



REPORT
of the Southern African Subregional Seminar on
HIV/AIDS & Employment Issues
for Labour Courts
(Hotel Sheraton, Pretoria, South Africa, 15-18 May 2006)

**ILO Project “HIV/AIDS Prevention and Impact Mitigation on the
World of Work in Sub Sahara Africa”, Objective 3 - Strengthening
legal and policy provisions (RAF/05/59/SID)**

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Background

According to UNAIDS, sub-Saharan Africa has just over 10% of the world's population but is home to more than 60% of all people living with HIV – 25.8 million at latest count. In 2005, an estimated 3.2 million women and men in the region became newly infected, while 2.4 million adults and children died of AIDS. Among young people aged 15-24 years, approximately 4.6% of females and 1.7% of males were living with HIV in 2005. While some countries appear to have a declining prevalence rate (Kenya, Uganda, Zimbabwe) others show little evidence of managing the epidemic. The world of work implications of these data are receiving priority attention from the ILO.

Moreover, labour court systems comprise a badly-neglected part of labour administration. At the national level, continuing professional upgrading may exist exclusively for the staff of the civil and criminal jurisdictions and rarely covers topics such as HIV/AIDS. Even where specific courses on human rights exist, they often target only the specialised human rights bodies, such as equality commissions or race relations bodies, and, again omit the world of work dimension of HIV/AIDS. In a parallel development, more and more countries are revising their labour laws to include perceived or actual HIV-infection as a prohibited ground of employment discrimination, with training for the employers, workers and their organisations on this new labour right, without including the ultimate enforcers of the law: the industrial tribunals. This project will therefore try to fill that gap, by targeting HIV/AIDS awareness and practical training at labour courts.

This Swedish-funded project aims at contributing to a strengthened legal framework for the protection of women and men workers infected and affected by HIV/AIDS. One of its main components is the professional upgrading, on a regular basis, of Industrial Tribunals and Labour Courts from the 14 targeted countries, in the field of HIV/AIDS and the national and international standards that can be used to ensure non-discrimination. This particular four-day training for national institutions responsible for delivering labour justice was organised for the seven targeted English-speaking countries: Botswana, Ethiopia, Lesotho, Malawi, Nigeria, South Africa and Zimbabwe. A similar training will be offered for the French-speaking African jurisdictions later in 2006.

The Department for social dialogue, labour law and labour administration (DIALOGUE) has backstopped many technical cooperation programmes aimed at strengthening the institutional capacity of the national Labour/Industrial Relations Courts (and conciliation, mediation and arbitration commissions and like bodies) so that the institutions are effective and well respected in the resolution of trade disputes. That is why DIALOGUE is backstopping Immediate Objective 3 of the Swedish-funded Project.

The seminar took place at the Hotel Sheraton, Pretoria, South Africa, from Monday 15 to Thursday 18 May 2006, inclusive.

The seminar falls into a series of ILO technical assistance activities aimed at harmonious industrial relations and decent work through better social dialogue. Several seminars of a similar kind have been carried out by different ILO units in

recent years. In Africa: two Southern Africa Subregional Tripartite Seminars on Equality Issues for Labour Court Judges and Assessors (Harare 1999 and Pretoria April 2005); two East African Seminars on International Labour Standards and Modern Court Administration for labour court judges and assessors (Kampala 2001 and Nairobi 2003 under the auspices of the ILO's SLAREA Project); a national training on using ILS and modern court administration for Nigeria (Abuja 2004 under the NIDEC Project) and the Southern Africa Subregional Tripartite Seminar on ILS for Industrial Court Judges and Assessors (Lusaka 2002 under the auspices of the ILO's SLASA project); in Asia: two South Asia Subregional Tripartite Seminars on Labour Disputes Settlement for Industrial Tribunals and Courts (Kathmandu 1999 & Manila 2003) and India and Nepal, 1996; for the Americas: two Caribbean Subregional Tripartite Seminars for Industrial Relations Courts and Labour Tribunals (October 1999 & May 2004) and seminars for the Central American Council of Prosecutors in Colombia 1997, and national seminars in Guatemala and Costa Rica (May and September 2003); as well as, since 1999, the annual course of the International Training Centre of the ILO at Turin (ITC Turin) for judges, educators and practitioners. The ILO has also, since 1984, supported meetings of the European Labour Court Judges which place on their agenda a number of recent issues including international labour standards, scope of the employment relationship, modern case management, industrial relations, discrimination in employment etc.

