HIV/AIDS, TB AND HUMAN RIGHTS: LITIGATING HIV RELATED MATTERS. A CASE FOR MEDIATION

A handbook for **Mediators**

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Handbook Synopsis

This handbook discusses the challenges associated with litigating and adjudicating HIV/AIDS cases in the Court room. These challenges are not in any way different from those faced by persons infected with TB. It highlights the global and national legal instruments on rights-based approaches and perspective on mediating HIV/AIDS cases. It also addresses the United Nations (UN) Guidance on Mediation and explains the fundamental principles recommended by the UN while carrying out mediation. The handbook highlights the human rights (rights and interest based) approaches to mediation and reflects on selected cases on HIV/AIDS handled by the High Court of Uganda and the treatment given to the PLHIV subject to prosecution in such cases. The handbook finally poses a challenge of mediation in the criminal justice system in Uganda which may not be rooted in the law but emphasizes room for reconciliative justice.

Keywords: HIV/AIDS, TB, Discrimination, PLHIV, Human Rights, ART and Mediation

1. Introduction and Background

2. The HIV epidemic remains one of the leading causes of death globally.[1]

The Sub- Saharan Africa remains the region most severely affected by the HIV epidemic.[2] In this region, nearly 1 in every 20 adults is living with HIV and it accounts for 24.7 million (nearly 71%) of the 35 million people living with HIV (PLHIV) worldwide. In this region, 58% of the total numbers of people living with HIV are women. Ten countries in Sub-Saharan Africa, three of which are EAC Partner States (Kenya, Uganda, and the United Republic of Tanzania) account for 81% of all people living with HIV in the region. Additionally, 2.9 million children aged 0–14, 2.9 million young people aged 15–24 and more than 2.5 million people aged 50 years and older are living with HIV in Sub-Saharan Africa. Of the estimated 1.8 million people living with HIV who were affected by conflict, displacement, or disaster in 2006, 1.5 million were living in Sub-Saharan Africa, with this number continuing to increase.[3]

The HIV epidemic continues to raise new and complex legal and human rights issues and challenges that have confronted all arms of government. The judiciary is in a unique position ultimately, as the warden of the constitution and constitutional rights of citizens and residents. The Constitution of the Republic of Uganda, 1995 is the supreme law of the country and the

1 HIV is the 6th leading cause of death in the world with 1.5 million deaths considered to be due to AIDS related illnesses in 2012. See WHO ,The top 10 causes of death' Fact sheet No 310, updated in May 2014, available at http://www.who.int/mediacentre/factsheets/fs310/en/index.html

2 Resolution adopted by the General Assembly (without reference to a Main Committee (A/60/L.57)) 60/262. Political Declaration on HIV/AIDS, July 2006.

4 A Comprehensive Analysis of the HIV & Aids Legislation, Bills, Policies and Strategies in The East African Community- Summary Report Submitted Jointly by The EAC Secretariat HIV And Aids Unit & UNDP Regional Service Centre for Africa, Addis Ababa (Ethiopia) October 2014.

3 A Comprehensive Analysis of the HIV & Aids Legislation, Bills, Policies and Strategies in The East African Community- Summary Report Submitted Jointly by The EAC Secretariat HIV And Aids Unit & UNDP Regional Service Centre for Africa, Addis Ababa (Ethiopia) October 2014.

judiciary is tasked with its interpretation and protection. The fundamental rights espoused in the Constitution such as equality, human dignity and health must permeate in the judgments of those tasked with their protection. The most vulnerable are the most affected, women, children who are either infected or left orphaned due to the epidemic and it is these people that the judiciary must seek to protect within the confines of the law. There are other legislations in place specifically on HIV/AIDS, that is, the HIV and AIDS Prevention and Control Act, 2014, in some cases as we shall see herein, reference has been made to the provisions of the Penal Code Act specifically on criminalisation of deliberate transmission of HIV/AIDS.[4]

Despite the inception of modern treatments and public health interventions, tuberculosis (TB) remains a significant public health threat in the World in the twenty-first century. The challenge of controlling TB in its traditional and new multidrug-resistant forms requires public health agencies at all local levels to develop and apply new tools. Among these tools is the use of law in support of efforts to effectively control cases of TB. Although the field of medicine is important in the detection, prevention, and treatment of TB, communicable disease control policies in countries like the U.S. are founded upon public health principles and governed by public health law. Public health law may be defined as "those laws (e.g., constitutional, statutory, regulatory, judicial, and policy) or legal processes at every level of government (e.g., federal, tribal, state, local) that are primarily designed to assure the conditions for people to be healthy."[5] While laws authorize and obligate the government to protect and advance the public's health, they also curtail government power through structural and rights-based limitations.[6] Structural limits include the constitutional principles of separation of powers which delineates responsibilities among the legislative, executive, and judicial branches of government to create, enforce, and interpret laws, respectively. Rights-based limits, inherent in constitutional principles and other laws, include affirmative norms such as individual rights to free expression, freedom of religion, bodily integrity, health information privacy, equal protection, due process, and freedom from unlawful governmental searches. Public health law thus includes a wide array of laws that enable and limit public and private actors in their efforts to protect the public's health.

