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The HIV and AIDS Tribunal of Kenya: An Effective Mechanism for the Enforcement of HIV-related Human Rights?

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Abstract

Established under Section 25 of the HIV Prevention and Control Act of 2006, the HIV and AIDS Tribunal of Kenya is the only HIV-specific statutory body in the world with the mandate to adjudicate cases relating to violations of HIV-related human rights. Yet, very limited research has been done on this tribunal. Based on findings from a desk research and semi-structured interviews of key informants conducted in Kenya, this article analyzes the composition, mandate, procedures, practice, and cases of the tribunal with the aim to appreciate its contribution to the advancement of human rights in the context of HIV. It concludes that, after a sluggish start, the HIV and AIDS Tribunal of Kenya is now keeping its promise to advance the human rights of people living with and affected by HIV in Kenya, notably through addressing barriers to access to justice, swift ruling, and purposeful application of the law. The article, however, highlights various challenges still affecting the tribunal and its effectiveness, and cautions about the replication of this model in other jurisdictions without a full appraisal.

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Introduction

Kenya has the fourth-largest HIV epidemic globally.[1] Some 1.6 million people were living with HIV in the country in 2013, of whom 100,000 were infected that year alone.[2] Since the country identified its first AIDS case in 1984, HIV has remained a serious public health concern that has claimed hundreds of thousands of lives and orphaned millions of children.[3] Despite recent progress in the response to the epidemic in Kenya, pervasive stigma, discrimination, and human rights violations associated with HIV remain serious challenges.[4] To address these challenges, Kenya adopted the HIV and AIDS Prevention and Control Act (HAPCA) in 2006.[5] A defining feature of HAPCA is the establishment of the HIV and AIDS Tribunal (hereinafter "tribunal").[6] The tribunal's role is to "determine complaints arising out of any breach" of HAPCA. Unlike the 26 other sub-Saharan African countries that have adopted HIV-specific legislation, Kenya, through the creation of the tribunal, sought to address the often forgotten yet critical issue of enforcement of its HIV legislation.[7] The tribunal was established as a statutory body to ensure the protection of human rights in the context of HIV within the limits described by HAPCA.[8]

While the tribunal is often lauded as a tool for access to justice, limited research has been done on this mechanism.[9] Beyond the curiosity that it may generate as the first and only HIV-specific judicial body in the world, is the tribunal an effective mechanism for ensuring the implementation and enforcement of HIV-related human rights?

Several elements are generally taken into consideration when assessing the effectiveness of judicial and quasi-judicial bodies, including the ability to compel parties to appear before them and to comply with their decisions, the accessibility to the court for complainants, the timeline for decision, and the extent to which the decisions are based on sound interpretation of the law.[10] For people living with HIV and their advocates, key concerns relating to access to justice and effective adjudication include court procedures that do not maintain confidentiality, limited knowledge of HIV and the legal issues that it raises within the judiciary, and lack of sensitivity to people living with HIV.[11]

This article therefore assesses whether the HIV and AIDS Tribunal of Kenya addresses some of these challenges to access to justice and to the judicial protection of human rights in the context of HIV. In doing so, the article describes and discusses the composition, procedures, and practice, as well as a key decision of the tribunal. This study is mainly based on a desk analysis of primary and secondary materials relating to HAPCA and the tribunal. The desk research was completed through semi-structured interviews with 11 key informants, conducted in Nairobi, Kenya, from August 20-29, 2014. Further information was also sought through email exchanges and phone interviews with two additional informants in September 2015. The interviewees included key informants involved in the development of HAPCA or in the work of the tribunal, such as the current and former chairpersons of the tribunal, the executive director of National Empowerment Network of People Living With HIV and AIDS in Kenya (NEPHAK), a member of the Commission for the Implementation of the Constitution, a judge of the High Court and the executive director of Kenya Ethical and Legal Issues Network on HIV and AIDS (KELIN).

The research was limited by challenges in accessing tribunal decisions which were not publicly available. Furthermore, while the author was able to interview members of organizations that have supported complainants before the tribunal, he was not in a position to directly interview individual complainants.

