards protection of others. The discrimination leads to stigma and marginalization which in most cases stem from moral perceptions on some of the modes of transmission, particularly through sexual intercourse and drug use. It is however clear that these perceptions and the resultant stigmatization is based on misinformation and fear.

The courts, she submitted, can play a major role in combating such discrimination, stigma and other stereotypes related to HIV by adopting human rights based approaches in granting protection and remedies against discrimination. The courts should endeavor to defend human dignity and equality and foster inclusion. She noted that the Kenya Constitution in particular is a transformative Constitution and contains a variety of provisions that can be instrumental in this regard.²⁴ Courts should be well informed on the science of transmission of HIV in order to avoid summary prejudices based on one’s HIV status and most importantly each case must be decided on its own merit.

It is also important to consider the long term ramifications of human rights cases and especially their impact on the overall preventive and curative interventions. With regard to access to treatment, she noted that the right to

life and health encompasses access to essential medicine and justiciability of the right to health is no longer at issue.²⁵ In order to safeguard these rights, there has to be a balance between intellectual property rights and these rights. She submitted that protection of human rights is a bigger obligation for the state and any intellectual property legislation should be declared unconstitutional if it is likely to lead to violation of the right to access medicine/ treatment, and therefore violate the right to dignity and life. She gave the example of the Patricia Asero & Others v. Attorney General case (supra)

In conclusion, Justice Mumbi urged that the judiciary has the capacity to help transform society, and has the tool for it - the Constitution of Kenya 2010. It can help fight stigma, exclusion and discrimination by the decisions and relief/ remedies that it grants in matters before court for all marginalized groups, particularly those living with HIV.

Session 8 - Wrap Up And Closing **Hon. Prof. Joel Ngugi, Director of the Judicial Training Institute**

Justice Ngugi aptly captured the deliberations of the two day session with the following Key highlights;

- i) Discrimination takes many forms and contexts and must be deeply thought about on order to be properly and effectively tackled by judicial officers.
- ii) The law cannot fully address the practical challenges that people face in their daily lives but it has a very important role to play in helping address those challenges
- iii) Unless we genuinely, sincerely and sensibly think about these issues, we can easily get it wrong. In the words of American Judge in 1944: “Law is at its best when it cuts through transitory emotions to protect against discrimination”

²⁴These include: Article 10-values and principles, including social justice, equality Article 27-non discrimination; and Article 53, 54, 55, 56, children, persons with disability; the elderly, the marginalised

²⁵Article 22 of the Constitution - provides avenue for court enforcement of the Bill of Rights and Article 43 of the Constitution – every person has the right to highest attainable standard of health, which includes the right to health care services, including reproductive health care;

- iv) Judges are leaders of communities - textual, social and legal communities and whatever they do in those communities have a lot of impact.
- v) Judges should base decisions on rationality, science and data and know the social and scientific facts in order to remain true to the office and to remove the compounding effects of stigma and discrimination.
- vi) Judges must understand that the law is both an emancipator tool as well as a tool of oppression when it comes to HIV related issues. Innovative interpretation of the law and the Constitution can be a key tool in advancing the rights of PLHIV.

Participant Feedback

Participants' completed evaluation forms and provided feedback on the Judicial Dialogue. Participants' main motivations for participating in the Judicial Dialogue were strongly aligned with the objectives of the Judicial Dialogue – namely to share experiences, build understanding of HIV and human rights ; and for the purposes of networking and generating ideas for effective sensitization and training of members of the judiciary on HIV.

Participants indicated they would use the information they gained through the Judicial Dialogue in their work in the following ways:

- to enhance interpretation of law in cases related to HIV;
- As reference and comparative materials that will inform judgments and the manner in which Judges and Magistrates discuss the evidence and law in the matter before them.
- To help in inform the society / community the impact of stigma and why HIV should not be stigmatized nor PLHIV's discriminated
- To take a Human Rights Approach to their work and consider the information while writing judgments to ensure that Human dignity is upheld at all times irrespective of whether one is HIV+ or not.
- To provide a new look, a new approach in solving cases because the stigma, the discrimination on shame are absent in hearing cases, decisions taking according Human Rights considerations.
- To use the knowledge gathered while dealing

with cases of drug trafficking and drug possession. While evaluating sentences, bail applications and also while dealing with PLHIV.