Purpose

The overall purpose of the seminar was to contribute to a strengthened legal framework for the protection of workers infected and affected by HIV/AIDS by ensuring that deliverers in the labour justice system – judges and workers and employer assessors where they exist – apply and advance the relevant labour law and demonstrate a better understanding of the epidemic in the world of work. The specific aims of this seminar were: (i) To increase the capacity of labour judges, as well as worker and employer assessors/members of labour courts and tribunals to handle HIV/AIDS related cases and (ii) to provide a forum for exchanging opinions regarding the role of ILS, national labour laws and the national institutions that apply those laws in mitigating the workplace impact of the epidemic.

Participation and organisation

There were 23 participants representing the Botswana Industrial and High Courts, the Lesotho Labour Court, the Malawi Industrial Relations and High Courts, the Nigerian Industrial Court, the Zimbabwe Labour Court, the secretariat to the Ethiopian Labour Relations Board, as well as the principal workers' and employers' organisations of these countries. The Participants List is attached (Annex A). Only four of the participants were women, one being the Judge President of the Malawi Industrial Relations Court.

The seminar was directed by Ms Jane Hodges, Senior Labour Law Specialist, DIALOGUE, ILO-Geneva, assisted by Mr. Mohammed Mwamadzingo, Senior Workers' Education Specialist for English-speaking Africa, based in ILO-Pretoria. ILO-Pretoria staff assured the administrative and logistical support.

Expertise from ILO HQ and field offices was provided, as an example of ILO cooperation. Care was taken to ensure local technical expertise through a choice of resource persons who are widely acknowledged to be experts on various specific aspects of HIV/AIDS and the legal implications of the epidemic in the world of work. Almost every session alternated between a woman and a man presenter: there were two women local resource persons, a gender specialist from Zimbabwe (Ms Nyamukapa) and a lawyer from South Africa (Ms Bhoola); a strong team from UNAIDS (led by Dr Mugabe); SRO-Harare's Specialists on Social Dialogue (Mr. Mandoro) and on International Labour Standards (Ms Balima); the Chief Technical Adviser of the ILO technical cooperation project "Strengthening Labour Systems for Southern Africa/ILSSA (Mr. Matthewson) and ILO-Pretoria's Senior Specialist in Workers' Education (Mr. Mwamadzingo).

Materials presented to the seminar

The best possible documentation was made available to the seminar. Each participant received the ILO 2001 Code of Practice on HIV/AIDS and the world of work and ILO/AIDS "Using the ILO Code of Practice and training manual: Guidelines for labour judges and magistrates" (2005); DIALOGUE Working Paper No. 3: "Guidelines on addressing HIV/AIDS in the workplace through employment and labour law" (2004) and CD-ROM "Labour Legislation Guidelines"; "How the ILO's international labour standards can help in the fight against HIV/AIDS in the world of work" by J. Hodges (2005); the 1998 Declaration on Fundamental Principles and Right at Work; loose-leaf copies of Conventions Nos. 97, 98, 102, 111, 121, 143, 149, 154, 155, 158, 159, 161, 175, 179; Recommendations Nos. 15, 111, 162, 164, 166, 168, 171 and the list of ratifications of ILO Conventions; Research on penalties: example from decisions on sexual harassment in employment by J. Hodges; as well as UNAIDS Fact Sheet; Epidemic Update (Dec. 2005); and "Courting Justice" publication (2006). Of great use were extracts from relevant court cases on HIV/AIDS in various jurisdictions and the case law compilation of ITC Turin entitled "Use of International Law by Domestic Courts" (July 2004 - supplied on diskette).