This article is divided into three sections. Section 1 provides a brief background to, and an analysis of, HAPCA. Section 2 discusses the composition, mandate, and work of the tribunal, including a review of its cases and an analysis of one of its key decisions. Section 3 assesses the challenges facing the tribunal. The article concludes with remarks regarding the contribution of the tribunal in enforcing HIV-related human rights.

Process and normative content of HAPCA

The making and entry into force of HAPCA

The proposal for an HIV-specific law in Kenya can be traced to the Task Force on Legal Issues Relating to HIV and AIDS (hereinafter "task force"), established in June 2001 by the country's attorney general, Amos Wako.[12] The task force was chaired by Ambrose Rachier, a lawyer and then-chairperson of KELIN, and comprised 13 members, four ex-officio members, and two secretaries.[13] The members were lawyers, medical experts, religious leaders, and people living with HIV. The task force was mandated to review existing laws, policies, and practices relating to HIV in Kenya, and to recommend an appropriate response to the epidemic.[14] Over the course of 11 months, the task force met with relevant ministries, members of parliament, medical professionals, religious leaders, non-governmental organizations, people living with HIV, sex workers, and members of the gay community.[15] In its final report, submitted in June 2002, the task force highlighted 12 HIV-related legal issues of concern and made recommendations for addressing them.[16] Among these recommendations, the task force called for the enactment of HIV-specific legislation "to be referred to as the HIV and AIDS Prevention and Control Act" and for the establishment of an "Employment Equity Tribunal for HIV and AIDS."[17] The main reason for recommending a special tribunal on HIV issues stemmed from concern that existing courts were too slow in delivering justice, had cumbersome procedures that hindered access to justice for people living with HIV, and were not sufficiently knowledgeable on HIV and the related legal and human rights issues.[18] In September 2003, the HIV and AIDS Prevention and Control Bill was tabled before Parliament.[19] The idea of the tribunal recommended by the task force was retained in the HIV bill, but as a broader mechanism with a mandate to enforce all provisions in the bill, not just those relating to employment. Parliament finally adopted HAPCA on December 5, 2006, and the president of Kenya assented to it on December 30, 2006.[20]

More than two years after HAPCA was adopted, however, it was still not in effect, due to a delay on the part of the responsible minister in setting a date for its commencement.[21] HAPCA was finally commenced on March 30, 2009. By that time, the delay in operationalization of the act had created great concern among civil society and contributed to legal action to compel the minister to operationalize this law.[22] Despite the act's commencement in 2009, the minister still did not bring several of its provisions into effect, namely sections 14 (consent to HIV testing), 18 (results of HIV test), 22 (disclosure of information), 24 (criminalization of HIV non-disclosure and exposure), and 39 (requirement for research).[23] Finally, in November 2010, all HAPCA provisions were brought into effect except for section 39, which was still not in effect as of January 2016.[24] According to Ambrose Rachier, opposition from the "research community" is responsible for the delay in operationalizing this provision, which requires that any HIV-related biomedical research conforms to the requirements of the Science and Technology Act of Kenya.[25]

Normative content of HAPCA

Two elements are worth highlighting in relation to the content of HAPCA. First, it contains a number of provisions that protect human rights and can advance the HIV response. Second, these positive norms exist alongside restrictive provisions which infringe upon human rights and risk undermining the response to HIV.

HAPCA contains a series of protective provisions that either explicitly protect the rights of people living with HIV or create an enabling environment for the HIV response. Key provisions explicitly protecting people living with HIV include sections 31 (non-discrimination in the workplace), 32 (non-discrimination in schools), 36 (non-discrimination in health institutions), 18 and 21 (protecting confidentiality of HIV results), and 33 (prohibition of restrictions to travel for people living with HIV). Protective measures supporting the HIV response in HAPCA include sections 4 (HIV education and information), 9 and 10 (blood

and tissue safety), 19 and 36 (access to HIV treatment) and 43(c) (involvement of people living with HIV in information and education campaigns).