- By utilizing the content covered in the workshop for the enhancement of the jurisprudence on the rights of people living with disabilities particularly with HIV

Participants' additional comments indicated demand for similar type events at national level and continuation of such dialogues on an annual basis. Some participants indicated that they believed that legislators, prison officials, lawyers and police officers would benefit from similar dialogues.

Personal testimonies of participants

Below is sample of some of the personal testimonies of the participants at the judicial dialogue.

Participant 1:

I am more conscious of the critical issues judicial officers need to know to render justice that upholds the rights and human dignity of person living with HIV and AIDS.

Participant 2:

I will look at the HIV and AIDS as a condition and a disease and not a death sentence. I will interpret all issues/ Law/ Circumstances from Human Rights angle and fight discrimination and stigma. Will avoid criminalizing the infection. I will take every opportunity to promote the rights of the people infected. I will emphasize that the starting point is to look at an infected person as a human being.

Participant 3:

Will be a change champion going forward; I will not wait for cases to reach my court. It will begin with my immediate surroundings.

Participant 4:

I got a human face for the MSM and commercial sex worker; it has positively impacted me to be highly sensitive while handling such cases.

Participant 5:

The content provides an additional perspective to the way in which we carry out our duties and responsibilities.

The outcomes of the Judicial Dialogue were largely achieved:

1. Through evaluation forms and in person comments, participants provided positive feedback on the Judicial Dialogue. Active engagement of judges and magistrates during the plenary discussion expanded participants' awareness and understanding

of the issues and challenges related to HIV. Significant sharing of experiences by member of the key population and candid questioning also enhanced participants' perception of the role of the courts in this area.

A self-assessment on the level of knowledge and skills on HIV-related issues relevant to the judiciary before and after the Judicial Dialogue indicates a strong increase in awareness of the complex legal and human rights issues raised by the HIV epidemic in Eastern and Southern Africa and the role of the law and the courts in protecting the rights of people living with HIV and key populations.

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Annexure I: Agenda

Monday, 28th October 2013

Moderator: Mr. Ambrose Rachier, Chairperson KELIN

19:30 – 21:30 Human Reception cocktail and dissemination of “Judging During the Epidemic - A Judicial Handbook on HIV, Rights and the Law”

- Welcome – Judiciary
- Remarks – Alfredo Teixeira, UNDP, Deputy Country Director, Programmes
- Living with HIV in Africa and Accessing Justice: A Real View – Ms. Patricia Asero, Petitioner in the Anti-counterfeit case
- Introduction to “Judging During the Epidemic – A Judicial Handbook on HIV, Human Rights and the Law” – Ms. Susan Timberlake, Chief, Human Rights and Law Division, UNAIDS
- Key Note Address – Hon. Justice Edwin Cameron, Constitutional Court of South Africa

Tuesday, 29th October 2013

08:00 – 08:30 Registration

08:30 – 10:15 **Session One – HIV, the Law and the Judiciary: Introducing the Issues**

Chair: Hon. Justice Prof. Joel Ngugi, Head of the Judicial Training Institute (JTI), Kenya (10mins)

- Keynote Address – Ms. Nardos Bekele-Thomas, UNDP Resident Representative / UN Resident Coordinator (10min)
- Remarks – John Kamigwi, Ag. Director, National AIDS Control Council-(NACC), Kenya (10min)

09:00 – 09:20 • Group Photo

- 09:20 – 10:15
- The HIV Epidemic in Eastern and Southern Africa – Ms. Maya Harper UNAIDS Country Coordinator (15min) TBA
 - Why a Rights Based Approach in Dealing with HIV Issues – Commissioner Catherine Muyeka Mumma, Commission on Implementation of the Constitution (15min)
 - HIV and the Law: Key Issues and Considerations for the Judiciary – Hon. Justice Edwin Cameron, Constitutional Court of South Africa (15min)

Discussion (20min)

10:15 – 10:45 REFRESHMENTS

10:45 – 12:45 **Session Two – Using the Law to End HIV-Related Discrimination and Other Human Rights Violations**

Chair: Hon. Justice Gatembu Kairu, Court of Appeal of Kenya (10min)

Interactive panel:

- Experience of PLHIV Facing Discrimination – Nelson Otwoma Coordinator (NEPHAK) (15min)
- Legal Protection Against HIV-Related Human Rights Violations in Eastern and Southern Africa in Line with the Report of the Global Commission on Law and HIV – Tenu Avafia, Policy Advisor, UNDP (15min)
- Discussions (40 min)
- Adjudicating HIV Related Discrimination Cases: Factors to Consider – Hon. Justice Edwin Cameron, Constitutional Court of South Africa (15min)

12:45 – 14:00 LUNCH

14:00 – 15:30 **Session Three – Enabling Legal Environment in the Context of Women**

Chair: Hon. Justice Agnes Murgor, Court of Appeal of Kenya (10min)

Interactive panel:

- Perspectives from the Women Living with HIV (Accessing Reproductive and Maternal Health Services & Property Rights; 2 speakers (7 min each) - Treezah Njoki and Rhoda Nafula (14min)
- Property and Inheritance Rights of Women, the Botswana Experience– Hon. Justice Ogaile Dingake High Court of Botswana (15min)
- Discussion (25min)
- Engaging the Judiciary on the Protection of Women’s Rights, Key Considerations –Commissioner Winnie Lichuma, Chairperson Gender & Equality Commission (15min)

15:30 – 16:00 REFRESHMENTS

16:00 – 17:00 **Session Four – Enabling legal environment in the context Children and Youth**

Chair: Hon. Justice Grace Ngenye High Court of Kenya (10min)

Interactive panel:

- Perspectives from a Youth Living with and Affected by HIV - Dorcas Kawira, Kenya (15min)
- Perspectives from NGOs Working with Children and Youth Living with and Affected by HIV. (Discrimination in Services). Sr. Mary Owens, Executive Director, Children of God Relief Institute – Nyumbani, Kenya (15min)
- Discussions (20min)

Wednesday, 30th October 2013

08:30 – 10:00 **Session Five – The Role Of Criminal Law in The Epidemic**

Chair: Commissioner Otiende Amollo (Chairperson Commission on Administrative Justice- Kenya)(10min)

- The Science on HIV & HIV Transmission Risk – Prof. Walter Jaoko, Deputy Programme Director, Kenya AIDS Vaccine Initiative (15min)
- HIV Testing, Counseling and Confidentiality, Key Considerations for the Judiciary and the Perspective on Criminalisation of HIV – Hon. Justice Edwin Cameron, Constitutional Court of South Africa (20min)
- Ending Overly Broad Criminalisation of HIV Non-disclosure, exposure and Transmission; UNAIDS Guidance book – Ms. Susan Timberlake, Chief, Human Rights and Law Division, UNAIDS (15min)
- Discussion (40 min)

- Adjudicating Cases of HIV Non- disclosure, HIV Exposure and/ or Transmission in a Sexual Context: Factors to Consider – Mr. Ambrose Rachier, Chairperson KELIN (15min)
- 10:00 – 10:30 REFRESHMENTS
- 10:30 – 12:30 **Session Six – Enabling Legal Environment in the Context of Key and Affected**
- Chair: Mr. Allan Maleche, Executive Director, KELIN (10min)
- Public Health Versus Human Rights the Dilemma with Key & Affected Populations – Prof. Walter Jaoko, Deputy Programme Director, Kenya AIDS Vaccine Initiative (20min)
 - Perspectives of Members of Key and Affected Populations: (Panel of MSM, Female Sexworker, Deputy Commissioner of Prisons, and Injecting Drug User – Mr. Allan Maleche, Executive Director, KELIN (40min)
 - Discussion (40 min)
- 12:45 – 14:00 LUNCH
- 14:00 – 15:40 **Session Seven – Access to Life Saving Treatment**
- Chair: Hon. Justice Kanyi Kimondo High Court of Kenya (10min)
- Access to medicines, HIV and the law: Perspective Of Persons Living with HIV–Ms. Patricia Asero, Petitioner in the Anti-counterfeit case (10min)
 - Intellectual Property and Access to Medicines: Legal Challenges in Kenya and select African countries and the use of Competition Law to reduce Medicine Prices – Umunyana Rugege Attorney SECTION27, Allan Maleche Executive Director, KELIN & Tenu Avafia, Policy Advisor, UNDP (40min)
 - Discussions (30min)
 - Adjudicating Cases Involving Access to HIV and AIDS Related Treatment and Care: Some Factors to Consider – Hon. Justice Mumbi, High Court of Kenya (15min)
- 15:40 – 16:15 Wrap up and Closing
- Summary of the Two Day Session, Key Highlights and Way Forward, Hon Justice Prof Joel Ngugi ,Director of JTI (15min)
 - Evaluation of the Judicial Dialogue – KELIN (10min)
 - Concluding Remarks – Ms. Maya Harper UNAIDS Country Coordinator (10min)
- REFRESHMENTS