Occasional literature was also available, including ACT/EMP's 2006 CD-ROM on HIV/AIDS issues for employers' organizations; DIALOGUE's "Glossary of industrial relations terms" (2004); the European Labour Courts' publication "Remedies and sanctions in industrial action" (1991); ILO's "Guidelines on achieving equal employment opportunities for people with disabilities through legislation"(2004); ILO's Code of Practice on protection of workers' personal data (1997); copies of reports of similar Seminars held for labour courts and industrial tribunals in Southern Africa, East Africa, Caribbean and South-east Asia; and various ILO/AIDS publications. There were also copies available of the UN Office of the High Commissioner of Human Rights' "International Guidelines on HIV/AIDS and Human Rights".

Some participants provided copies of national HIV/AIDS policies and descriptions of their labour justice systems and relevant cases (Botswana, Malawi) and of their own organisations' strategies on HIV/AIDS (Ethiopia, Nigeria).

Participants also received copies of the ten PowerPoint presentations: (i) Overview of the ILO & the ILS system, (ii) ILO instruments relevant to HIV/AIDS, and (iii)

Domestication of international labour law within national legal frameworks (by Ms Balima), (iv) ILO's Code of Practice: a tool for judges and assessors (by Ms Hodges); (v) UNAIDS Data and latest epidemiological information; (vi) Case studies of Botswana, Lesotho & SADC Code of Conduct - comparing instruments on HIV/AIDS (by Mr Mandoro); (vii) The gender dimension of HIV/AIDS in the world of work and its legal consequences (by Ms Nyamukapa); (viii) The role of trade unions and employers' organizations on the pandemic of HIV/AIDS (by Mr. Mwamadzingo); (ix) Legal & procedural issues relevant to complaints concerning HIV/AIDS in the world of work (by Ms Bhoola); and (x) Dispute prevention and disputes resolution (by Mr. Matthewson).

Programme and methodology

The programme appears in Annex B.

Given that the participants largely comprised a legally-qualified group, a combination of training methods was used. Inter-active lectures, PowerPoint presentations, panel discussion, brainstorming exercises, two-person paired quiz on gender, and two moot court role plays (one based on a Namibian Labour Court decision concerning non-recruitment in the armed forces based on HIV/AIDS and the other based on refusal to upgrade to non-casual contractual status based on HIV/AIDS heard in an Indian High Court).

For both the moot courts, participants divided into groups to discuss the facts, write brief judgements using international labour law and relevant comparative decisions and report back to plenary sitting as Presiding Judge and two sitting Judges of an imaginary Labour Court. As in past seminars, this methodology proved to be a popular and successful means of gaining practical experience. It involved the participants in legal research (accessing ILS and the compilation of cases provided, checking ratification and domestication status, and applying the ILO's Code of Practice on HIV/AIDS and on personal data), consensus-reaching on the Bench (deliberating between panel members on appropriateness of penalties for the guilty party and compensation for the victim) and decision-writing (analysing the facts, representing the law, entering judgement and specifying remedies).

For the gender and AIDS module, two inter-active formats were chosen. To introduce the subject, participants divided into pairs to answer a short "Gender Quiz". Later, a mini "gender audit" of five national laws on HIV/AIDS was carried out, with the participants gathering in country groups to analyse the texts from the point of view of gender sensitivity and workplace relevance. The findings appear below.

Opening ceremony

The Welcome Address of Ms Judica Makheta, Director of ILO-Pretoria, unavoidably absent, was read by Mr. Mwamadzingo. The ILO-Pretoria Office was responsible for many of the ILO member States represented at the seminar, and was committed to fighting the effects of HIV/AIDS in them all. The Office hosted a number of important technical cooperation projects operating in this area. This particular activity took place in accordance with the enforcement recommendation of the ILO's 2001 Code of Practice on HIV/AIDS in the world of work, namely paragraph 5.1(k), which