Coercive provisions in HAPCA include restrictive measures for access to HIV testing for children (sections 14 and 22), mandatory HIV testing for alleged sexual offenses (section 13(3)) and overly broad criminalization of HIV non-disclosure, exposure, or transmission (section 24). These provisions have raised concerns among public health and HIV experts, as well as people living with HIV.[26] In particular, section 24 creates a broad obligation on people living with HIV to disclose their status and criminalizes any act that exposes another person to HIV. This section has been the focus of intense advocacy and litigation efforts by civil society on grounds that it lacks certainty, creates a risk of unfair prosecution against people—particularly women—living with HIV, and that it is likely to deter people from accessing HIV services.[27] In a groundbreaking ruling on March 18, 2015, the High Court of Kenya declared section 24 unconstitutional on grounds that it is "vague and lacking in certainty" and therefore likely to violate the right to privacy.[28]

Composition, mandate, and powers of the HIV and AIDS Tribunal

The HIV and AIDS Tribunal of Kenya came into effect with the commencement of HAPCA in 2009. Part VII of HAPCA deals specifically with the tribunal. It outlines in some detail the composition, jurisdiction, and powers of the tribunal, as the main body tasked with enforcing HAPCA.

Composition of the tribunal

The tribunal comprises seven members: six regular members and a chairperson.[29] The attorney general appoints members to three-year terms.[30] HAPCA distinguishes three categories of tribunal members.[31] These are: legal experts (three members), medical practitioners (two members) and persons with "specialised skill or knowledge necessary for the discharge of the functions of the Tribunal" (two members).[32] The three legal experts are the chairperson, who "shall be an advocate of the High Court of not less than seven years standing" and two advocates of the High Court of "not less than 5 years standing."[33] HAPCA does not require that these members have judicial experience, or that they have expertise in specific areas such as human rights or HIV-related legal and ethical issues. However, in practice, the legal experts who have thus far been appointed to the tribunal have involved renowned legal practitioners with knowledge on HIV-related legal and ethical issues. For instance, the first chairperson was Ambrose Rachier, who chaired the Task Force on Legal Issues Relating to HIV and AIDS.[34]

The second category of tribunal members comprises two "medical practitioners recognized by the Medical Practitioners and Dentist Board as specialists under the Medical Practitioners and Dentists Act."[35] The inclusion of medical practitioners in the tribunal is important; it is aimed at ensuring that the work and decisions of the tribunal are informed by best-available scientific knowledge relating to HIV, its modes of transmission, and its impact. However, while requiring that these medical practitioners be specialists, HAPCA does not explicitly state that their specialization must be related to HIV.

The third category of tribunal members comprises two "persons with specialized skills or knowledge necessary for the discharge of the functions of the Tribunal." This category is unclear and could create uncertainty about what "skills and knowledge" are to be taken into consideration. In practice, however, people living with HIV and members of non-governmental organizations have been appointed as members of the tribunal under this category. For instance, since its launch, the tribunal has had among its members Joe Muruiki, the first Kenyan who publicly announced his HIV-positive status in September 1989.[36] HAPCA finally requires that at least two tribunal members be women.[37] While this requirement for gender diversity is positive, the threshold of two female members out of seven may appear insufficient. For instance, the Kenyan Constitution of 2010 calls on the state to take measures to ensure that "not more

than two-thirds of the members of elective or appointive bodies shall be of the same gender."[38]

Ultimately, the multi-disciplinary composition of the tribunal with a "unique mix of legal, medical and social expertise coupled with a requirement of gender balance" is an important feature.[39] It is necessary to enable the tribunal to address the complex legal and social issues raised by the HIV epidemic, provided that the current practice of ensuring representation of HIV experts and people living with HIV (although not explicitly stated in HAPCA) is maintained.

Mandate of the tribunal

The tribunal is granted a broad mandate to "hear and determine complaints arising out of any breach of the provisions of the Act."[40] However, HAPCA explicitly excludes criminal jurisdiction from the mandate of the tribunal.[41] In addition to its mandate to adjudicate complaints, the tribunal is also mandated to "perform any other such functions as may be conferred upon it by [HAPCA] or by any other written law being in force." This provision may be interpreted to recognize an "extra-judicial" mandate to the tribunal that may entail actions such as making recommendations for the effective implementation of HAPCA. For its current chairperson, Jotham Arwa, the tribunal can and should engage in such a role and recommend actions that the government and others should take to effectively implement HAPCA.[42] Arwa stressed in this regard that "what we intend to do is not only to deal with reported cases, we want to develop the law in the area of HIV/AIDS so that the public health environment is more friendly to the protection of rights of people living with the disease."[43] In practice, the tribunal chairperson has, for example, written to the cabinet secretary for health requesting the swift development of guidelines on privacy and confidentiality of HIV status in health care settings, as required by section 20 of HAPCA.[44]