Annexure II:

Participants list: Judicial dialogue

EVENT: JUDICIAL DIALOGUE ON HIV, HUMAN RIGHTS AND THE LAW IN EASTERN & SOUTHERN AFRICA

28th – 31st October 2013

Venue: Safari Park Hotel, Nairobi, Kenya

No.	Name	Sex	Institution	Country
1.	Abigail Mshila	F	Judiciary	Kenya
2.	Aggrey Muchelule	F	Judiciary	Kenya
3.	Anne A. Omollo	F	Judiciary	Kenya
4.	Beatrice Mutungi	F	Judiciary	Tanzania
5.	Charles Nchore Ondieki	M	Judiciary	Kenya
6.	Charles Obulutsa	M	Judiciary	Kenya
7.	Daisy Chepkemboi Mosse	F	Judiciary	Kenya
8.	Eddah Agade Savai	F	Judiciary	Kenya
9.	Elena Nderitu	F	Judiciary	Kenya
10.	Everlyne Onzere	F	Judiciary	Kenya
11.	Elizabeth Juma	F	Judiciary	Kenya
12.	Gérard Rugemintwaza	M	Ministry of Justice	Burundi
13.	Godfrey Oduor	M	Judiciary	Kenya
14.	Grace Ngenye	F	Judiciary	Kenya
15.	Ishaq Abduljabar Hussein	M	Judiciary	Kenya
16.	Jacinta Orwa	F	Judiciary	Kenya
17.	Jacqueline Kamau	F	Judiciary	Kenya
18.	Jared Sani	M	Judiciary	Kenya
19.	Jesse Nyaga	M	Judiciary	Kenya
20.	Joel Ngugi	M	Judiciary	Kenya
21.	Judith Nyagol	F	Judiciary	Kenya
22.	Kanyi Kimondo	M	Judiciary	Kenya
23.	Leah Waigera	F	Judiciary	Kenya
24.	Linnet Ndolo	F	Judiciary	Kenya
25.	Lilian Arika	F	Judiciary	Kenya
26.	Lucy Mbugua	F	Judiciary	Kenya
27.	Mbutfo Donatus Mamba	M	Judiciary	Swaziland
28.	Molefi Makara	M	Judiciary	Lesotho
29.	Mugeni Siwale Mulenga	F	Judiciary	Zambia
30.	Mumbi Ngugi	F	Judiciary	Kenya
31.	Njeri Thuku	F	Judiciary	Kenya

No.	Name	Sex	Institution	Country
32.	Oagile Dingake	M	Judiciary	Botswana
33.	Patrick Kiage	M	Judiciary	Kenya
34.	P.M. Mugure	F	Judiciary	Kenya
35.	Percy Night Tuhaise	F	Judiciary	Uganda
36.	Steven Gatembu Kairu	M	Judiciary	Kenya
37.	Thripsisa Wamae Cherere	F	Judiciary	Kenya
38.	Weldon Korir	M	Judiciary	Kenya
39.	Ambrose Rachier	M	KELIN	Kenya
40.	Abbas Hamis	M	Reach out Center Trust	Kenya
41.	Catherine Mumma	F	Commission on the Implementation of the Constitution	Kenya
42.	Daughtie Ogutu	F	ASWA	Kenya
43.	Edwin Cameron	M	Constitutional Court	South Africa
44.	Elizabeth Kaganda	F	TACAIDS	Tanzania
45.	John Mathenge	M	HOYMAS	Kenya
46.	Otiende Amollo	M	Commission on Administrative Justice	Kenya
47.	Patricia Asero	F	NEPHAK	Kenya
48.	Teresia Nafula Bwire	F	OMARI Project	Kenya
49.	Walter Jaoko	M	Kenya Vaccine Initiative	Kenya
50.	Winnie Lichuma	F	Gender Commission	Kenya
51.	Umunyana Rugege	F	Section 27	South Africa
52.	Amitrajit Saha	M	UNDP	Ethiopia
53.	George Wainaina	M	UN Cares	Kenya
54.	Hellen Magutu	F	ILO	Kenya
55.	Ludfine Anyango	F	UNDP	Kenya
56.	Maya Harper	F	UNAIDS	Kenya
57.	Manaana Mumma	F	UNDP	Kenya
58.	Ruth Masha	F	UNAIDS	Kenya
59.	Susan Timberlake	F	UNAIDS	Switzerland
60.	Tenu Avafia	M	UNDP	USA
61.	Allan Maleche	M	KELIN	Kenya
62.	Belice Odamna	F	KELIN	Kenya
63.	Francis Rakewa	M	KELIN	Kenya
64.	Melba Katindi	F	KELIN	Kenya
65.	Lydia Ndirangu	F	KELIN	Kenya
66.	Tracy Nzenye	F	KELIN	Kenya
67.	Veronica Omunga	F	KELIN	Kenya