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

In Uganda, responses to the epidemic initially focused on health interventions such as HIV prevention campaigns, care for the sick, voluntary counselling and testing, and more recently

4 Paul Mukiibi, HIV/AIDS, TB and the Law: Experience from the Bar. A Paper presented to the Judicial officers in a judicial dialogue on HIV/AIDS, TB, Human Rights and the Law at Protea Hotel-Entebbe. December, 2020. Available at https://uganet.org/wp-content/uploads/2020/12/HIV_AIDS_TB-AND-THE-LAW_-EXPERIENCE-FROM-THE- BAR.pdf accessed on 6 December 2021.

5 Hodge JG. Law as a tool for improving the health of children and adolescents in schools. J. Sch. Health. 2006;76(9):442-445.

6 Ibid.

antiretroviral treatment (ART). There has been considerable investment in communication and awareness-creation to stem the further spread of HIV. Over time, some responses to the human rights violations of people living with, affected by, and at risk of HIV have been designed in the form of legal services. Many of these are still yet to take root and ensure accessibility by those they target.[7]

As a country, Uganda has put in a lot of effort to end the HIV epidemic in the country. It has formulated various laws and policies in order to curb the spread of the virus amongst the people, to protect the rights of those already infected with the disease and protect those not yet infected from being infected by the same. Uganda has therefore used a number of national, regional and international policies in order to fight the HIV epidemic and its related effects.

Overtime, in spite of the intrusive approaches to HIV prevention by the State (and private actors), the courts have sought to strike a balance between public health concerns and human rights in applying traditional elements of crime to penal provisions; jealously safeguarding privacy rights and confidentiality of medical results in wake of HIV reporting and notifications; disapproving and sanctioning HIV-based discrimination in employment, etc. Additionally, the courts have been at the centre for the right of access to HIV treatment and medicines, including, importantly antiretroviral treatment (ART).[8]

The realities of stigma, discrimination and neglect of human rights protection has been an integral component in the responses to HIV. The high degree of stigma and discrimination associated with HIV/AIDS has made human rights protection not only a priority to ensure the rights of people living with and at-risk of HIV but to address public health goals as well. It is this factual reality that has borne out the confluence between HIV, human rights and the law and it has become a seminal theme of policy, academic and even judicial discourse on HIV/AIDS.

3. Rights and Mediation: an unnatural alliance?

The traditional literature on dispute resolution has maintained a careful distinction between 'rights-based' and 'interest-based' approaches in mediation. Disputes that engage legal or other rights or are framed primarily in those terms are seen as lending themselves to adjudicative, often court-based processes, "in which disputants present evidence and arguments to a neutral third party who has the power to hand down a binding decision."[9] This contrasts with 'interest-based' dispute resolution processes, which encourage the parties to look beyond legal rights to their underlying interests and "[treat] a dispute as a mutual problem to be solved by the parties".[10] Interest-based approaches are seen as the more natural domain and strength of mediation: a process involving a neutral third party who facilitates communication, negotiation and problem solving by the parties to help them address the dispute constructively and move towards agreement on how to manage

7 Mukasa, S. & A. Gathumbi, 'HIV/AIDS, Human Rights and Legal Services in Uganda: A Country Assessment' (OSIEA, May 2008).
8 Ibid..
9 William L. Ury et al., eds. Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (San Francisco: Jossey-Bass, 1988), 7.
10 Ibid. p. 6

or, ideally, resolve it.[11]

At the same time, the theory and practice of mediation have sought to evolve to allow for the inevitable co-existence of rights and interests in practice. It has done so by defining different modes or styles of mediation to address each, according to the parties' preferences or the exigencies of the situation. The key distinction made is between evaluative and facilitative mediation.