Powers of the tribunal

In hearing cases brought before it, the tribunal has been granted the powers of a subordinate court.[45] It can therefore summon witnesses, take evidence under oath, or call for the production of books or other documents as evidence.[46] Failure to attend or give evidence before the tribunal, without sufficient reason, when summoned is a criminal offense.[47]

In deciding on complaints, the tribunal has the power to make any order that it deems appropriate.[48] These orders may include payment of damages for present and future financial loss or for impairment of dignity or emotional and psychological suffering.[49] This broad applicability of reasons for awarding damages is important in the context of HIV, where stigma and discriminatory attitudes encroach upon individual dignity and inflict emotional and psychological pain that may not necessarily be recognized before normal courts. Parties in whose favor damages or costs are awarded can obtain a certificate from the tribunal which, upon filing before the High Court, is deemed and executed as a decree of the High Court.[50] Orders by the tribunal can also involve requiring that specific steps be taken to stop a discriminatory practice.[51] Finally, the tribunal has the power to require respondents to make regular progress reports regarding the implementation of its orders.[52]

Practice and cases of the tribunal

In this section, an overview of the practice before the tribunal and the nature of its cases is presented, followed by a discussion of YBA v. Brother Nicholas Banda and Three Others, which sheds light on the approach of the tribunal in handling HIV-related complaints.[53] The case of YBA was selected for analysis because it is one of the best-reasoned rulings of the tribunal that the author was able to secure as part of this study.

Overview of practice and cases

Although the first members of the tribunal were announced in 2009, they were only sworn into office in June 2011, some two years later.[54] Following the swearing-in, the tribunal started handling and hearing some of the cases that it had already received, which had started to pile up.[55] With no Rules of Procedures, the tribunal adopted a pragmatic and flexible approach to receiving and adjudicating

complaints.[56] The tribunal does not require that lawyers assist complainants. However, in cases where complainants need legal support, the tribunal has directed them to non-governmental organizations such as KELIN and the Law Society of Kenya.[57] The tribunal allows individuals to submit cases through simple letters, and there is no cost involved in filing a complaint. The tribunal pays particular attention to issues of privacy and confidentiality in its handling of complaints. It holds its hearings in camera and complainants have the option to withhold names and other personal details in decisions and in other tribunal papers. When the complainant so requests, the tribunal rather uses identifiers to protect privacy and confidentiality. The concerns relating to the protection of privacy and confidentiality of complainants has also been cited as a reason for not reporting or publicly releasing the decisions of the tribunal.[58] While these reasons may appear legitimate, the lack of access to the decisions of the tribunal represents a barrier for creating awareness of its work, practice, and effectiveness in advancing human rights in the context of HIV.

Complaints filed before the tribunal are first handled by the registry. Cases that fall within the tribunal's jurisdiction are referred for consideration while the others are sent to other suitable jurisdictions or mechanisms.[59] The tribunal is not permanent; it sits in sessions during which it considers six to ten cases. Complaints brought before the tribunal are generally settled within a few weeks to three months. This is a significant improvement in terms of swift administration of justice, particularly as disputes before normal courts in Kenya often take several years to be determined.[60] The decisions of the tribunal are subject to appeal and to judicial review before the High Court of Kenya. This was explicitly stated by the High Court in Republic v. HIV and AIDS Tribunal & Another, a case in which a party challenged a tribunal decision.[61]

In a period of two years, November 2011 to November 2013, the tribunal received 232 complaints.[62] The tribunal considered 68.5% (159) of these complaints, while the others (31.5%) were referred to normal courts and other institutions with the mandate to handle them.[63] As of December 2014, the tribunal had handled some 300 complaints, either through rulings on the merits, settlement between the parties, or referral to other bodies.[64] Many complaints filed before the tribunal are indeed settled by the parties before a ruling is made. In general, the tribunal does not become involved in the process and terms of the settlements between the parties, but it does allow the parties to record the terms of their settlements through an order of the tribunal.[65] While such settlements may be expedient for the parties, who do not have to go through a judicial process of several weeks or months, the tribunal has expressed concern that in the long run, settlements may impair its ability to make precedent-setting rulings on critical issues.

