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UNDP LAW COMMISSION: AFRICA DIALOGUE SUMMING UP

UNDP Global Commission on HIV and the Law
African Regional Dialogue

Pretoria, South Africa
3-4 August 2011

The Hon. Michael Kirby AC CMG

UNITED NATIONS DEVELOPMENT PROGRAMME
GLOBAL COMMISSION ON HIV AND THE LAW

AFRICAN REGIONAL DIALOGUE

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INTRODUCTION AND SETTING

The African Regional Dialogue of the UNDP Global Commission on HIV and the Law ("Global Commission") took place in Pretoria, Republic of South Africa, on 3-4 August 2011. The dialogue was held immediately prior to the second meeting of the Global Commission. This followed the regional dialogue on 5-6 August 2011.

Participants attended the regional dialogue from all parts of Africa. As in previous Regional Dialogues, the participants were divided between those representing various aspects of governmental activities in Africa and those representing civil society. On the first day of the Regional Dialogue, the two meetings convened separately. Members of the Global Commission divided their time between the civil society and

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[*] Based on the remarks of the author at the conclusion of the African Regional Dialogue held in conjunction with the second meeting of the UNDP Global Commission on HV and the Law, Pretoria, South Africa on 4 August 2011.

[**] Commissioner of the UNDP Global Commission on HIV and the Law. Co-Chair of the Technical Assistance Group of the Global Commission; member of the UNAIDS Reference Group on HIV and Human Rights; one time member of the WHO Global Commission on AIDS.

governmental meetings on 3 August 2011. However, the two groups then came together in a single meeting in which they had a full opportunity to express their views to each other, to seek responses and to comment in each other's presence on responses of other participants.

The initial meeting on 3 August 2011 was preceded by a breakfast, arranged by the Global Commission, and attended by those participants in the government representation who were, or had been, members of the judiciary in Africa. As well, on the evening of 3 August 2011, between the two regional sessions, a formal opening ceremony was convened by Mr. Jeffrey O'Malley, Director, HIV/AIDS Group of UNDP. This was addressed by Mr. Agostinho Zacarias (UN resident representative/co-ordinator in Republic of South Africa), Ms. Sheila Tiou (Regional Director, UNAIDS Regional Support Team for Eastern and Southern Africa), Commissioner Biece Gawanas (Commissioner for Social Affairs, African Union Commission and member of the UNDP Global Commission) and by the Permanent Head of the Ministry of Justice and Constitutional Development, on behalf of Minister Jeffrey Thamsanua Radebe MP (Minister of Justice and Constitutional Development, South Africa).

What follows is a summary of remarks made by the author at the closing session of the Regional Dialogue.

THE CENTRALITY OF AFRICA

Africa is central to a successful strategy to respond to the HIV/AIDS pandemic. It is in Africa that most cases of HIV infection have appeared since the first manifestations of the epidemic in the early 1980s. It is in Africa that most of the people presently living with HIV and AIDS

(PLWHA) exist. It is in Africa that responses are essential if the epidemic is to be turned around and the UNAIDS policy of “Getting to Zero” is to be successful, with its vital goals of preventing further infections, increasing access to available therapies, reducing stigma and discrimination and promoting care and treatment for all in need.

In a sense, everything begins in Africa. According to anthropologists, human life itself began in Africa. The National Geographic Society in the United States provides a service to interested individuals, by reference to samples of their DNA that traces the likely genetic origins of people around the world, reflecting the huge migrations of peoples that have taken place back to the dawn of time. In my own case, I submitted my DNA to the Society. The response showed that my ancestors came out of Africa, proceeded inferentially on foot to present-day Arabia and then turned westwards, tracking through Europe to finish their long journey ultimately in the British Isles, principally in Ireland.

In a sense, these discoveries, by no means unusual for people living in faraway Australia, constitute a kind of metaphor for the duty of humanity to return to Africa and to support Africa governments and civil society representatives in tackling the HIV epidemic, so devastating to the African continent.