Evaluative mediation leans the process towards so-called 'rights-based approaches', and is indeed referred to by some as 'rights-based mediation'.[12] The evaluative mediator draws on law, industry practice or other authoritative sources to provide direction to the participants on appropriate grounds for settlement. As such, this approach arguably moves towards a form of non-binding, persuasion-based adjudication. By contrast, facilitative mediation focuses more on an interest-based process and a less interventionist role for the mediator. The facilitative mediator focuses on enhancing and clarifying communications between the parties to help them decide themselves what to do, presuming that they are better placed to devise effective solutions than is the mediator. This view of a zero-sum tension between rights and interests when it comes to dispute resolution does not preclude a mediator from moving between evaluative and facilitative modes of interaction with parties to a dispute. But it does presume that the more rights are inserted into the process, the less room there is for interests. And with the growth of mediation in the commercial field, where legal considerations relate primarily to contractual rights, there has been growing traction for the idea that rights considerations get in the way of interest-based approaches and can legitimately and profitably be left outside the door of the mediation room.[13]

4. Mechanisms for addressing Human Rights Violations

The modern conception of international human rights as a body of law originated after World War II.[14] In 1948, the U.N. General Assembly adopted the Universal Declaration on Human Rights (UDHR), the foundational document for international human rights.[15] Many of the principles in the UDHR have become customary international law (CIL)[16] through their incorporation in constitutions [17] and the creation of regional and global human rights charters[18] and treaties.[19] The broad topic of state obligations under international human rights treaties extends beyond the scope of this paper;[20] for the purposes here, it is enough to recognize that states have some level

11 Carrie Menkel-Meadow et al., eds. Mediation: Practice, Policy and Ethics (New York: Aspen, 2006), 91

12 Ibid.

13 Ibid.

14 A Short History of Human Rights, in Human Rights here and now (Nancy Flowers ed., 1998), available at http://www1.umn.edu/humanrts/ edumat/hreduseries/hereandnow/Part-1/short-history.htm.

15 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

16 See Vojin Dimitrijevic, Customary Law as an Instrument for the Protection of Human Rights 8–9, 14 (ISPI, Working Paper No. 7, 1998) (exploring how principles and rights of the UDHR became a part of CIL). See also A Short History of Human Rights, supra note 16 (stating that the UDHR is a part of CIL).

17 A Short History of Human Rights, supra note 14.

18 E.g., African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 59; Statute of the Inter-American Commission on Human Rights (1979); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Nov. 4, 1950, 213 U.N.T.S. 221.

19 E.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

20 See, e.g., Oona A. Hathaway, Do Human Rights Treaties Make a Difference? 111 YALE L.J. 1935, 1950 (2002) ("Once a state has

of obligation to protect the human rights of their people.[21]

The Charter of the United Nations identifies mediation as an important means for the peaceful settlement of disputes and conflicts, and it has proven to be an effective instrument to address both inter-State and intra-State conflicts. The United Nations Handbook on the Peaceful Settlement of Disputes between States (1992) further developed understanding of mediation of disputes between States and remains a useful resource.[22]

The report of the Secretary-General on Enhancing mediation and its support activities (S/2009/189) examined the mediation challenges faced by the United Nations and its partners and outlined some considerations for strengthening mediation processes. Mediation actors have continued to adapt their approaches and capacities to meet the changing nature of conflict, particularly in recognition of intra-State conflicts as a threat to international and regional peace and security. General Assembly resolution 65/283, entitled "Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution", which was adopted by consensus, recognized the increased use of mediation, reflected on current challenges facing the international community in such mediation efforts, and called on key actors to develop their mediation capacities. The General Assembly also requested the Secretary-General, in consultation with Member States and other relevant actors, to develop guidance for more effective mediation, taking into account, inter alia, lessons learned from past and ongoing mediation processes.[23]

The Constitution of the Republic of Uganda has provisions on mostly economic, social and cultural rights. Chapter Four on the Bill of Rights is devoted to civil and political rights. Under the National Objectives and Directive Principles of State Policy in the Constitution, there is no specific reference to the right to health; rather it is implied under objectives on provision of basic medical services, access to clean and safe water, food security and nutrition. Under Chapter 4, Article 21 of the Constitution provides for equality and freedom from discrimination. This includes equality before and under the law in all spheres. Other rights guaranteed under Chapter 4 include protection of the right to life[24], personal liberty[25] , respect for human dignity and protection from cruel, inhuman and degrading treatment or punishment[26], protection from deprivation of property[27], right to privacy of

accepted such an obligation, the argument continues, the obligation becomes binding and a nation must comply with it."); Jordan J. Paust, Customary International Law and Human Rights Treaties Are Law of the United States, 20 MICH. J. INT'L L. 301 (1999) (arguing that is appropriate for judges to apply customary international law, including human rights treaties).

21 See Rhonda Copelon, The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S., 3 N.Y. CITY L. REV. 59, 66–67 (1998) (discussing the obligations of states under the ICCPR). See generally Rolf Kun- ¨ nemann & David Bergman, Module 9: Obligations of States and Nonstate Actors, in CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING RESOURCE (International Human Rights Internship

22 Ibid.

23 United Nations Guidance for Effective Mediation, 2012 available on http://repository.un.org/bitstream/handle/11176/400960/8%20November%202019%20%28Mediation%20and%2 0Negotiation% accessed on 07 December 2021.

