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## Issue No.1

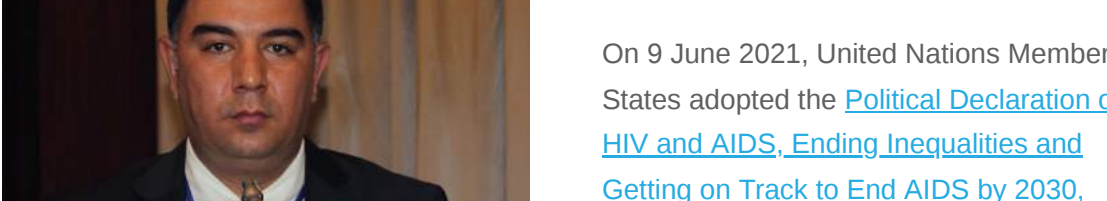
September 2021

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### Message from Justice Sharof Alanazarzoda, member of the Steering Committee

on the occasion of the release of the First Issue of the Newsletter



Honorable members of the Forum,

On 9 June 2021, United Nations Member States adopted the [Political Declaration on HIV and AIDS: Ending inequalities and Getting on Track to End AIDS by 2030](#), twenty years after the landmark meeting dedicated to HIV/AIDS at the United Nations General Assembly Special Session (UNGASS) and adoption of the [Declaration of Commitment on HIV/AIDS](#).

The newly adopted Political Declaration is based on scientific evidence, grounded in human rights, and sets new ambitious targets serving as an important road map to advance the global HIV response over the next five years. If the international community reaches these targets, 3.6 million new HIV infections and 1.7 million AIDS-related deaths will be prevented by 2030. However, the achievement of these goals will require urgent and transformative actions and augmented cooperation at national, regional and global levels.

To our utmost regret, Eastern Europe and Central Asia remains one of the three regions in the world where the HIV epidemic continues to grow, while the percentage of incidents and prevalence of new infections is higher than in other regions. Of the 1.7 million people living with HIV in the region, only 43 percent are on treatment. Since the outbreak of the COVID-19 pandemic, which has affected the entire global community, the existing gaps further exposed inequalities affecting the most vulnerable groups of the population and hindering their access to healthcare services; this, in turn, also significantly affected people living with HIV.

It is noteworthy that in recent years there have been a number of positive trends in the improvement of the legal environment and practices relevant to HIV and TB in the region. Nevertheless, certain legal barriers to enjoyment of rights and freedoms of people living with HIV, key populations at risk of HIV and people with TB still persist, and there is no sufficient and effective protection of such people from violations of their rights.

In its flagship ["Rights, Rights & Health" report](#) of 2012 and the subsequent [2018 Sulejmanovic](#), the Global Commission on HIV and the Law recognized the legal environment – laws, law enforcement and justice systems – has immense potential to better the lives of HIV-positive people and to help turn the crisis around. Without the contribution of members of the judiciary in combating HIV and related conditions, it is unlikely that significant change in how HIV is comprehended on a societal, legal and medical level will be actualized. Court actions and legislative initiatives, informed by fairness and pragmatism, can help nations to address HIV and co-infections.

In numerous case law adopted around the world, we can observe that despite shortcomings of laws and policies judges continue to play a significant role in protecting people living with HIV and other vulnerable groups.

It should be also emphasized that on numerous occasions the judicial community has repeatedly set a positive example of consolidation with the aim of strengthening the role of judges in the HIV response. In 2014, in support of the Global Commission's recommendation and with the assistance of the United Nations Development Programme (UNDP), the Africa Regional Judges' Forum on HIV and AIDS was established, which held its last meeting on 22 June 2021. In 2018 and 2019 four Eastern European and Central Asian judges, including myself, had an opportunity to attend the Forum meetings and witnessed the importance of such a platform for strengthening judicial cooperation on issues related to HIV, creating a clear demand to establish the Eastern Europe and Central Asia Regional Forum for Judges on Human Rights and the Law (hereafter – the Forum) with the support from the UNDP. In 2019 and 2020, the first two meetings of the Forum were held and broadly attended by more than 140 participants from the countries of the region and abroad. The Steering Committee was established to lead and provide general guidance to the work of the platform. I am pleased to highlight that, even in such a short period after the launch of the Forum, we can already observe a number of innovative initiatives put forward by members of the Forum at the national level. For example, in Tajikistan, the Supreme Court is considering the development and adoption of a Plenary Resolution on HIV-related cases. In Ukraine, the National School of Judges initiated the development of a training course for judges on HIV and the Law. In a number of countries of the region, it has become a good tradition to hold national meetings of judges in addition to the Annual Forum Meetings.