No.	Name	Sex	Institution	Country
68.	Wairimu Kigii	F	KELIN	Kenya
69.	Anne Ireri	F	Rapporteur	Kenya
70.	Jackson Awele	M	Rapporteur	Kenya
71.	Joy Obuya	F	Eyeris Production	Kenya
72.	Lylla Latif	F	Rapporteur	Kenya
73.	Nduru Gichamba	M	Rapporteur	Kenya
74.	Sophie Awino	F	Rapporteur	Kenya
75.	Matthews Nduma	M	Judiciary	Kenya
76.	Agnes Murgor	F	Judiciary	Kenya
77.	Sylvester Kalembera	F	Judiciary	Malawi
78.	Richard Mwongo	M	Judiciary	Kenya
79.	Miriam Flamigni	F	UNICEF	Kenya

Annexure III: Keynote Address

Keynote address- Ms. Nardos Bekele- Thomas, UNDP Resident Representative, UN Resident Coordinator

Honourable Judges, Magistrates, Colleagues and Friends, Ladies and Gentlemen, From the outset let me appreciate the Kenya Judiciary Training Institute (JTI) and Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), who have worked hard with the UN in general and with UNDP and UNAIDS in particular to make this a reality.

I am very pleased to participate in the first ever Judicial Dialogue on HIV, Human Rights and the Law for Eastern and Southern Africa Region , which is a result of the compelling report of UNDP hosted Global Commission on HIV and the Law. The report, as you are aware, recommends the need to comprehensively engage the Judiciary in the HIV response. Your presence here is a powerful testimony of your commitment to confront the HIV epidemic within the judicial system and as such bring justice and eliminate prejudice for the benefit of society at large.

I would like to take this opportunity to pay tribute to a distinguished colleague of yours, Justice Edwin Cameron of the Constitutional Court of South Africa, who is with us today to share his personal, social, and professional experience on the issue of HIV & AIDS.

Distinguished Judges and Magistrates, this dialogue is happening at a time when the world has made tremendous advancement in offering many possibilities to address HIV. While HIV still remains a leading cause of death, we are now aware of the diverse and innovative approaches, tools and systems needed to deliver effective HIV responses 30 years since its discovery.

For instance:

- For the first time, a majority, (54%) of people eligible for lifesaving HIV treatment in low- and middle-income countries have access to treatment. They are consequently living longer and are more productive.
- Research is now showing that effective treatment for people living with HIV reduces their ability to transmit the virus to others. So

if we treat people, we also prevent HIV from being transmitted.

- Political commitment to address HIV remains strong as expressed in the UN 2011 Political Declaration on HIV and AIDS which sets bold goals for the HIV response by 2015, including the reduction of HIV-related stigma, discrimination and laws that act as obstacles to access to HIV services.
- In January 2012, the African Union (AU) Assembly Decision No: Assembly/AU/Dec.413 (XVIII), drew a roadmap of shared responsibility to draw on African efforts for a viable health funding with support of traditional and emerging partners to address AIDS dependency response. This Roadmap presents a set of practical African-sourced solutions for enhancing shared responsibility and global solidarity for AIDS, TB and malaria responses in Africa on a sustainable basis by 2015.

Why is the law critical to the hiv epidemic?

You are all aware that, we cannot end AIDS without the law and the courts supporting us. Ending new HIV infections and deaths by AIDS will not be possible without attention to the social and legal contexts in which people live, and the challenges that they face in fulfilling their health, dignity and security.