And so we all came to Pretoria to share our experiences and learn from each other. All we could offer was a reflection and the sharing of a serious engagement as we examined the empirical facts of the epidemic and listened to the diverse views that were expressed by participants; with their distinctive backgrounds. Our voices were like the reflections of the sun on the waters of Africa. On the Atlantic Ocean, off the coast of

Ghana and Côte d'Ivoire. Or the Indian Ocean surrounding Mauritius and washing against the shores of South Africa and the Horn of Africa. Or on the Great Lakes in Malawi. Or on the historic Nile, bringing its vital waters through the parched desert to Uganda and into Lake Victoria. Or on the Limpopo River passing to the north of the venue of our meeting. What follows is simply one recollection in the mind: like glistening sunlight on the waters of Africa.

It is proper to start this reflection with a tribute to those practical people who made the dialogue possible. The intrepid Secretariat of the UNDP who, in co-operation with UNAIDS and other members of the United Nations family, prepared the papers, mastered the logistics, sought out the representative participants and brought the whole large enterprise into being. The hotel and support staff in Pretoria who facilitated the arrangements. The translators who helped up bridge the gulf between people of different languages and traditions. Our marvellous moderator, Ms. Zainab Badawi, also had a mighty power of concentration. She never lost it over the two days of our meetings. She had mastered her brief and was fully aware of the particular African dimension of HIV. As a judge of many years, I developed a capacity to concentrate for long hours of engagement in court with complex issues. But most people get through their lives without such necessities. We owe a special debt to our moderator. She stimulated, encouraged, sometimes goaded and pushed us towards dialogue, interchange and sharing.

Symbolically enough, part of our meeting was held in the Mandela Room of Burgers Hotel in Pretoria. The very name of our meeting place was an inspiration and an encouragement to us. So were the photographs of African liberation leaders placed throughout the hotel. We were told, for

example, of the courage of Kenneth Kaunda, independence leader of Zambia. He lost his son to AIDS. But he did not lose his love of his son. He looked after him, as a parent should, in his home, which happened to be the State House in Lusaka. When embarrassed civil servants and others suggested that this gesture was embarrassing to those who felt disquieted about the disease, President Kaunda refused to budge. His love and duty towards his son provide an essential antidote to the fear, hatred and discrimination that has sometimes attended HIV on the African continent. Love is the essential message of all of our world's great religions. It is also a common foundation of universal human rights as they have been developed by the United Nations since 1945.

The opening session of this Regional Dialogue engaged us all with the voices and experience of four leaders in the African struggle against the epidemic: Jonathan Berger and Michaela Clayton, in particular, recounted their experiences over decades in civil society: seeking to confront attitudes of fear, discrimination, ignorance and hostility. We were reminded in that session of the frightening size of the epidemic in Africa. And of the intensity of the feelings that it engenders. Feelings of fear, anger, sorrow, loss and also determination.

The sessions that followed examined particular aspects of the HIV epidemic. Yet the interaction between governmental and civil society participants was sustained throughout the day and never lost sight of the integration of the sub-topics and their individual importance for all members of the human family, but especially for the vulnerable groups identified as most at risk: women, children, men who have sex with men (MSM), transgendered people (TGP), sex workers (CSW), prisoners and

drug users (IDU). What follows are some of their ideas that were derived from those particular sessions.

WOMEN AND HIV

In the session on women and HIV, we heard of shocking cases of forced sterilisation; of health care consent forms imposed upon patients who cannot read or do not understand their terms; of the invocation of different cultures and traditions, including in village courts, with attitudes sometimes adverse to the rights of women left vulnerable in the outfall of the epidemic; of ongoing marital rape and its inadequate legal protection and law enforcement; of the need for new champions to speak up for women; and of the analogous problems faced by transgender persons, such as “Ronnie” whose story was told and could not fail to touch all of us who heard it.

In these messages, there were resonances of the earlier regional dialogues held by the Global Commission in Asia/Pacific and in the Caribbean. Political leaders in the Caribbean described how they had sought and found male supporters endorse and follow up the demands for women’s equality and dignity in the face of HIV. The need for well identified law reforms, for improved police action and for better health care approaches was a constant theme of this part of our exchanges.