It should be also mentioned that at the Second Meeting of the Forum, the agreement was reached on the need for further development of an interactive platform for the ongoing exchange of information and experience between Forum members. With the support of UNDP, the development of the platform is currently underway. Moreover, twice a month it is planned to issue a Newsletter "Judiciary, HIV and the Law" in Russian and English, which will provide updates on upcoming events of the Forum and overviews of the latest publications, jurisprudence and other materials related to HIV, human rights and the law. On behalf of the Steering Committee of the Forum, I would like to express hope that the Forum members will take an active part in developing the online platform and issuing the Newsletter, as well as disseminating information about these resources among members of the judiciary in their respective countries.

I would like to invite you to familiarize yourselves with the First Issue of the Newsletter and fill out the Feedback Form in order to improve the quality and relevance of the information to be provided in the upcoming issues of the Newsletter.

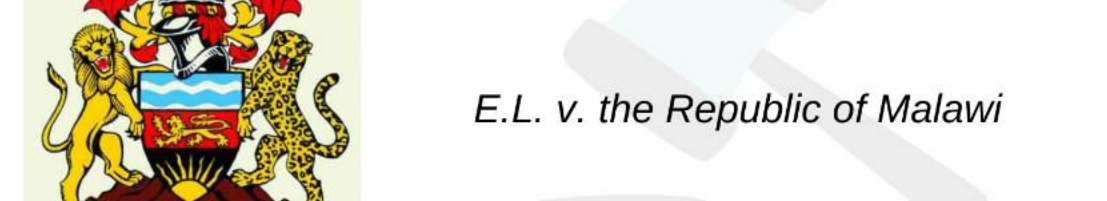
Sincerely,

Sharof Alanazarzoda

Member of the Steering Committee of the ECCA Regional Judges' Forum on HIV, Human Rights and the Law

Judge of the Supreme Court of the Republic of Tajikistan

### Jurisprudence of national courts: Malawi



**E.L. v. the Republic of Malawi**

E.L., a 26-year-old mother of four living with HIV, was charged and further convicted by the lower court under Section 192 of the Malawian Penal Code for an "unlawful, negligent or reckless act that is likely to spread a disease dangerous to life". According to the prosecution, she "unlawfully, negligently and knowingly" breastfed a complainant's baby who was left in her care. At the time of the incident, E.L. was on Antiretroviral Therapy (ART). She claimed that the breastfeeding happened accidentally and she stopped it immediately and notified the child's mother. The child received post-exposure prophylaxis (or PEP) and was tested HIV negative.

E.L. who was not represented by a lawyer, pleaded guilty and was sentenced to nine months imprisonment with hard labor. However, after receiving legal aid, she subsequently appealed her conviction and sentence imposed before the High Court of Malawi. In the appeal, she raised the issue of constitutionality of Section 192 of the Penal Code and claimed that the conviction was ill-founded and excessive. In support of her claim, the appellant put forth expert testimonies showing that the risk of transmission through breast milk from a woman on ART to a child is less than one percent. She also claimed that the expert statements are consistent with the [WHO and UNICEF Guidelines on HIV and Infant Feeding](#), as well as the Malawi national Guidelines of the Ministry of Health affirming the safety and advisability of breastfeeding by women living with HIV, which also proves the negligible risk of HIV transmission. In the light of the above-mentioned, E.L. stated that there is no evidence confirming that she might know that such transmission is likely possible or that she eventually transmitted HIV to the infant.