Those complaints which the parties do not settle proceed to the tribunal for decision on the merits. When deciding on cases, the tribunal relies primarily on the provisions of HAPCA. It also uses and invokes relevant other legislation with bearing on HIV, including the Employment Act as well as the Constitution of Kenya. Where the tribunal finds that a violation of the provisions of HAPCA has occurred, it explicitly states so and provides appropriate relief to the complainants, including, in several cases, financial compensation. The persons in whose favor the damages and costs are awarded can apply for a certificate from the tribunal stating the amount of the damages or costs.[66] The beneficiary may then file the certificate in the High Court, after which it is considered an order of the High Court and is executed as such.[67]

The majority of the complaints that the tribunal receives relate to HIV in the workplace. These include cases of mandatory HIV testing as a prerequisite for employment, and HIV-related discrimination in the workplace, such as denial of promotion, demotion, or irregular transfer of workers based on their HIV status.[68] The second category of cases relates to access to HIV services, including HIV treatment. These cases involve discrimination and abuse in health care settings and denial of services based on HIV status.[69] The third category of cases relates to issues such as domestic violence, property, and inheritance, which are often filed by women.[70] Although the overwhelming ma-

jority of complaints before the tribunal have been submitted by people living with HIV, the tribunal can hear any case relating to a breach of HAPCA regardless of the HIV status of the complainant.[71]

Human rights organizations and people living with HIV in Kenya have praised the tribunal for its smooth, flexible, and sensitive approach to justice in the context of HIV.[72]

The case of YBA v. Brother Nicholas Banda and Three Others

The case was filed on August 24, 2012, by a complainant anonymously identified as YBA, who worked for the Registered Trustees of Marist Brothers (the fourth respondent in the case) from 1992 to 2012. YBA tested positive for HIV in 2003 and alleged that her supervisor (the first respondent) compelled her to submit her medical record, including the HIV test result, to her employer. YBA further alleged that her HIV status was disclosed by her supervisor to other employees, and that she had since then been the victim of derogatory and abusive comments, as well as discriminatory acts and practices, based on her HIV status. YBA also alleged that her employment was terminated in 2012 because of her HIV-positive status. In her prayers, she sought that the tribunal declared the respondents' actions illegal for violating HAPCA and the Constitution of Kenya, and also asked that it ordered damages for emotional distress and other violations.

The ruling of the tribunal in this case is significant for a number of reasons. First, it found that the complainant's right to non-discrimination, privacy, and confidentiality, as provided under HAPCA and the Kenyan Constitution, had been violated.[73] Second, it awarded significant compensation for the damages suffered by YBA, including for emotional and psychological distress caused by the disclosure of her HIV status, in violation of her right to privacy and confidentiality. In total, the tribunal awarded her Ksh958,614, which at the time was the equivalent of approximately US$11,000. This amount is substantive for the complainant, who was earning a monthly salary of Ksh14,000 (approximately US$164). Third, and probably most importantly, the tribunal in its ruling dealt with whether it has jurisdiction to hear employment-related disputes. This question is a critical issue since the great majority of cases that have come before the tribunal relate to workplace issues, including compulsory HIV testing as a precondition for employment and unfair dismissal based on HIV status. The question of the tribunal's jurisdiction to hear employment cases arises in light of section 87(2) of the Employment Act, which grants exclusive jurisdiction to the Industrial Court in employment-related disputes. In its decision in YBA, the tribunal held that section 87(2) could not be construed as barring its jurisdiction on HIV-related employment issues. Rather, the tribunal stressed that its composition made it a specialist court with expert knowledge on HIV, as opposed to the generalist expertise on employment of the Industrial Court. The tribunal thus held that:

> *this tribunal also has in its membership, at least two medical practitioners, at least one person experienced in matters of HIV and AIDS, and finally, at least one person living with HIV virus. This tribunal is therefore equipped with the requisite intellectual resources to effectively address all legal, medical, social and psychological issues that may emerge in the context of HIV and AIDS litigation, and is therefore better placed to adjudicate cases of violation of the rights of persons living with HIV and AIDS in the workplace than a single judge of the Industrial Court.*[74]

The tribunal therefore concluded that it has jurisdiction to hear cases relating to the violation of the rights of people living with HIV in the workplace, provided that "such violations are proved to be *solely on account of the HIV status* of the concerned individuals" [emphasis added].[75] Through this purposeful interpretation of HAPCA and other relevant laws, the tribunal addressed a key uncertainty relating to its mandate and further cemented its jurisdiction on HIV-related employment issues.

In its decision, the tribunal also held that it has jurisdiction to hear cases alleging violation of fundamental rights pursuant to Articles 20(4) and 169(1) of the Kenyan Constitution. According to Article 20(4), "[i]n interpreting the Bill of Rights, a court, tribunal or other authority shall promote – (a) the values that underlie an open and democratic

society based on human dignity, equality equity and freedom and; (b) the spirit, purport and objects of the bill of rights". In a July 2015 ruling, however, the High Court of Kenya held that in the absence of legislation explicitly conferring such power, the tribunal does not have jurisdiction to entertain matters relating to violation of the Constitution.[76] While a setback, this decision has no impact on the mandate of the tribunal to advance the protection of human rights as provided under HAPCA.

Challenges affecting the tribunal

While noting the achievements of the tribunal over the past three years, many challenges still hinder its effectiveness and threaten to compromise the realization of its objectives. These challenges are multi-faceted and relate to structural, financial, and operational issues. In addition, the limited public awareness of the tribunal remains a concern.

Structural, operational, and financial challenges

Complaints before the tribunal can only be lodged in Nairobi, where it is located. For a tribunal initially created to address concerns of access to justice, the fact that people cannot access it closer to where they live creates a serious hurdle. The tribunal is currently considering options for addressing this issue, including through the possibility for people to submit their complaints to the tribunal at the registry of courts in the areas where they live, or by holding mobile hearings of the tribunal at the county level.[77]

The quorum for sittings of the tribunal has been raised as a challenge. The fact that all tribunal members have other occupations and commitments makes the five-out-of-seven-member quorum hard to achieve, thus leading to delays in scheduling its sittings.[78]

The tribunal still does not have its own Rules of Procedures. It relies for its work on the provision of the HIV Act and adapts general rules applicable before normal courts. This situation leads to uncertainty and lack of clarity for those seeking justice before the tribunal. In response, the tribunal has developed draft rules of procedures, which were transmitted to the Chief Justice of Kenya in 2014.[79]

While its staffing has recently increased from one employee in 2013 to some 20 employees in 2014, the tribunal still does not have sufficient numbers of qualified lawyers to support its work.[80] It also lacks appropriate physical infrastructure. As of December 2014, it was located within the premises of the National AIDS Control Council of Kenya. This situation is not ideal for the smooth and confidential administration of justice on a highly stigmatized condition such as HIV. It also may contribute to the limited awareness of the tribunal; as its former chairperson said, "How do you want people to go to a tribunal that does not exist?"[81]

Finally, the tribunal is still confronted with financial constraints. During its first two years of activities, it was mainly supported by donors, including the United Nations.[82] In recent years, however, the Kenyan government sharply increased the tribunal's funding from Ksh11 million (US$113,000) in the financial 2013-2014 to Ksh126 million (US$1.2 million) in 2014-2015.[83] This financial commitment should be maintained and expanded so the tribunal can recruit the necessary legal and other staff, rent appropriate premises, hold sessions at county levels, and undertake other activities necessary to fulfill its mandate.