24 Article 22, Constitution of the Republic of Uganda, 1995.

25 Article 23, ibid.

26 Article 24, ibid.

27 Article 26, ibid.

person, home and other property[28], right to a fair hearing[29], right to education[30], and family rights[31]. The challenge herein is that there is no specific provision on the right to health.

5. The Mediation Process

Mediation is facilitated negotiation. Mediators are used by parties to a dispute to: depersonalise the dispute, thus reducing the level of emotion; enable discussion to take place when the parties are not willing to talk directly to one another; permit confidential information to be used to facilitate a settlement without revealing it to the other side; clarify issues and identify the interests of the parties; develop new options for a mutually satisfactory resolution; and prevent conflict aftermath.[32]

Mediation is a process whereby a third party assists two or more parties, with their consent, to prevent, manage or resolve a conflict by helping them to develop mutually acceptable agreements. The premise of mediation is that in the right environment, conflict parties can improve their relationships and move towards cooperation. Mediation outcomes can be limited in scope, dealing with a specific issue in order to contain or manage a conflict, or can tackle a broad range of issues in a comprehensive peace agreement.

Mediation often exists alongside facilitation, good offices and dialogue efforts. Mediation, however, has its own logic and approach, aspects of which may be relevant to other approaches to the peaceful settlement of disputes.

Mediation is a voluntary endeavour in which the consent of the parties is critical for a viable process and a durable outcome. The role of the mediator is influenced by the nature of the relationship with the parties: mediators usually have significant room to make procedural proposals and to manage the process, whereas the scope for substantive proposals varies and can change over time.

Rather than being a series of ad hoc diplomatic engagements, mediation is a flexible but structured undertaking. It starts from the moment the mediator engages with the conflict parties and other stakeholders to prepare for a process and can include informal "talks-about talks" and may extend beyond the signing of agreements, even though the function of facilitating the implementation of an agreement may best be performed by others.

5.1 Effectiveness of Mediation

Mediators are "process" experts. To be effective, they need not have expertise in the subject of the dispute. Initially, they help the parties decide what is to be discussed and how the discussions are to take place. The parties decide whether, and when, to bring in experts.

28 Article 27, ibid.
29 Article 28, ibid.
30 Article 30, ibid.
31 Article 31, ibid.
32 33 Ibid.

Mediation also offers the parties maximum control over the process of resolving the conflict, an opportunity to redefine the area of discussion so that the larger interests can be served, and a collaborative framework rarely found in formal proceedings. Even when direct negotiations have broken down, mediation can provide a face-saving procedure for reestablishing communication among the parties.

An effective mediation process responds to the specificity of the conflict. It takes into account the causes and dynamics of the conflict, the positions, interests and coherence of the parties, the needs of the broader society, as well as the regional and international environments. Mediation is a specialized activity. Through a professional approach, mediators and their teams provide a buffer for conflict parties and instill confidence in the process and a belief that a peaceful resolution is achievable. A good mediator promotes exchange through listening and dialogue, engenders a spirit of collaboration through problem solving, ensures that negotiating parties have sufficient knowledge, information and skills to negotiate with confidence and broadens the process to include relevant stakeholders from different segments of a society. Mediators are most successful in assisting negotiating parties to forge agreements when they are well informed, patient, balanced in their approach and discreet.

Effective mediation requires a supportive external environment; most conflicts have a strong regional and international dimension. The actions of other States can help to reinforce a mediated solution or detract from it. A mediator needs to withstand external pressures and avoid unrealistic deadlines while also developing the support of partners for the mediation effort. In some circumstances the mediator's ability to harness incentives or disincentives offered by other actors can be helpful to encourage the parties' commitment to a peace process.

By its very existence, a mediation process has an impact on the balance of power and political calculations within and between different groups. Mediators and the international community, as support actors, need to be sensitive to both the positive and the potentially negative impacts of a mediation process. Mediators need to retain the option either to put their involvement on hold or to withdraw. This may be appropriate if they consider that the parties are pursuing talks in bad faith, if the evolving solution is at odds with national or international legal obligations, or if other actors are manipulating the process and limiting the mediator's room for manoeuvre. However, this is a sensitive decision, which needs to weigh the risks of withdrawing against the value of keeping the parties at the table in a faltering process while exploring alternative means for the peaceful settlement of disputes.

Not all conflicts are amenable to mediation. There are some indicators that suggest the potential for effective mediation. First and most importantly, the main conflict parties must be open to trying to negotiate a settlement; second, a mediator must be accepted, credible and well supported; and third, there must be general consensus at the regional and international levels to support the process. When an effective mediation process is hampered, other efforts may be required to contain the conflict or to mitigate the human suffering, but there should be constant efforts to

remain engaged so as to identify and seize possible windows of opportunity for mediation in the future.