read: “The competent authorities should supply technical information and advice to employers and workers concerning the most effective way of complying with legislation and regulations applicable to HIV/AIDS and the world of work. They should strengthen enforcement structures and procedures, such as factory/labour inspectorates and labour courts and tribunals”. Noting that the Code was the main benchmark - and working tool - for ILO work in this area, she was pleased to see from the programme that participants would be spending a lot of time on how to use it in adjudication of HIV-related cases. At the same time, the international labour standards of the ILO were also extremely useful to the judiciary and labour justice mechanisms in fighting against the stigma and practical workplace problems related to HIV/AIDS. This seminar’s emphasis on ILS was, therefore extremely useful, particularly as the fundamental Conventions were widely ratified in the sub-region. Also, exposure to good practice examples from national labour laws in English-speaking Africa (and other parts of the world) would be enhanced through the seminar. She realized that there may not yet have been many cases on AIDS lodged in the jurisdictions present. Botswana, for example had had only four cases before its Industrial Court – but they were key cases, with well-reasoned decisions that would be useful for all present to learn from. And that acquisition of comparable knowledge would be precious because, given the UNAIDS statistics on infection rates in English-speaking Africa, all labour justice arenas may one day soon be faced with complaints related to the epidemic. That was why having a forum such as this four-day seminar was vital for the sharing of experiences from other tribunals’ approaches in the fight against HIV/AIDS in the world of work. She wished all participants a fruitful and enjoyable seminar.

Ms Jane Hodges, from ILO HQ, welcomed participants to the first training seminar within the programme to mitigate the impact of HIV/AIDS in Sub-Saharan Africa through enhanced compliance with the legal framework, graciously funded by Sweden. The Department has been committed to strengthening the knowledge and skills of labour courts and industrial tribunals for many years. After all, labour court judges, and the whole labour court system, comprise a badly neglected part of labour administration. Now, this Programme enabled the general training to expand into the vital area of HIV/AIDS and the world of work. The ILO’s DIALOGUE Department saw such professional upgrading as strengthening of social dialogue in the labour justice systems for the seven English-speaking jurisdictions represented and hoped that it would serve the judges and employer and worker participants well when handling complaints related to HIV/AIDS back home. She outlined the inter-active methodology and the ILO’s assembling for the seminar of excellent resource persons from UNAIDS, SRO-Harare and ILO-Pretoria as well as from the host country, South Africa, and her neighbour Zimbabwe. The Programme would cover, in particular, subregional experiences in two areas that were, sadly, often forgotten when examining how to fight HIV/AIDS using the legal system, namely the gender dimension and judicial procedure issues.

The Hon. Judge President of the South African Labour Appeal Court, Justice Ray Zondo, delivered the Opening Address. He stressed that labour justice jurisdictions needed to know why so few cases were being lodged in jurisdictions where prevalence rates were officially between 20 & 30%. The stigma and discrimination surrounding HIV/AIDS had to be addressed; even jurisdictions like SA, whose Labour Courts had heard around four or five HIV-related cases should learn from

experiences in other jurisdictions on both substantive decisions and procedural issues. He trusted that the seminar would examine not only the latest medical and legislative information, but practise the skills required for good in-court proceedings.

Participants' expectations

Improving the knowledge base

Learn more on ILS on HIV & AIDS

Effects of ratified ILS in dualist countries

Learn from other who have already HIV/AIDS provisions in their Labour Codes

Content of labour law – domestic and international

How the law can protect workers affected

Understand link between HIV/AIDS and Labour Courts

Learn about labour court cases on HIV/AIDS

Labour cases on HIV/AIDS

Learn more about how other labour courts are dealing with HIV/AIDS cases

Procedures of how court should deal with applicants, protect them against unnecessary cross examination

Better understand how UNAIDS can contribute or improve understanding of HIV/AIDS, share knowledge and information

Gaining skills to apply the knowledge

Knowledge and skills which will assist us in protecting rights of workers affected

Greater sensitivity on rights of HIV+ workers and duties of employers

Application of ILS with regard to HIV/AIDS at workplace

Role of Judges when faced with HIV/AIDS cases

Good judgements

Striking a happy balance between employers' contractual rights and HIV/AIDS sufferers

To be assisted in order to be not prejudicial to both sides: strike a fair balance

Strike a balance with employers interests, productive workforce

Role of employers in prevention and mitigation in workplace and enhance their ability to represent employers in cases related to HIV/AIDS

Sustainable commitment using knowledge & skills

Networking among English-speaking African judges, HIV/AIDS topic as a starter

Group reach a consensus, a stand, on how - as judges - we should deal with HIV/AIDS, & consensus that make HIV/AIDS different from other diseases

Linkages between employers and labour judges with regard to workplace intervention