CHILDREN AND HIV

Africa has the greatest number of orphans as a result of HIV. It was therefore necessary to address this special feature of the epidemic, so important in Africa: children who are themselves infected with HIV, sometimes neo-natally, and children of parents who are or were infected. A point made at the outset was that the regional dialogue

should have included some children who could speak of the epidemic themselves, as it impacts their lives. This has been a feature of the United Nations response to HIV, ever since Jonathan Mann took charge of GPA at the outset. Getting the vulnerable to speak and not just to be spoken to or spoken of.

A frequent issue presented under this heading was the limits imposed by the law in many countries affecting children's access to information and to HIV tests and treatment, without the necessary involvement, knowledge or consent of their parents or guardians. The dialogue was told that, in Mauritius, access to testing and treating without parental involvement is provided for children: thereby addressing an impediment that can otherwise arise in ensuring early availability of essential medicines, tests, and health care.

One particular issue that was raised in this session concerned the fact that increasing numbers of children with HIV themselves, or children orphaned by HIV, are now reaching the age of puberty and thus of sexual activity. It was recognised that unless this special challenge was faced, a new wave of infections could ensue, striking at the specially vulnerable and extending the burdens of HIV beyond its first generation.

SEX WORKERS AND HIV

Some of the liveliest contributions to the dialogue were given by sex workers who strongly supported the UNAIDS strategy designed to prevent further infections. They told stories of serious discrimination that they had faced from the abuse of official power: including from the conduct of some police officers in confiscating condoms or using such protections as evidence of illegal activities, thereby actually discouraging

safer sex practices. Several sex workers described the demands of police officers for sex as the price sometimes extracted for release from official custody. They gave harrowing stories of their marginalisation and of the stigma heaped upon them, including sometimes self-stigma because of the pervasive pressures of society.

One of the chief lessons of this part of the dialogue was the need to distinguish clearly between human trafficking and adult consensual involvement in sex work. As in previous regional dialogues, several of the sex workers insisted on this distinction and demanded action by the Global Commission to narrow the application of the *Palermo Protocol* designed to end cross-border human trafficking. With one voice, the sex workers signified their own opposition to involvement of minors in the sex industry. However, they also insisted on the need for adult sex workers to have protection and to be supported as amongst the most effective potential agents for safer sexual activities.

The interventions of sex workers marked out the strong contrast between the strategies which they advocated and the many stories of oppression which they told. Their stories included harrowing instances of the release of police dogs on sex workers; the ungloved search of sexual organs allegedly or ostensibly for drugs; and even one instance in South Africa where sexual organs had been sprayed by police with capsicum spray, purportedly to discourage their activities. Once again, the dialogue concluded that what was needed was law reform and the support of parliamentary champions who would advocate decriminalisation and redress for violence and oppression. To some extent, a division of legal approach appeared in accounts of the laws and official practices in English-speaking Africa, as against French-

speaking countries, where the regulatory non-criminal approach tended to be adopted in relation to sex work.

DRUG USE AND HIV

In many parts of Africa, HIV is not associated with drug use, particularly injecting drug use. In this respect, the regional dialogue in Pretoria was different from other regional dialogues held in Asia/Pacific and Eastern Europe in particular. Nevertheless, several participants called attention to the special relevance of drug use for the spread of HIV.

Still, the dialogue heard about the need to promote the availability of sterile syringes used for injecting drugs; the need for alternative therapies for drug addiction, including methadone substitution therapy; and the need to assure care treatment and support for persons who were drug users or drug dependent to avoid exposure to HIV infection.

The speakers on this topic were generally involved in youth support, which is where drug use is sometimes evident. They too insisted on a non-judgmental and evidence-based approach to strategies designed to reduce the risks of infection. As in previous dialogues, these representatives called for the Global Commission to take a lead on the reduction of criminal law enforcement of drug offences and the reform of international treaties to impose obligations on states to criminalise possession and small use engagement in presently illegal drugs.

HIV AND CRIMINAL LAW

An important part of the dialogue was concerned with the troubling issue of the exposure of MSM to HIV risks, given that in the majority of African states, the law still criminalises adult, consensual same-sex activity. The

dialogue on this issue demonstrated once again the feature revealed in other regions of the world that countries which had adopted the British common and statute law system had generally inherited and maintained criminal sanctions against MSM; whereas countries of the civil law tradition did not. Although there were exceptions to this historical rule, they were generally in countries that bordered common law nations and had copied their criminal code provisions, either because of the influence of geographical proximity (Cameroon) or because of local Islamic religious influences on the law (Senegal, Sudan).