For decades, mediation had proven an effective means of resolving complex disputes in the field of organized labor.[33] More recently, mediation has become an important adjunct to litigation in family law matters.[34] Parties frequently involved in general civil litigation also are beginning to investigate alternatives to adversarial processes.[35]To date, state legislation concerning mediation has been limited though some legal instruments are available in Uganda. However, the number and scope of mediation programs are increasing dramatically.[36] There is reason to believe that mediation also can contribute substantially to the resolution of public interest disputes.

6. Fundamentals or Principles of Mediation

For an effective mediation, a mediator needs to take into consideration some key fundamental principles. These principles were approved by the UN under the UN Guidance on mediation.[37]

Preparedness

Responsible and credible mediation efforts require good preparation. Preparedness combines the individual knowledge and skills of a mediator with a cohesive team of specialists as well as the necessary political, financial and administrative support from the mediating entity. While not predetermining the outcome, preparedness entails the development of strategies for different phases (such as pre-negotiations, negotiations and implementation), based on comprehensive conflict analysis and stakeholder mapping, including examination of previous mediation initiatives. Since a mediation process is never linear and not all elements can be fully controlled, strategies need to be flexible to respond to the changing context. Preparedness allows the mediator to guide and monitor the mediation process, help strengthen (where necessary) the negotiating capacity of the conflicting parties and other stakeholders, assist them in reaching agreements, and galvanize support (including among international actors) for implementation. A well-prepared and supported mediator is able to manage expectations, maintain a sense of urgency while avoiding quick-fix solutions, and effectively respond to opportunities and challenges in the overall process.

Consent

Mediation is a voluntary process that requires the consent of the conflict parties to be effective.

33 For a discussion of mediation in the collective bargaining context, see W. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (1971).

34 In California, for example, mediation is mandated for child custody matters in divorce cases. CAL. CIV. CODE § 4607 (West. Supp. 1983). A substantial segment of the family law bar nationwide is beginning to utilize collaborative processes, including having the same lawyer-or in some cases a lawyer and therapist team-work with the separating couple. See generally AM. BAR ASS'N, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (1982); Riskin.

35 See, e.g., "'Managing" Company Lawsuits to Stay Out of Court, Bus. WK., Aug. 23, 1982, at 59.

36 Ronald L. Olson, Chair of the A.B.A. Special Committee on Alternative Means of Dispute Resolution, notes in his foreword to the monograph STATE LEGISLATION ON DIsPUTE RESOLUTION, supra note 21, that more than 400 private and government agencies are currently providing informal dispute resolution services. In addition, 188 communities in 38 states have established "neighborhood justice centers." For a description of an exemplary program of this type, see SAN FRANCISCO COMMUNITY BOARDS, 1981 ANNUAL REPORT (1981) (on file with authors). Mediation also has come to play an important role in the juvenile justice field. See E. VORENBURG, A STATE OF THE ART SURVEY OF DISPUTE RESOLUTION PROGRAMS INVOLVING JUVENILES (1982)

37 Supra at note 23

Without consent it is unlikely that parties will negotiate in good faith or be committed to the mediation process.

A range of issues can affect whether conflict parties' consent to mediation. The integrity of the mediation process, security and confidentiality are important elements in cultivating the consent of the parties, along with the acceptability of the mediator and the mediating entity. However, the dynamics of the conflict are a determining factor, and whether parties' consent to mediation may be shaped by an interest to achieve political goals through military means, by political, ideological or psychological considerations, or by the actions of external players. In some instances, parties may also reject mediation initiatives because they do not understand mediation and perceive it as a threat to sovereignty or outside interference. In a multi-actor conflict, some, but not all, conflict parties may agree to the mediation, leaving a mediator with the difficult situation of partial consent to commence a mediation process. Moreover, even where consent is given, it may not always translate into full commitment to the mediation process.

Consent may sometimes be given incrementally, limited at first to the discussion of specific issues before accepting a more comprehensive mediation process. Consent may be conveyed explicitly or more informally (through back channels). Tentative expressions of consent may become more explicit as confidence in the process increases.

Once given, consent may later be withdrawn, especially when there are differences within a party. Armed or political groups may splinter, creating new pressures on the negotiations process. Some splinter groups may pull out of the mediation all together and seek to derail the process.

Impartiality

Impartiality is a cornerstone of mediation if a mediation process is perceived to be biased, this can undermine meaningful progress to resolve the conflict. A mediator should be able to run a balanced process that treats all actors fairly and should not have a material interest in the outcome. This also requires that the mediator is able to talk with all actors relevant to resolving the conflict.

Impartiality is not synonymous with neutrality, as a mediator, is typically mandated to uphold certain universal principles and values and may need to make them explicitly known to the parties.