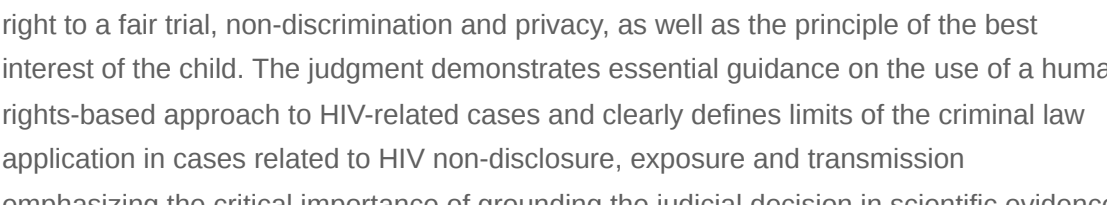
On 19 January 2017, the High Court of Malawi found that the charge against the appellant was disproportionate. It highlighted that the offense under Section 192 of the Penal Code has three distinct elements: unlawfulness, negligence, or recklessness – each to be applied separately. However, the prosecution did not separate these elements and charged E.L. with all three elements. Notably, the position of the prosecution during the appeal proceedings concerning the charge was similar to the one given by the Court in the judgment. In addition to that, the High Court highlighted that the appellant was not represented by a lawyer and, therefore, she was not able to fully understand the charge and, consequently, her guilty plea is invalid. The Court also touched upon the issue of the appellant's right to dignity and privacy under the Constitution of Malawi noting that her HIV and treatment statuses were introduced as evidence in the court. It stated that obtaining such information and admitting it into evidence the police and courts need to ensure a sufficient level of protection of the rights of people living with HIV. It granted the anonymity order for the applicant and her children asserting that criminal law should not be applied to cases where there is no significant risk of HIV transmission or where the person did not know about his or her HIV-positive status, did not understand how HIV is transmitted or did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences. The Court stressed that the Malawian legal system should ensure that criminal cases alleging HIV transmission are consistent with Malawi's international human rights obligations. The Court laid stress upon the best interest of the child, as well as any statement that "incarcerating a woman with her child should always be the last resort for any court" and referred to provisions of the [UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders](#) (or "the Bangkok Rules"). In conclusion, the High Court noted that the "proceedings in the lower court had procedural irregularities including blatant bias", which led to a "grossly excessive" sentence and came to the conclusion that the appellant's right to a fair trial was compromised. It, therefore, declared the conviction to be wrong in law and thus a nullity, resulting in the appellant's immediate release. On the appellant's claim on the constitutionality of penal law provisions, the High Court concluded that the appellant had a convincing legal argument but declined to hear the matter, recommending instead that the claim should be referred for separate determination via the proper procedure.

The decision in the case E.L. v. Republic covers a range of issues of crucial importance for the development of jurisprudence in HIV-related cases that underpins the right to health, right to a fair trial, non-discrimination and privacy, as well as the principle of the best interest of the child. The judgment demonstrates essential guidance on the use of a human rights-based approach to HIV-related cases and clearly defines limits of the criminal law application in cases related to HIV non-disclosure, exposure and transmission emphasizing the critical importance of grounding the judicial decision in scientific evidence and research. This judgment showcases the devastating impact that discrimination and prejudices could have on people living with HIV, especially those in a vulnerable situation, including when it comes to fair balance and access to justice in criminal cases. It is noteworthy that the Court's reasoning took into account statements provided by international experts (Amicus curiae), international standards and recent reports related to HIV transmission. From the procedural point of view, the High Court decision to apply the anonymity order is an important precedent towards better protection of dignity and privacy of people living with HIV that also conforms to the principle of the best interests of the child.

The full text of the judgment is available in [English](#) [here](#).

### UNDP Guidance for Prosecutors on HIV-related criminal cases

The English version of the document is available for download [here](#).



The new UNDP [Guidance for Prosecutors on HIV-related criminal cases](#) was presented during the webinar held on 1 June 2021. The online event was broadly attended by prosecutors and other legal and civil society professionals and representatives of communities of people living with HIV from different countries and regions. Among the speakers of the event were representatives of UNAIDS, UNDP, the International Association of Prosecutors, the High Court of Malawi, and civil society organizations GNP+ and HIV Legal Network.

