

Statement of Principles on HIV, the Law and the Judiciary in sub-Saharan Africa

10 – 12 December 2009
Johannesburg, South Africa

Meeting of Eminent African Jurists on HIV and the Law in the 21st century

BACKGROUND

1. We, judges from more than 15 sub-Saharan African countries, met in Johannesburg from 10 to 12 December 2009 to review the role that judges could play to deal constructively with, and mitigate, the harsh impact of the HIV epidemic.
2. We underline that HIV is having a severe impact on the economic, social and cultural fabric of our societies, with adverse effects on the health, human rights and development gains made in the region.
3. We are deeply concerned that sub-Saharan Africa remains the region most severely affected by HIV, with more than 22 million people living with HIV, more than 1.4 million AIDS-related deaths in 2008, and with women representing approximately 60 per cent of all HIV infections.
4. We affirm that HIV is fundamentally a human rights issue. We also recognise the universality of the human rights of all persons, including those living with and/or affected by HIV.

ROLE OF THE LAW IN RESPONDING TO THE EPIDEMIC

5. We note that the law, and the manner in which it is interpreted, applied and developed, has the potential both to mitigate and aggravate the impact of the epidemic. Some laws afford protection whilst others may exacerbate vulnerability to HIV.
6. We recognise that, where no specific legislation relating to HIV exists, other sources of law, including the common law, comparative jurisprudence and/or international law where appropriate, should be expansively and purposively interpreted and developed to ensure the realisation of the human rights of all, including those vulnerable to HIV infection and living with HIV.

EVIDENCE-INFORMED DECISION-MAKING

7. We recognise the importance of understanding the science of HIV transmission, prevention, treatment, care and support in order to ensure evidence-informed adjudication on all matters relating to HIV.
8. We stress the importance of developing guidelines for, and within, our respective judiciaries, aimed at empowering all judicial officers to deliver evidence-informed and rights-based judgments on all matters relating to HIV. In this regard, judicial education should be aimed at the entire hierarchy of the judiciary, including the use of internationally accepted non-stigmatising language. This will help to eliminate myths, misconceptions and prejudices related to HIV and to AIDS.

STIGMA AND DISCRIMINATION

9. We are acutely aware of, and concerned about, the continued stigma and discrimination that is experienced by those vulnerable to and living with HIV. Such stigma and discrimination undermine their inherent dignity.
10. We are particularly concerned by the absence of protective anti-discrimination legislation in a number of African countries. We call for a review of all laws to ensure consistency with the *International Guidelines on HIV/AIDS and Human Rights*. Furthermore, laws should be developed, where necessary, to ensure full and effective protection against unfair discrimination on the basis of HIV status.

PROTECTING AND EMPOWERING WOMEN: THE LINKS BETWEEN HIV, GENDER-BASED VIOLENCE AND PROPERTY RIGHTS

11. We recognise that gender inequalities fuel the epidemic in sub-Saharan Africa.
12. We understand that gender-based violence, discrimination against women, inequitable distribution of property and other goods, combined with lack of access to the legal system increase vulnerability to HIV infection.
13. We urge judges to implement widows' inheritance rights, as these rights support food security, economic empowerment and the ability to mitigate the impact of the epidemic.
14. We note the existence of various initiatives aimed at alleviating court backlogs and overcoming barriers to justice, in particular in cases that disproportionately affect women. These measures include specialised courts for issues that affect women, the allocation of particular days to deal with backlogs and barriers, and programmes to cut the costs of access.
15. We call on judiciaries to experiment with these and other initiatives aimed at addressing these barriers.

PROTECTING AND EMPOWERING CHILDREN

16. We recognise that many children are left vulnerable by the HIV epidemic and that this manifests in many ways, including large numbers of orphans, child-headed households, children born with HIV, children vulnerable to trafficking and high HIV prevalence among adolescents.
17. We stress the importance of taking these facts into account when determining the best interests of the child in all relevant HIV-related juridical matters such as guardianship, adoption, inheritance, education, social security, and access to health care services, including voluntary testing and counselling, and prevention, support and treatment services.

PROTECTING AND EMPOWERING MARGINALISED AND CRIMINALISED COMMUNITIES

18. We note that the *Declaration of Commitment on HIV/AIDS*, adopted at the United Nations General Assembly Special Session on HIV/AIDS (UNGASS) on 27 June 2001, recognises the existence of “identifiable groups which currently have high or increasing rates of HIV infection or which public health information indicates are at greatest risk of and most vulnerable to new infection”.
19. We stress the importance of enforcing, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of, all human rights and fundamental freedoms by people living with HIV and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and to developing strategies to combat stigma and social exclusion connected with the epidemic, as agreed by Governments in the *Political Declaration on HIV/AIDS* (2006) at the UNGASS.

ENSURING PROPER APPLICATION OF CRIMINAL LAW

20. We are mindful of the negative impact that laws that expressly criminalise HIV transmission have on HIV prevention, treatment, care and support programmes. In this regard, we understand that the criminalisation of HIV transmission refers to laws that impose criminal penalties on people living with HIV for not disclosing their HIV status or for exposing others to the virus or for transmitting it, as well as special, HIV-focused prosecutions.
21. We recognise that the use of criminal law to target vulnerable groups undermines prevention, treatment, care and support and increases stigma. It also prevents vulnerable communities from accessing services such as HIV prevention, treatment, care and support.

COURT PROCEEDINGS AND ACCESS TO JUSTICE

22. We recognise that the ability to claim human rights relevant in the context of HIV depends on knowledge of rights, access to courts and affordability of legal services.
23. We call on all judicial officers to work towards increasing access to justice by educating the public about the legal process. This will improve transparency of the legal system.
24. We stress the importance of ensuring that the judiciary is able to harness the experience and expertise of civil society in order to enhance access to justice. Mindful of the imperative to respect the separation of powers, we recognise the need for the judiciary to work with the other branches of government to ensure access to justice.

ACCESS TO HIV TREATMENT

25. We note the importance of securing, expanding and sustaining access to treatment of proven quality, safety and efficacy, mindful of the fact that for those with access to highly active antiretroviral therapy, HIV infection is ordinarily a chronic manageable condition.
26. We recognise that the judiciary may have an important role to play in relation to a wide range of treatment-related issues such as the provision, expansion, suspension or termination of health services, equal access to such services, public procurement of medicines, and the relationship between intellectual property rights and access to affordable medicines.

THE WAY FORWARD

27. We call upon members of the judiciary to use their positions of power and influence to act as role models by providing leadership on the HIV epidemic in their communities.
28. We commit to upholding the rule of law so that governments fulfil their national and international obligations relevant to HIV.
29. We call upon UNAIDS to establish, as a matter of urgency, a Commission on AIDS and the Law that includes jurists and assists countries to align their laws with the *International Guidelines on HIV/AIDS and Human Rights*.