Inclusivity

Inclusivity refers to the extent and manner in which the views and needs of conflict parties and other stakeholders are represented and integrated into the process and outcome of a mediation effort. An inclusive process is more likely to identify and address the root causes of conflict and ensure that the needs of the affected sectors of the population are addressed. Inclusivity also increases the legitimacy and national ownership of the peace agreement and its implementation.

In addition, it reduces the likelihood of excluded actors undermining the process. An inclusive process does not imply that all stakeholders participate directly in the formal negotiations, but facilitates interaction between the conflict parties and other stakeholders and creates mechanisms to include all perspectives in the process.

It cannot be assumed that conflict parties have legitimacy with, or represent, the wider public. Mediation efforts that involve only armed groups may send the signal that violence is rewarded. In addition to generating resentment within other sectors of society, this could encourage others to take up arms in order to get a place at the negotiating table. Civil society actors can play a critical role in increasing the legitimacy of a peace process and are potentially important allies. Women leaders and women's groups are often effective in peacemaking at community levels and should therefore be more strongly linked to the high-level mediation process. However, support from civil society and other stakeholders cannot be taken for granted, as some of these actors may have hard-line positions and oppose the mediation.

In designing an inclusive process, mediators face a number of challenges. There may be instances in which not all conflict parties want to engage in mediation or have sufficient levels of coherence to negotiate, making only a partial process possible. Arrest warrants issued by the International Criminal Court, sanctions regimes, and national and international counter-terrorism policies also affect the manner in which some conflict parties may be engaged in a mediation process. Mediators need to protect the space for mediation and their ability to engage with all actors while making sure that the process respects the relevant legal limitations.

In seeking to broaden the process to other stakeholders, mediators may also face constraints from conflict parties who generally seek to determine who, how and when different actors are brought into the process. In some instances, more exclusive dialogue with conflict parties may be required to move the process forward expeditiously, for example in negotiating ceasefires, especially where parties feel too exposed politically or if their security may be compromised.

Mediators need to gauge the comfort levels of conflict parties and convince them of the value of broadening participation. They also have to balance having a transparent process with protecting the confidentiality of the talks. Mediators have to grapple with the potential tension between inclusivity and efficiency. Mediation processes become more complex (and may be overloaded) when the consultation base expands and/or multiple forums are used to engage actors at different levels. In addition, it may be difficult to engage interest groups that are not easily defined or lack clear leadership, for example social movements and youth groups. These kinds of issues put a premium on stakeholder mapping, planning and management of the process.

National ownership

National ownership implies that conflict parties and the broader society commit to the mediation process, agreements and their implementation. This is of critical importance because it is the communities who have suffered the major impact of the conflict, the conflicting parties, who

have to make the decision to stop the fighting, and society as a whole that must work towards a peaceful future. While solutions cannot be imposed, mediators can be helpful in generating ideas to resolve conflict issues.

It is challenging, however, for an external mediator to identify whose ownership is necessary and to facilitate ownership of the process beyond people in positions of power. Cultivating and exercising ownership may require strengthening the negotiating capabilities of one or more of the conflict parties, as well as civil society and other stakeholders, to enable their effective participation in the process and ability to engage on often complex issues. The extent to which the process is inclusive has a direct impact on the depth of ownership.

National ownership requires adapting mediation processes to local cultures and norms while also taking into account international law and normative frameworks.

International law and normative frameworks

Mediation takes place within normative and legal frameworks, which may have different implications for different mediators. Mediators conduct their work on the basis of the mandates they receive from their appointing entity and within the parameters set by the entity's rules and regulations. Thus, United Nations mediators work within the framework of the Charter of the United Nations, relevant Security Council and General Assembly resolutions and the Organization's rules and regulations.

Mediators also conduct their work within the framework constituted by the rules of international law that govern the given situation, most prominently global and regional conventions, international humanitarian law, human rights and refugee laws and international criminal law, including, where applicable, the Rome Statute of the International Criminal Court. In addition to binding legal obligations, normative expectations impact on the mediation process, for example regarding justice, truth and reconciliation, the inclusion of civil society, and the empowerment and participation of women in the process.

Consistency with international law and norms contributes to reinforcing the legitimacy of a process and the durability of a peace agreement. It also helps to marshal international support for implementation. However, balancing the demands of conflict parties with the normative and legal frameworks can be a complex process. Mediators frequently have to grapple with the urgency of ending violence in contexts where there is also a clear need to address human rights violations and other international crimes. The applicable law may not be the same for all conflict parties, or their understanding of that law may vary. In addition, while there is a growing international consensus on some norms, not all norms are equally applied in different national contexts and there can be different interpretations within a given society.