30 years of HIV have shown us that key to an effective HIV response is an enabling and protective legal environment. Creating a protective legal environment for the HIV response will require action from all branches of government – the executive, legislative, and judiciary, but we are here in Nairobi to discuss your critical role as custodians of the judicial system.

Laws and legal institutions can protect the dignity of all people living with HIV and in so doing fortify those most vulnerable to HIV - so called key populations such as men who have sex with men, people who use drugs and sex workers. The law can open the doors to justice when these people's rights are trampled. By ensuring access to property and protection from all forms of violence, the law can improve women's lives and give them the power and independence they need to preserve their health and that of their children.

However, other laws can also do grave harm to the bodies and spirits of people living with HIV. They can perpetrate discrimination and isolate the people most vulnerable to HIV from the programmes that would help them to avoid or cope with the virus. By dividing people into criminals and victims or sinful and innocent, the legal environment can destroy the social, political and economic fabric that is necessary to overcome this global epidemic.

Why do we focus on Africa

Despite much progress in the AIDS response, Africa remains the most heavily affected region in the world. The Continent is home to two out of three people living with HIV. Today, only half of Africans living with HIV who are eligible for HIV treatment are able to access it.

Why the judiciary is so critical to HIV

Members of the judiciary are often the last resort for those who are subjected to human rights violations. This includes people living with and at risk of HIV. They turn to courts for justice and redress and so they should.

Courts throughout the region have been seized of a wide variety of cases relative to HIV-related discriminations requiring transformative decisions such as those handled by judges in Kenya, Botswana, Namibia, Tanzania, South Africa and Uganda, to name a few. I would like to take this opportunity to acknowledge the judges with us today who contributed to some of these ground-breaking judicial decisions that have not only vindicated the rights of people in their countries but are also significantly advancing legal protection globally. This also includes decisions from the recently established HIV & AIDS Equity Tribunal in Kenya - a very noble initiative and a pioneer globally.

As you all know, your role as leaders in your communities is equally important. You have a grand responsibility in shaping individual and community attitudes through actions towards people living with HIV and vulnerable groups.

As you all know, the legal issues raised by HIV touch upon societal values and notions that are still controversial in many countries – sex outside of marriage, drug use, different sexualities.

But we have seen powerful examples of members of the judiciary in this region such as the ones

sighted above taking on these challenges including for minorities.

The importance of today's dialogue

The UN believes in the critical role of the judiciary for advancing “zero discrimination”. This is the reason why we are supporting this and other judicial dialogues and conversations as important opportunities for members of the judiciary to exchange views with their peers and other experts on how to best approach the complex legal and human rights issues that may arise in the context of the epidemic.

We believe that such dialogues would offer space and platform for knowledge sharing between the judges and magistrates, custodians of justice, and people living with and at risk of HIV.

Sustaining judicial engagement in the HIV response through judicial education and sensitisation

Finally sustaining judicial engagement for effective HIV response is vital. To this effect, I am pleased that we have with us representatives from judicial training institutions who will take forward the key outcomes of this regional dialogue to inform strategies and training plans in their respective countries. We hope that the collection of jurisprudence developed by UNDP and the Handbook “Judging during the Epidemic- a Judicial Handbook on HIV, Human Rights and the Law” developed by UNAIDS will be useful resources in your judicial education.

Finally, I would like to reiterate the UN's commitment to support the work that you do to make ‘zero discrimination’ a reality

Thank you very much.

Annexure IV: Concluding Remarks

Ms. Maya Harper-UNAIDS Country Coordinator

It is a privilege to bring to a close the end of the two day in depth judicial dialogue on HIV, human rights and the law. HIV unlike any other health condition raises major human rights issues of stigma, discrimination, gender inequality and gender based violence. We have seen how HIV both feeds on, and causes, marginalization throughout our societies. For these reasons, we have recognized that human rights and the law are cornerstones of an effective AIDS response.

We have also heard, quite powerfully, that because of these realities, those living with and affected

by HIV have long been forced to seek justice. They have demanded their rights to life, to non-discrimination, to HIV information, education and services; to treatment; to protection from sexual violence; and to participation.

The law cannot overcome this epidemic, but it can offer protection and justice to those who are affected by it. It can reduce the vulnerability to HIV infection and its impact on women, children, sex workers, people who use drugs, men who have sex with men, migrants and prisoners.