Enhanced appreciation of HIV/AIDS and workplace

Eye opener for an increased collaboration with ILO

Decisions mentioning international instruments, ILS and Human Rights

Substantive proceedings

Summary: debunking the myths still needed

The various modules gave rise to a number of issues already noted in other judges' training, namely awareness of the limited transmission modes but deep fear of working/having contact with HIV-positive people. Workplace discrimination was often indirect, disguised as non-appointment, unfavourable terms and conditions or dismissal for "incapacity to do the job". This appeared to occur in all countries represented, even where employers realized the progressive nature of the disease. Inherent requirements of jobs were discussed at length: should there be compulsory testing for airline pilots, long distance transport drivers and hotel/catering industries staff, asked some participants? Another well debated issue was the employer's need to know status if it is to be expected to engage in workplace care and treatment, or even to consult with staff on an appropriate workplace policy. Having ILO lawyers and UNAIDS doctors present in the discussions helped clarify some of these issues. Overall, behavioural change together with clear national legislation and workable workplace policies seemed to be the participants' choice of policy mix. The modules on the role of workers' and employers' organization, as well as on how ADR can assist in sensitive handling of complaints/grievances related to HIV/AIDS, demonstrated the ILO's holistic approach to fighting the epidemic. Many judges, for instance, regretted that they could not entertain cases or use ILS in decisions because of the rigidities of their adjudication rules; that was why the social partners' role is crucial. Debate was of a very high level, but showed that training seminars such as this one, designed expressly for labour justice systems, was very much needed.

...and a great need for on-going training for labour courts/industrial tribunals and High Courts

All participants openly acknowledged the need for continued professional development. The point was made that labour courts required specialist training as they are, by definition, specialized courts expected to have specific expertise. There was strong support for training in the area of HIV/AIDS which also involved knowledge of workplace equality, labour dispute settlement and rule of law/access to justice for all persons involved in proceedings: individual women and men workers, social partners, legal practitioners and judicial officers.

Module 1 - The ILO, its standard-setting system and international labour standards (ILS)

Ms Balima introduced the ILO: its history, tripartite structure, standard-setting system and supervisory machinery. Highlighting the tripartite nature of the Organization which gave universality and viability to the instruments it adopted, she described the adoption of the ILS and their submission to competent national authorities, as well as their monitoring by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the Conference Committee on the Application of Standards, the Governing Body Committee on Freedom of Association and other ad hoc supervisory machinery. She gave examples from African member States in the system. The reporting system (based on Article 22 of the ILO's Constitution, with copies of the Governments' reports being shared with the social partners by virtue of Article 23) now consisted of a two-yearly and five-yearly cycle so that

administrations were not over-loaded in preparing the required reports. The reports, and comments from the social partners, enabled the CEACR to make a detailed examination of the law and practice applying each ratified text. The CEACR also compiled each year a General Survey on relevant topics covered by groups of related instruments (in 2006, on labour inspection, with several paragraphs devoted to new workplace challenges like HIV/AIDS), so as to give the governments and social partners an up-to-date picture of the way the texts were applied throughout the world, including in non-ratifying States. The CEACR's General Report - which noted difficulties encountered and cases of progress - and the General Surveys were submitted via the Governing Body to the International Labour Conference's Committee on the Application of Standards, for examination. That Committee presented its own report to the full plenary of the ILC. Its methodology included selecting a list of the most serious cases of violations of ratified Conventions, for discussion in public and hopefully arriving at an agreement with the State in question about remedying the situation. For the most serious cases, if no improvements were made over time, the tripartite Conference Committee could decide to name the country in a special paragraph in its report. The technical assistance of the International Labour Office would invariably focus in on trying to make progress in such cases. All these processes could add weight to efforts – in law and in practice – to fight the spread of the epidemic by using relevant ILS.