Coherence, coordination and complementarity of the mediation effort

The increasing number and range of actors involved in mediation makes coherence, coordination

and complementarity of mediation efforts both essential and challenging. Coherence encompasses agreed and/or coordinated approaches, while complementarity refers to the need for a clear division of labour based on comparative advantage among mediation actors operating at the different levels.

The actions of the international community, including the United Nations, regional, subregional and other international organizations, States, NGOs, national and local actors, all have an impact on mediation, even if their engagement in a given mediation process may vary. This diversity can be an asset, as each actor can make unique contributions at different stages of a mediation process. But multiplicity also risks actors working at cross-purposes and competing with each other. Different decision-making bodies, political cultures, legal and normative frameworks, levels of resources and financial and administrative rules and procedures will make coherence, coordination and complementarity difficult.

Joint or co-led mediation initiatives have been used as one way to promote coordination among regional and international organizations. While they have served important political purposes, the results have been mixed. It is generally preferable to have a lead mediator from a single entity based on a strategic partnership and coordination with other mediating entities. The lead has to be established on a case-by- case basis.

Coherent support for the mediation effort from international actors and consistent messaging to the conflict parties are other critical aspects in creating an environment conducive for mediation. Interested States and others may not be directly involved in the mediation but still have an impact on the process. Groups of friends and international contact groups, when aligned with the goals of the mediation effort, will often be helpful.

Quality peace agreements

Different kinds of agreements are reached over the course of a mediation process, ranging from those more limited in scope, such as ceasefires or procedural agreements on the nature of talks, to more comprehensive peace agreements. Furthermore, mediation may be required in the implementation stage, although usually by another set of actors so as to avoid reopening the agreement to negotiations.

Peace agreements should end violence and provide a platform to achieve sustainable peace, justice, security and reconciliation. To the extent possible in each situation, they should both address past wrongs and create a common vision for the future of the country, taking into account the differing implications for all segments of society. They should also respect international humanitarian, human rights and refugee laws.

Both the characteristics of the process and the contents of the accord determine the viability of a peace agreement. Its durability is generally based on the degree of political commitment of the conflict parties, buy-in from the population, the extent to which it addresses the root causes of the

conflict, and whether it can withstand the stresses of implementation in particular whether there are adequate processes to deal with possible disagreements that arise during implementation.

The implementation of peace agreements is often highly dependent on external support. The early involvement in the process of implementation support actors as well as donors can help encourage compliance with sometimes difficult concessions made during the negotiations. Although external support is critical to ensure that conflict parties have the capacity to implement the agreement, too much dependency on external assistance can undermine national ownership.

6.1 Summary of the Fundamental Principles of Mediation by UN

- Preparedness
- Consent
- Impartiality
- Inclusivity
- National ownership
- International law and normative frameworks
- Coherence, coordination and complementarity of the mediation effort
- Quality peace agreements

7. Experience from the Bar and Bench in Uganda

Litigation and adjudication of HIV/AIDS cases in Uganda has majorly been in the area of criminal law. This is partly because of the country`s efforts at criminalizing what has been disguised as the deliberate transmission of HIV/AIDS. Persons that have so far been tried in both lower courts (magistrate courts) and courts of record (specifically High Court of Uganda) have been charged under section 171 of the Penal Code Act cap. 120, with the offence of Negligent act likely to spread an infection of disease. Although we have the HIV and AIDS Prevention and Control Act, 2014, prosecution under this law hasn`t been realised. This is partly due to perhaps the discriminative character of the law and challenges associated in proving most of the provisions under the Act. In some of the decisions in this area in Uganda, there has been judicial activism and developing jurisprudence in the arena of HIV/AIDS litigation and adjudication.

In Kemigisha Adrine vs Uganda[38]; Hon. Mr. J. Musa Ssekaana considered the severity of the Applicant`s HIV status in addition to other conditions to grant the applicant bail pending her trial.

In Uganda vs No. 19515 Sgt. Driver Nkojo Solomon[39]; Hon. Mr. J. Wilson Masalu Musene found the accused guilty with the offence of murder but considered his HIV/AIDS positive status as a mitigating factor and did not sentence him to a maximum punishment rather imprisonment for 18 years.

38 HCCA No. 97 of 2019, High Court of Uganda at Mbarara delivered on 24th January 2020.
39 HCT-00-CR-SC-0036-2016, High Court of Uganda at Kampala (then Criminal Division)) delivered on 16th January 2018.

In Rosemary Namubiru vs Uganda[40]; Hon. Mr. J. Rugadya Atwoki upheld the conviction by the lower court that the appellant was negligent since she knew her HIV positive status and the consequence of her actions but reduced the sentence of 3 years` imprisonment to five months which is the period she had so far served in prison. It is however important to note that the court observed the following;

a. The appellant was an elderly person aged 64 years, thus a mother and grandmother to the toddler;
b. That she was "sickly" and "HIV positive".
c. The toddler remained HIV-free.
d. The appellant had no intention of harming the toddler.
e. The court also noted that the sentence was manifestly excessive. It argued that "medical practitioners need some degree of protection". It noted that 3 years was an excessive sentence and accordingly reduced it to five months.