Representatives of MSM at the African regional dialogue insisted on the need to confront the fiction that homosexuality is "not African" and that MSM were somehow not "true citizens". The stigma derived from those attitudes produced a silent cohort of the population at great risk. Repeatedly, MSM told the dialogue of the urgent duty of African leaders to address this urgent need for legal and social reform.

Various solutions were offered in this session to respond to the issues presented by MSM. These included enlisting national constitutions and human rights instruments to confront the criminal laws (as had been done in India in respect of s377 of the Indian Penal Code in the *Naz Foundation Case*); enforcement and provisions of anti-discrimination laws to protect the rights of MSM; and provision of community education with legislative leadership on the issue to help reverse generations of ignorance and prejudice.

To the assertion by one Member of Parliament that support for reform and repeal of laws against MSM would be impossible for politicians because they would thereby be "digging their own graves", another

participant starkly presented the choice. It is either risking digging the politicians' *political* graves or continuing, by indifference, to help dig the *actual* graves of MSM throughout Africa.

To the assertion by one government participant that there was a "homosexual problem" in parts of Africa, an MSM leader in civil society declared: 'There is no homosexual problem. The problem is with those who want to continue the oppression of MSM'. Unfortunately, the dialogue did not provide any easy solutions to secure progress on this issue. However, it was agreed that this issue was one of the main issues which the Global Commission would have to address, and not only in Africa.

PRISONERS, REFUGEES AND HIV

Although the Global Commission had not singled out prisoners as a specially vulnerable group, several participants in the African dialogue, including one national prison governor, emphasised the urgent need to address the special risks of HIV in prison. Those risks arose inevitably from the close confinement together of large numbers of young men. If sexual activity was inherent in that situation, several participants insisted that it was the duty of the state to provide condoms and other protections for those, in prison, who were subjected to unprotected sexual activity or who engaged in consensual activity but without access to condoms. The prison governor participant expressed anxiety concerning the suggested conflict between his legal duty (not to permit or condone unlawful MSM activity within the prison) and his moral duty (to protect all of the prisoners in his charge).

CRIMINALISING HIV TRANSMISSION

Participants in the African dialogue explained the proliferation of laws criminalising individual cases of HIV transmission. These laws had come to Africa, in part, as a result of the N'jemena model law which had been initially adopted in Francophone Africa but had later spread throughout the central and western regions of the continent.

Whilst some participants were willing to acknowledge that instances of deliberate or intentional infection of others with HIV could justify the imposition of criminal sanctions, most participants expressing a view were of the opinion that such extreme cases could adequately be dealt with by pre-existing laws. The danger of a specially enacted law on HIV transmission was that it would encourage further oppression and stigmatisation of HIV positive persons and would result in unrealistic and unnecessary demands that such people should refrain from sexual activity altogether. As well, the actual language of such legal provisions could be distorted by being invoked in the case of women breastfeeding their children or in instances of adult consensual sexual conduct where it must be expected that individuals will now be aware of HIV and take appropriate precautions to protect themselves.

Explaining the enactment of such infection crimes, one member of an African legislature said: 'MPs are political animals. These offences are popular with the people. That is why we are enacting them'. However, participants insisted that such laws were not effective to reduce the spread of HIV; involved the disproportionate expenditures of public funds in problematic criminal prosecutions; and imperilled the desirable procedures of encouraging persons at risk to undergo HIV testing and to protect themselves. This strategy might be discouraged if self-

knowledge of HIV status were subsequently to be invoked in order to prove criminal responsibility. Much of the discussion on this topic was focused on the limited ambit of any proper criminal offence, whether addressed to (1) deliberate infections; (2) wilful infections or (3) reckless indifference or deceptive infections. Some consideration was given to how, in the current circumstances, the model N'jemena HIV code, so recently rolled out, could now be rolled back in this particular respect.