Turning to the ILS relevant to HIV/AIDS, Ms Balima explained the evolution of the epidemic from a public health challenge to a global crisis. The workplace dimension was clear because employment discrimination based on real or perceived HIV status was a violation of workers' rights, deaths and absences due to the virus were reducing the labour supply, the virus was mostly present in the working age segment of the general population (15-49 years) thus attacking productivity, valuable skills and experience were being lost, measures related to accommodating death and disease related to HIV/AIDS were increasing labour costs and social security systems – already under strain in Africa where HIV infection was high - could not absorb the extra drain on resources. The ILO was an ideal catalyser for a response because of its broad labour protection mandate, its ILS and its tripartite structure which reached out into the world's workplaces, formal and informal. The best way to respond to the human rights implications of the epidemic was to develop policies at national and enterprise levels that protect the rights of those concerned. This rights-based approach meant applying all principles of human rights to those infected and affected by the virus. Not only was the Code of Practice useful as it was soft law adopted specifically to address the problem, but also the range of ILS could be used even though they did not specifically address HIV/AIDS. Convention No. 111 was the key ILO instrument on the right to equality at work. Although it did not list HIV-infection among the seven grounds of banned discrimination in employment and occupation, it permitted ratifying member States to add other grounds, and several had indeed added HIV-status, or health, or disability, all of which were useful in giving protection to workers against discrimination in this area. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the jurisprudence that had built up around its provisions were particularly helpful prohibiting mandatory pre-and post-recruitment testing, breaches of confidentiality regarding HIV status, the denial of training and career progression and for dismissals based on HIV. The Termination of Employment Convention, 1982 (No. 158) and its accompanying Recommendation No. 166 protected against unjustified dismissal and in particular made it clear that temporary

absence from work because of sickness or injury was not a valid reason for dismissal, a principle important given the progressive nature of the evolution of AIDS-based sickness. The Vocational rehabilitation of and Employment (Disabled Persons) Convention, 1983 (No. 159) was also critical in helping to address problems related to HIV/AIDS because its wide definition of disabled person could cover seropositive workers; it provided that special protective measures be adopted (working time flexibility, leave accommodations, work station changes, transfers to less onerous tasks without loss of pay etc.) until such time as the person was too ill to work at all. Other useful texts included: Conventions Nos. 98 and 154 on collective bargaining because they provided the environment in which negotiations could take place to adopt workplace agreements on HIV/AIDS as well as AIDS-related specific provisions in national, sectoral (e.g. mining, transport & construction) and enterprise-level collective bargaining agreements that would then become binding at national law. Conventions Nos. 155 and 161 on occupational safety and health stipulated a number of measures that made sense in an HIV/AIDS context, such as protective clothing and equipment at no cost to the worker, transfers to less onerous jobs and no abuse of health surveillance systems for discriminatory testing, and worker counselling following regular workplace health checks. The social security Conventions, Nos. 102 and 121, also gave guidance on the principle of non-discrimination in coverage and on benefits and entitlements (e.g. lump sums v. periodic payments, especially in view of the progressive nature of HIV infection). Specific ILS, like the Nursing Personnel Convention, 1977 (No. 149) the Part-Time Work Convention, 1994 (No. 175) and the two migrant workers' Conventions (Nos. 97 and 143) were also useful for those populations of workers engaged in at-risk occupations or in employment relationship status that made them vulnerable and unprotected when infected.

Ms Balima lastly introduced a module on the domestication of ILS into national legal systems, to show the many and varied ways that ILO member States were using ILS to help decide cases at home. ILS were used as a source of direct international law, as a source of equity and for better interpretation where national provisions were vague or silent on workplace issues; they could also give weight to/strengthen an already existing interpretation given by domestic courts. When a State ratified a treaty, it undertook to give effect to that treaty. The impact of international treaties at national level in judicial decision-making relied on the nature of the legal system: in monist systems, the ratified international treaty entered into national law directly, superseded any national text and could be used directly by complainants in judicial proceedings; in dualist systems, a second, legislative, step was required after ratification, namely the adoption of a specific national law translating the provisions of the international text into the domestic arena by Parliamentary adoption. ILO Conventions usually contained an Article specifying the means that may be used to implement the Convention. The report forms, adopted by the ILO's Governing Body and sent to member States to request information on the manner in which the Convention was being applied, usually requested copies of relevant judicial decisions. The position in nearly all Commonwealth and common law countries was fairly similar: international law did not have priority over national law, nor could it be relied on directly to establish a cause of action before the national courts. This had been based on the theory that treaties established inter-States obligations and were not designed to address individuals. However, in common law jurisdictions, it was generally accepted that Conventions that had not been incorporated by a specific legislative Act into the

national system could, nevertheless, have an indirect impact on interpretation and application of that national law. Indeed, in many labour laws at the national level, one noted nowadays references to the effect that the text should be interpreted in a manner that was consistent with international law. In fact, many newly adopted Constitutions make such references as well. The modern view on the effect of treaties seemed to be that international norms were justiciable, at least in so far as domestic law did not contradict them; recent commentators were noting this erosion of the old common law dualist approach.