For these reasons and more, the UN applauds the Judicial Training Institute and KELIN for convening us all- justices, judges, magistrates, people living with and vulnerable to HIV and the UN – to discuss this important agenda. I have learned so much in the last 2 days from interacting with you.

The United Nations appeals to all members of the judiciary to advance judicial decisions that support human rights and increase access to justice for all those living with and vulnerable to HIV. We appeal

to you as leaders in your community to champion non-discrimination and social inclusion in the context of HIV.

It is amazing that, only thirty years ago, the world offered little hope to people living with and vulnerable to HIV. There was widespread political denial, and millions died in silence and shame. Now people living with HIV live long and healthy lives, raise families, are with access to treatment, and are able to be productive members of society-their viral load undetectable. But millions still go without HIV prevention, and less than half in need are provided treatment. Reaching them all with HIV prevention and treatment means reaching them with justice as well.

It is high time that HIV becomes a health condition like any other health condition with all people willing and able to let their status be known without fear of discrimination. We will not be able to transform HIV and societies in this way without you – the Judiciary and the courts.

Thank you very much.

Annex V

Resource materials for Judicial officers

Sources of case law

International databases:

AIDSLEX (the AIDS and Law Exchange): www.aidslex.org

Global Health and Human Rights Database: <http://www.globalhealthrights.org/>

ILOAIDS – Legislation and policies: www.ilo.org/aids/legislation/lang-en/index.htm

Regional databases:

Southern African Legal Information Institute: <http://www.saflii.org>

African Court on Human and Peoples' Rights: <http://www.african-court.org/en/>

ESCR-Net case law database: <http://www.escr-net.org/caselaw>

HUDOC European Convention on Human Rights case law database: <http://www.echr.coe.int/echr/en/hudoc>

National databases of judgments:

Kenya Law Reports: <http://www.kenyalaw.org>

Uganda Legal Information Institute: <http://www.ulii.org>

Lesotho Legal Information Institute: <http://www.lesotholii.org>

The Canadian Information Institute: <http://www.canlii.org/en/>

Indian Kanoon: <http://www.indiankanoon.org/about.html>

Canadian HIV/AIDS Legal Network and UNAIDS, 2006, *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV, 2006*. http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2006/jc1189-courtingrights_en.pdf

ILO, 2013, *HIV and AIDS and Labour Rights: A Handbook for Judges and Legal Professionals*, Geneva.

* This resource is not yet available online; please refer to the provided USB stick for an electronic copy.

UNDP, 2013, *Compendium of Judgments – Background Material, Judicial Dialogue on HIV, Human Rights and the Law in Southern and Eastern Africa, Nairobi, Kenya, 28-31 October*

2013.

* This resource is not yet available online; please refer to the provided USB stick for an electronic copy.

SALC, 2012, *Protecting rights: Litigating Cases of HIV Testing and Confidentiality of Status*, SALC Litigation Manual Series.

<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Litigating-Cases-of-HIV-Testing-and-Confidentiality-of-Status-Final.pdf>

SALC, 2012, *Equal Rights For All: Litigating Cases of HIV-related Discrimination*, SALC Litigation Manual Series.

<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/10/HIV-and-Discrimination-Manual-pdf.pdf>

UNDP, 2013, *Compendium of Judgments – Background Material, Judicial Dialogue on HIV, Human Rights and the Law in Asia and the Pacific, Bangkok, Thailand, 2-4 June 2013*.

<http://www.undp.org/content/dam/undp/library/hiv/English/Compendium%20of%20Judgments%20-%20Background%20Material%20BKK%20Judicial%20Dialogue%20FINA%20%20.pdf>

Other relevant sources of information on HIV, human rights and the law

Global Commission on HIV and the Law: www.hivlawcommission.org

International Labour Organisation: www.ilo.org

International Commission of Jurists: www.icj.org

Joint United Nations Programme on HIV/AIDS: www.unaids.org

Kenya Legal and Ethical Issues Network on HIV and AIDS: <http://kelinkenya.org/>

Lawyers Collective: www.lawyerscollective.org/

NAM, AIDSmap: www.aidsmap.com

Section 27: www.section27.org.za/

Southern Africa Litigation Centre: www.southernafricalitigationcentre.org/

The Center for HIV Law and Policy: www.hivlawandpolicy.org/

United Nations Development Programme: www.undp.org

Key recommendations pertaining to legal environments and HIV

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