HIV AND INTELLECTUAL PROPERTY LAW

One of the most vigorous sessions of the African regional dialogue concerned the law of intellectual property (patents and trademarks) and its impact in 'the context of HIV' on life saving therapies. The participants watched a documentary film that included a leading Indian chemist, engaged in the production of generic anti-retroviral drugs subsequently sold for patient use in Africa at radically reduced prices. In the course of the documentary, this individual had declared: 'I am not the thief. It is the [pharmaceutical drug companies] that are the thieves. They grossly over-charge. I produce and supply life saving drugs'.

Several participants in the dialogue were willing to acknowledge the legitimate role of intellectual property law to protect and encourage inventiveness in the preparation of new pharmaceuticals. However, they expressed dismay and alarm at the apparent ready willingness of many African countries to enact reforms to patent law and to execute free trade agreements, effectively binding them to refrain from maximising or even invoking the "flexibilities" guaranteed to them under the World Trade Organisation TRIPS agreement on intellectual property protection. Thus, the adoption by Kenya of so-called 'anti-counterfeiting' IP laws were criticised as over-extensive, unnecessary in the context and likely

to reduce the permissible availability of generic drugs, acknowledged by the TRIPS agreement but bargained away under new laws or Free Trade Agreements (FTA).

Several participants in the dialogue referred to the urgent necessity to alert all African states to the importance of avoiding “TRIPS+” and to refrain from participating in the proposed new Anti-Counterfeiting Trade Agreement (ACTA). A number of participants explained the special anxieties in Africa about phoney drugs, out-of-date pharmaceuticals and so-called customary ‘wonder drugs’. For the most part, this was the social problem to which the reformed laws were said to be addressed. However, the participants acknowledged the need to differentiate between addressing that problem and adopting overreaching laws that reduced the availability of cheaper therapies to save lives in Africa. The need for further legal reform and further amendment of laws already enacted was emphasised. Several participants in the African dialogue called on UNDP to provide technical assistance so that the continent of Africa would not be “held hostage” to those who were pressing for ACTA, FTAs and laws that were not in the interests of (most) African interests. One practical solution urged by a number of delegates was that health ministers should be included in the discussions that trade and finance ministers typically have about IP law reform and in IP treaty engagement.

HIV AND ACCESS TO JUSTICE

A common theme throughout the African dialogue was the practical difficulty of securing practical access to justice in order to uphold basic rights. Several suggestions were made by participants. These included: (1) greater efforts to educate citizens about rights to health and how they

could enforce them; (2) anonymising the names of parties to cases involving assertions of rights by HIV positive people so that PLWHAs would not be discouraged from asserting their legal rights; (3) conducting such cases before courts sitting in camera so as to reduce the stigma and to encourage resort to the law; (4) and providing judicial education so as to reduce the hostility and fear that exists in the judiciary in relation to HIV and that may impede intelligent and informed decisions when such cases are presented.

The contribution by judges to the African dialogue was extremely useful. It revealed that judges acknowledge the need for greater objective information about HIV/AIDS within the judiciary and in particular about reforms of the law that are necessary and useful to reduce the present high rates of infection in Africa and to protect the right to health, to life and to access to health care.

CONCLUSIONS AND OUTCOMES

At the end of a day of intense discussion, much common ground was evident in the African dialogue between the representatives of government and the participants from civil society. Each shared a common determination to reduce the enormous and ongoing impact of HIV in Africa; to secure life saving therapies for those already infected; and to educate all players in the dangers of HIV and the ways of avoiding infection.

Our moderator, Zainab Badawi, could be diplomatic. As she was on the occasion where she declined to mention the name of a former African leader who had been responsible for many HIV deaths because he personally rejected the existence of HIV as a viral agent. However,

when required, our moderator could be galvanised into action, becoming sharp and very much to the point. During a discussion where it was mentioned that the Kingdom of Swaziland had the highest rate of HIV in Africa, and when several new initiatives were detailed, she asked, tellingly, why it had taken three decades of the epidemic to get round to launching them.

There were moments of grim humour during the dialogue. When it appeared that one African country did not make anti-retroviral drugs available to foreign nationals detained in its prisons, the senior prison administrator from another country present was heard to exclaim: "Jesus Christ!". This invocation reflected his strongly felt view that any person in the care and protection of the state anywhere in Africa, indeed anywhere in the world, was entitled to essential life saving therapies, whatever his or her nationality.