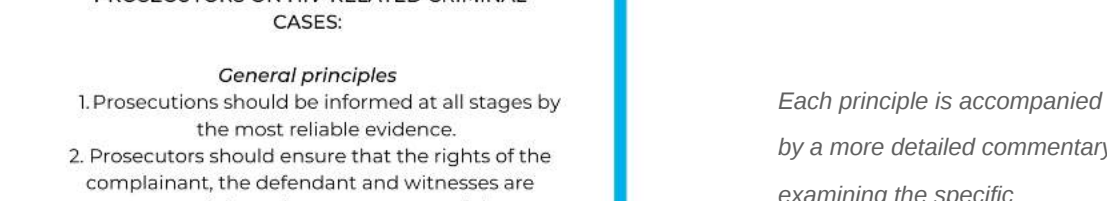
This Guidance was developed and addressed specifically to prosecutors, bearing in mind different roles prosecutors may play in various legal systems, and presents **10 key principles** that should assist prosecutors in handling criminal cases involving an allegation of HIV non-disclosure, exposure or transmission.

### 10 KEY PRINCIPLES GUIDING THE WORK OF PROSECUTORS ON HIV-RELATED CRIMINAL CASES

General principles	Each principle is accompanied by a more detailed commentary explaining the specific application of the principle by prosecutors in the course of their handling of a potential or ongoing prosecution; it is also intended as a resource for attorneys who assist, judges who interpret laws and who adjudicate these cases, people living with HIV who bear the brunt of HIV criminalization, and public defenders and advocates who represent those charged under these laws.
1. Prosecutors should be informed at all stages by the most reliable evidence. 2. Prosecutors should ensure that the rights of the defendant and witnesses are respected throughout every stage of the proceedings.	
<b>Deciding whether and how to prosecute</b> 3. Prosecutors should pursue prosecution in only limited circumstances, as HIV is most effectively addressed as a public health matter. 4. Prosecutors should establish a sufficient evidentiary basis for prosecution. 5. Prosecutors should consider whether a prosecution is in a given case in the public interest.	
<b>As required fair considerations</b> 6. Prosecutors should generally consent to pre-trial releases, should avoid statements and arguments that stigmatize or discriminate, or contribute to public misinformation about HIV. 7. Prosecutors should ensure the correct interpretation of science and its limitations, if seeking to prove actual transmission of HIV.	
<b>Sentencing considerations</b> 8. Prosecutors should ensure there is no discrimination in sentencing. 9. Prosecutors should ensure sentencing is not disproportionate.	

The development of the Guidance was informed by a review of relevant literature and consultations with people living with HIV, lawyers, prosecutors, judges, academics, human rights advocates and representatives of international organizations. Currently, the publication exists only in English, but the translation of the Guidance to Russian and other UN languages is underway. When other language versions of the document will be available, a series of webinars in different languages, including Russian, will be held to familiarize a broader audience with the Guidance and its provisions.

### Virtual meeting of the Africa Regional Judges' Forum



On 22 June 2021, a meeting of the [Africa Regional Judges' Forum on HIV, Human Rights and the Law](#) (hereafter – ARJF) was organized online and gathered ARJF members from various African countries, UNDP representatives and speakers from Southern African Litigation Centre (SALC) and Positive Vibes. The meeting aimed at updating judges on UNDP's HIV, Health and Development policies and jurisprudence, as well as discussing the impact of COVID-19 and related laws, projects and activities, as well as discussing further activities of the ARJF, Justice Key Dialogue and Justice Zuzika Talking facilitated the working sessions and discussions among ARJF members and other participants.

The agenda of the meeting included four working sessions covering the following issues: introductions and welcome words; a brief overview of UNDP activities on issues related to HIV and LGBTI in Africa and beyond (Jeff O'Malley, UNDP) and a presentation of the role of ARJF and its work (Amona Mmochi-Chalmers, SALC); analysis of the impact of COVID-19 laws and activities of law enforcement on the rights of marginalized populations, including relevant jurisprudence (Anneke Meerkotter, SALC); "Community of Practice" opportunities for online interaction (Lee Mondry, Positive Vibes) and progress achieved in the elaboration of the Training Manual on HIV, AIDS, TB and the Law for Judicial Officers (Justice Shanzha Mwa, the High Court of South Africa and the ARJF's Judicial Education Sub-Committee).