An important new development was the adoption in 1998 of the ILO's Declaration of Fundamental Principles and Rights at Work, which declared that "all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the ILO, to respect, to promote and to realise in good faith" the four fundamental principles, namely freedom of association and the effective recognition of the right to collective bargaining, elimination of child labour and forced labour and the achievement of equality in employment. This was therefore the basis for more impetus to use the principles embodied in the ILO's fundamental Conventions as both direct sources of law and as interpretative tools in labour courts.

Ms Balima listed various criteria to assist in accommodating international and domestic labour norms: prefer the standard which was the most favourable to the worker; interpret rights broadly but exceptions narrowly; follow constitutional advice about general reading of national laws in conformity with international treaties; *lex posterior derogate*; respect acquired rights; *pacta sunt servanta*; good faith; opt for the norm with the greatest positive effect. The seven countries represented at this seminar came from a mix of monist (Ethiopia, Malawi) and dualist (Botswana, Lesotho, Nigeria, South Africa, Zimbabwe) judicial backgrounds. She concluded by noting that other texts could be used by domestic courts, such as soft law (ILO's Code on HIV/AIDS), unratified Conventions, Recommendations (that were not open to ratification) and jurisprudence of the CEACR and other supervisory bodies.

The ensuing Question and Answer session (Q&A) covered the following issues related to the modules on the ILO and ILS relevant to the epidemic: why did certain powerful member States ratify so few Conventions; the role of most representative organisations of workers and employers in the reporting and ILC debate; could individuals access all of the ILO's supervisory machinery; what kind of sanctions were available against member States that continually violated ILO standards; how to use Convention No. 111 and its "inherent requirements of the particular job" provision that might allow employers to dismiss or transfer workers in sectors like transport or airlines; and which jurisdictions were being the most active in using ILS. Examples were taken from the ITC Turin 2004 compilation to note the most frequently used Conventions (e.g. Nos. 87, 98, 111, 158, 132 and 156) and the labour courts that were the most frequent users (in particular southern African jurisdiction such as the Botswana Industrial Court).

There was a large number of interventions on the use of ILS in domestic judicial systems. All participants agreed on the usefulness of International Labour Standards as (i) a source of law which could be directly applied at the national level, (ii) a means of interpretation where domestic texts were unclear and (iii) a source of equity in achieving fair outcomes. However, the domestication of the international treaty

obligation was crucial in the most African constitutional contexts represented at the seminar. Some participants noted that if there was no ratification, whatever the monist/dualist system, the courts' hands were tied; in some systems, judges were not permitted to refer to texts not raised in pleadings or in argument; others wondered why practitioners were not being trained on ILS and HIV/AIDS as well given their role in advising clients; were trade unions and employers' organizations living up to their full potential in assisting members when lodging dismissal or discriminatory treatment cases; yet others referred to current labour law reform processes in their countries and the usefulness of clarifying the hierarchy of international Conventions in new Acts (Lesotho, Malawi). Participants were interested to learn of the Botswana examples of using ILO Conventions in *J.S. Gaborone v. Newspaper Editorial and Management Services Ltd.* Case No. IC 64/98 dated 23 April 1999.

Module 2 – ILO's Code of Practice: a tool for labour judges and assessors

Ms Hodges introduced the 2001 Code of Practice for use by labour courts, as envisaged in paragraph 5.1(k) of the text. After outlining the history of the Code, its 10 fundamental principles, its inspiration for the social partners at national, sectoral and enterprise levels and acceptance worldwide, she detailed three stages for judges' action. First, judges and workers' and employers' assessors could ensure better legal compliance by acquiring and applying in their judgements technical knowledge on HIV laws and ILS relevant to HIV-related cases. Secondly, these labour law enforcers could make labour justice accessible to persons living with HIV/AIDS by the manner in which they run their proceedings (e.g. name suppression orders, urgent hearings, closed court, confidentiality of medical evidence). Thirdly, they could promote social change and use their position in communities to influence behavioural change in the fight against HIV/AIDS.