Although that same official later had a sharp difference with a representative of MSM from his own country, few of us will forget the almost poetic declaration of that man, dismissed as 'young and inexperienced' when he declared in response: "I am a citizen. I am a human being. I have rights. I insist on my rights. I insist that I be treated as a person with dignity by my own country".

The sex worker representatives secured a cheer when, looking around the room with a smile, they declared: "We keep your secrets!". One sex worker, a Princess no less, asserted that there was no substantial difference between paid sex work and sex within marriage. The one was a system of "pay as you go". The other was simply a system of "pre-paid", in which occasionally, over time, the goods "deteriorated".

Amidst the African dialogue about the suffering from HIV in Africa, there were occasionally opportunities to laugh. But, as with most humour, there was frequently a sharp edge to the jest. And there were tears as well.

Other good responses were to the insistence by Justice Key Dingake of Botswana that political and governmental leaders were 'accountable to the people'. They would be held accountable before the bar of history for the failure to take action quickly enough, as demonstrated in countries that had failed to reduce the toll of HIV. Everywhere in the dialogue there was a healthy feeling of the urgency needed after years or decades of neglect and paralysis.

Africa is the epicentre of HIV. Yet often it is the continent whose laws provide the greatest impediments to successful strategies to address the HIV epidemic. The participants broke up from their dialogue. Most returned immediately to their homelands where the realities of HIV daily confront them: continuously, tragically, remorselessly. But now with prospects of hope.

A significant portion of the African dialogue was devoted to what was called the "second virus" of HIV in Africa: the virus of discrimination. Particular attention was paid during the dialogue to the laws in a number of African countries that criminalise same-sex adult activity, transactional sex work, drug use and the increase of the plight of women, children and other groups, especially Uganda, Nigeria and Malawi. Appeals were made to the legislators present to open their doors and their hearts to the vulnerable groups such as those who were participating in the

Pretoria meeting. In several countries, it was reported that it was often difficult to secure such access.

Likewise, participants for civil society declared that it would be beneficial if members of the judiciary had the kind of direct and intense engagement that had been evident in Pretoria. It would perhaps open the eyes of the judges to the reality upon which the law is expected to operate. Repeatedly, participants complained about the procrastination of law makers in Africa in addressing the urgent needs of law reform in respect of women, children, MSM, CSW and IDU throughout Africa. The regional dialogue in Pretoria was all very well. It came and then as quickly, it was over. Yet ironically, representatives of the government in South Africa were absent from all but the ceremonial opening of the meeting. And, even then, the Minister who was to have spoken was detained and unable to attend even though South Africa had much to tell of challenge, denial and now belated engagement with HIV. Those governments that were represented in Pretoria would often, at home, deny equal access to the kind of exchange of ideas and of experiences that was a feature of the Pretoria meeting. And that is essential to get right the effective response that will help contain and reverse the toll of HIV throughout the continent and beyond.

The members of the UNDP Global Commission who had watched and observed the African regional dialogue gathered together for dinner after the dialogue. Their vehicle took them past the beautiful Union Buildings that house the government of a free and multi-racial democracy. It was at those buildings in 1994 that I first came to Pretoria. A new President, Nelson Mandela, was being sworn into office. He had invited me to his Inauguration because, during his treason trial, decades earlier, the

International Commission of Jurists in Geneva had sent observers week by week and month by month to watch the trial proceedings where his life was at stake.

The presence of those lawyers may have helped to save Nelson Mandela's life. His generous spirit and optimistic leadership later won him the respect of his own fellow citizens and of people of goodwill everywhere. In Africa and in the world beyond, we need the same attitudes of optimism, outreach and respect for every person that Nelson Mandela taught. If South Africa could cast off the chains of apartheid, every land in Africa could renounce the chains of prejudice and ignorance over HIV and AIDS. It was in this spirit that the participants in the African Regional Dialogue departed from Pretoria.

Now it falls to the Global Commission to prepare a report for the world that helps to establish a new chapter in the African response to the epidemic. And helps the world truly to get to zero in this most unexpected, difficult and painful challenge to public health that still ravages Africa - the original source of all humanity.

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