In Komuhangi Silvia vs Uganda[41]; Hon. Mr. J. Stephen Mubiru made quite a number of important observations concerning HIV/AIDS prosecution in relation to sec. 171 of the Penal Code Act cap. 120. His Lordship observed the following;

a. In order prosecution to succeed under this offence, it must establish that the act was committed with intent to cause the contact which causes infection of a disease.
b. Criminal negligence refers to a mental state of disregarding known or obvious risks to human life and safety.
c. Likelihood connotes a significant possibility as contrasted with a remote possibility, that a certain result may occur or that infection in such circumstance may exist. There should be evidence led before court showing that infection in such circumstances is not merely fanciful, remote or plausible but rather that it is statically significant and almost certain. It should be one whose occurrence is almost certain to materialize, unless preventive steps are taken.
d. Evidence must show the presence of "significant risk" and the circumstances must have presented a realistic possibility of transmission.

The above decisions specifically Komuhangi Silvia vs Uganda, demonstrate that handling matters in the court room concerning PLHIV must be taken consciously. The evidence must be carefully scrutinized and the accused`s HIV status should not be used to disadvantage him or her in the entire trial process. This is not a call for preferential treatment of accused PLHIV but a responsibility of both the bar and bench not to stigmatise and discriminate accused persons during the trial process because of their HIV positive status.

A comparison between Rosemary Namubiru and Komuhangi Silvia`s cases presents a great

40 HCT-00-CR-CN-0050-2014, High Court of Uganda at Kampala (Criminal Division)
41 HCCA No. 0019 of 2019, High Court of Uganda at Gulu delivered on 29th August 2019.

concern. In the latter, the trial Judge emphasizes once the accused`s viral load is low, then the intention of transmitting HIV is absent. In the former, the trial Judge did not consider any scientific evidence of transmission of HIV but concentrated on the ordinary ingredients of the offence under the Penal Code Act.

This is a challenging situation because both the bar and bench need to appreciate the scientific evidence on transmission of HIV to appreciate the ingredient of intention and what amounts to a neglect act in the context of HIV/AIDS.

8. Conclusions

The legal profession has an important role to play in the response to the HIV/AIDS epidemic. It should be aware of the causes of HIV/AIDS, and familiar with the body of law that is growing up as a consequence of its unexpected advent. It should ensure justice and equality in every courtroom, and be alert to the differential way general laws fall upon those who are living with HIV/AIDS, their families and dependants. Because judges sometimes have choices in deciding cases, where their decisions are relevant to HIV/AIDS, they should rest them upon sound data. They should be helped to do so by an informed and enlightened legal profession. They should expel from their minds the stereotypes, the myths and the prejudice that have surrounded HIV/AIDS in its short history. This does not, of course, mean automatically deciding every case in favour of the person living with HIV/AIDS.

The law must be observed and lawyers must remain professional and neutral in the performance of their tasks. But it does mean that the judges, in particular, should be generally aware of the features of HIV/AIDS and approach legal and factional problems without the blinkers of prejudice or ignorance. All lawyers should be particularly alert to colleagues in the court process who suffer because of the epidemic. To the best of their ability, they should reach out with help and understanding. And as leaders of the community, they should contribute to the discussion of law reform which the HIV/AIDS epidemic demonstrates to be needed. HIV/AIDS is, after all, another virus - a human illness, an enemy to the entire human family.

The key fundamentals for effective mediation by UN provide some suggestions as to how they may be applied in practice. It makes the case for mediators to have expertise and professional support and recognizes the need for careful assessment, proper planning and regular monitoring and evaluation in order to enhance the chances for success and minimize mediator error. The importance of a supportive external

environment for the mediation process is underscored, with emphasis placed on the need for cooperation among entities involved in mediation. While all these factors are important, the success or failure of a mediation process ultimately depends on whether the conflict parties accept mediation and are committed to reaching an agreement. If the parties are genuinely willing to explore a negotiated solution, mediators can play an invaluable role.

The fact that most HIV/AIDS and TB related cases in Uganda are criminal in nature and ordinarily criminal law in Uganda lacks mediation, stakeholders need to devise ways on how to apply some of these fundamental principles in plea bargaining and reconciliative justice. The Plea-Bargaining Rules can for instance be designed (by way of amendment) to capture and accommodate some of these fundamental principles which can yield justice to accused persons prosecuted and fall in the category of PLHIV. This in the end will revamp the criminal justice system in HIV/AIDS and TB litigation.