Below is a more detailed [overview of the analysis of the impact of COVID-19 laws and activities of law enforcement on the rights of marginalized populations](#), including relevant jurisprudence, delivered at the meeting. In her presentation, Anneke Meerkotter, Executive Director of the SALC, mentioned that COVID-19 resulted in the use of extraordinary laws, limitation of rights by law enforcement agencies, including through extreme restrictions on freedom of movement and access to services, as well as laws criminalizing certain behaviors in the interests of public health in countries in the African region and across the world. The Centre evidenced the negative impact of such measures on rights and access to services, especially when it comes to LGBTIQ+ and other marginalized populations, and the disproportionate use of police powers against some populations. The quarantine measures imposed throughout the outbreak of the COVID-19 infection showcased the importance of ensuring access to justice in cases of interpersonal violence. For example, in South Africa, during lockdown periods courts prioritized criminal proceedings and issuance of protection orders for cases related to sexual offenses gender-based violence and femicide. In other countries studied, despite the suspension of court proceedings courts remained open for domestic violence cases (Botswana) or obtaining or amending orders for immediate protection (Bulgaria, Serbia and Turkey). In some jurisdictions remote or electronic procedures (including through WhatsApp) for filing and hearings in domestic violence cases were authorized. However, survivors with no reliable access to the internet and technological devices or with disabilities still experienced barriers in accessing justice. To overcome this challenge, courts in many countries introduced various mitigation measures. For instance, in Peru and Uruguay, courts have extended protective orders automatically during the pandemic so that survivors do not have to leave the home and jeopardize their safety. The research carried out by the SALC recorded a number of critical jurisprudences illustrating the role of the court in the assessment of human rights violations during the pandemic. This includes but not limits to the assessment of implied initial measures and laws applied, restrictive measures and limitations and their influence on vulnerable communities, the lack of oversight and abuse of powers, impact of the applied measures on specific rights, including labor rights.

### EXAMPLES OF JURISPRUDENCE PRESENTED IN THE ANALYSIS

**Persecution of LGBTIQ+ persons**

In Uganda, on 20 March 2020, the police arrested 23 people at a LGBTIQ+ shelter for alleged violation of quarantine restrictions. 20 of 23 suspects were moved to prison, where some of them were subjected to torture. They spent two months in detention until the charges were dropped by the court order. On June 15, the High Court ruled that the authorities violated the right to liberty and the right to a fair trial by imposing restrictive measures that put them at constant risk of arrest under vagrancy laws. By sanctioning the arrest of poor and marginalized women on the ground, those who have no means of subsistence and cannot give a satisfactory account of themselves, vagrancy laws undermine Article 24 of the Women's Protocol.

**Advisory Opinion of the African Court on Human and Peoples' Rights on Access to Public Spaces**

At least 18 African countries have penal provisions that criminalize vagrancy. Following the request of the Pan African Lawyers Union, the African Court adopted an opinion on the matter. The Court ruled that vagrancy laws punish the poor and underprivileged, including but not limited to the homeless, the people with disabilities, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. However, individuals under such difficult circumstances are already challenged in enjoying their other rights, including their socio-economic rights. The Court stated that such laws violate a number of human rights provisions set in the African Charter on Human Rights, the African Children's Rights Charter, and the Women's Rights Protocol. It is specifically mentioned that many poor and marginalized women across Africa earn a living by engaging in activities that put them at constant risk of arrest under vagrancy laws. By sanctioning the arrest of poor and marginalized women on the ground, those who have no means of subsistence and cannot give a satisfactory account of themselves, vagrancy laws undermine Article 24 of the Women's Protocol.

[Advisory Opinion of the African Court on Human and Peoples' Rights, No. 1/2018, 4 December 2020](#)

The next meeting of the Forum will take place in October 2021.

### We hope that you enjoyed the First Issue of the Newsletter!

In order to make sure we deliver the best and most relevant content, we ask for your honest feedback below. This helps us make sure the Newsletter is useful for Forum members and other readers. Your suggestions and comments will be greatly appreciated!

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