Limited awareness of the tribunal

Knowledge of the tribunal and its mandate and work remains limited. Key informants within the National Human Rights Commission and the judiciary interviewed as part of this study knew little about it. A 2012 study conducted in 15 counties found that only 32.5% of people living with HIV knew about the tribunal, as opposed to nearly 70% who were aware of HAPCA.[84] In general, knowledge of the tribunal is greater among HIV organizations and people living with HIV in Nairobi.[85]

The delays in setting up and operationalizing the tribunal, its lack of appropriate offices, its location only in Nairobi, as well as the fact that its decisions are not reported or publicized, have been cited among the reasons for the limited awareness

of this body.[86] Also, the tribunal has not yet conducted a meaningful communication and public awareness campaign to educate people on its existence and work. Although the tribunal has in some cases referred complainants to non-governmental organizations working on legal issues, it has not yet developed a deliberate and systematic collaboration with these organizations and people living with HIV, including for orienting potential complainants.[87]

In July 2014, the tribunal launched an ambitious 2013-2017 strategic plan in an effort to address these challenges.[88] The plan provides a candid assessment of the tribunal's strengths and weaknesses. It also sets three strategic objectives: 1) to deliver justice, in a judicially transformative environment, for people living with and affected by HIV; 2) to build the institutional capacity of the tribunal so as to effectively and efficiently discharge its mandate; and 3) to build partnerships and collaboration with stakeholders in order to enhance access to justice.[89] It is expected that the implementation of the plan for the five-year period will cost Ksh1.873 billion (US$19 million).[90] To date, the plan remains largely unfunded.

Conclusion and recommendations

The tribunal is a defining feature of HAPCA. After a sluggish start, due mainly to the delays in the entry into force of HAPCA, it is now starting to keep its promise of ensuring justice for people living with and affected by HIV in Kenya. Through its composition, mandate, procedures, and decisions, the tribunal is emerging as a positive experiment for enforcing HAPCA and for protecting the rights of people living with HIV. The tribunal addresses some of the challenges relating to access to justice and rights-based judicial decisions for people living with HIV, thanks, notably, to a bench that is sensitive to and knowledgeable on HIV issues, less cumbersome proceedings that protect confidentiality and privacy, and speedy rulings. Furthermore, as evidenced in its ruling in the case of YBA v. Brother Nicholas Banda and Three Others, the tribunal has adopted a purposeful interpretation of HAPCA and the Constitution of Kenya that advances the protection of fundamental rights for people living with HIV. The tribunal should be encouraged to more proactively use its mandate to recommend measures for the effective implementation of HAPCA, including by calling for the elaboration of guidelines on critical HIV-related human rights issues where they are needed to address unlawful practices such as involuntary sterilization.[91] There is also a need to strengthen collaboration with non-governmental organizations and more systematically engage actors involved in the response to HIV, including health professionals and employers, as part of efforts to advance the implementation of HAPCA.

However, these promises risk being undermined by the many challenges that still confront the tribunal. These include operational, structural, and financial challenges, as well as limited awareness on its work. The tribunal's strategic plan for 2013-2017 offers solutions to some of these challenges, but this plan remains largely unfunded two years after it was developed, and steps to ensure its effective implementation have been lacking. Realizing the potential of the tribunal will require continued commitment on the part of the Kenyan government, as well as other partners involved in the response to HIV, to ensure that it has the resources needed to fulfill its mandate.

As the only judicial mechanism in the world specifically dedicated to the epidemic, can the HIV and AIDS Tribunal of Kenya serve as possible model in other countries? Is such a tribunal a viable and effective option for consideration in other jurisdictions, particularly in sub-Saharan Africa? The Model Law on HIV in Southern Africa explicitly recommends such a tribunal as an option to enforce HIV-related human rights and advance justice for people living with HIV and those affected by the epidemic.[92]

This study shows that the establishment of an HIV-specific tribunal is a complex endeavor. The author therefore calls for caution, particularly in light of the political, financial, staffing and other challenges confronting the HIV and AIDS Tribunal of Kenya. This research highlights the need for further studies to appraise the tribunal and its contribution to enforcing HAPCA and advancing

HIV-related human rights, particularly now that some of the challenges to its operation are being addressed. Additional research should also provide insights into the perspectives of complainants and other parties who appeared before the tribunal. Such research is critical to understanding whether and under which circumstances an HIV-specific tribunal may be worth considering in other jurisdictions.

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