She outlined a number of African labour statutes, regulations and Codes covering HIV/AIDS (Botswana, Lesotho, Mozambique, Namibia, South Africa, Zimbabwe, as well as the SADC Code on HIV/AIDS), circulated some good practice texts from other regions (Cambodia, Philippines, Viet Nam, CARICOM) and highlighted jurisdictions already using the Code. South Africa's Labour Court was one good example, as shown in *PFG Building Glass Pty. Ltd. v. Chemical Engineering, Pulp, Paper Wood & Allied Wkrs' Union & Ots (2003) 24 ILJ 974*. In typical cases before industrial tribunals and labour courts, the Code gave clear guidance on the following six critical issues:

1. Should employers be permitted to test employees for HIV?
2. Should insurance companies be permitted to test applicants for HIV?
3. Should employers be obliged to treat information related to an employee's HIV status as confidential?
4. Can employers dismiss an employee living with HIV?
5. What is expected of employers in accommodating the HIV status of an employee?
6. What is expected of employers regarding treatment?

Ms Hodges took participants through court rules/bench books for examples of how judges and assessors could make labour justice more accessible to HIV complainants. Rules of Court from two jurisdictions (Botswana, Zimbabwe) were summarised as offering good practice. The Zimbabwe Labour Court rules specifically referred to the

informality of proceedings and the President's role in attempting conciliation and mediation before commencing adjudication. Registrars could be crucial in setting a welcoming atmosphere for complainants and assist in drafting Statements of Case and motions, pre-hearing conferences could find solutions that were less stressful and less time-consuming than full hearings, evidentiary rules could be used with discretion in view of the health of the complainant and the nature of cross-examination and drawing medical evidence, and costs awards could take into account the progressive nature of the disease. Urgent interim relief in the Botswana Rules could be crucial if a complainant worker was in the last phase of the disease. Ms Hodges concluded with the warning that, even if certain jurisdictions had not received cases on this subject, they would come. The ILO's standards and practical tools like the Code and the "Guidelines for labour judges and magistrates" and "Guidelines on addressing HIV/AIDS in the workplace through employment and labour law" were developed in a tripartite setting to assist labour justice systems. Seminars like this one would allow participants to confidently handle and fairly adjudicate cases when they arrived.

During Q&A the participants noted the usefulness of the Code as a tool for decision-making, and it was relatively well known throughout the countries present. So why were more tribunals not using it? Answers varied. In some jurisdictions, such soft law instruments might be useful more for interpretive purposes. The Nigerian National Industrial Court's new founding statute would include a provision concerning the recognition of international law; but would "international law" be interpreted to extend beyond ratified treaties and cover texts like the Code? Also, some judgements on AIDS were overturned on appeal, and judges might be wary of using the Code if it gave the basis for an appeal. The Botswana Industrial Court's experience with a number of AIDS cases - and the role of the High Court in overturning or confirming judgements - was discussed at length. Nigeria's High Court example of a judge's own fear of catching the disease leading to the clearing of a courtroom when an HIV+ witness appeared, demonstrated strongly that efforts should be undertaken by all involved to develop the knowledge of members of the judiciary and arbitration commissions and boards about HIV/AIDS and its world of work implications. Regarding remedies and sanctions, participants shared their mandates (reinstatement, back pay and compensation, damages, interdicts and mandamus orders, directions to undertake HIV/AIDS training), and the worker and employer participants added their views about criminalization of HIV-related offences. They were interested to hear of worldwide trends in other areas of labour law - like sexual harassment - where heavy fines, especially for recidivists appeared to work better than penal sanctions. Other queries related to locus standi to bring cases, the shifting onus of proof, employers' vicarious liability and adequacy of the tribunals and courts' facilities in general although many had new provincial premises (Malawi, Nigeria).

On testing, participants agreed with the Code's prohibition and understood the situations where voluntary, informed testing with counselling (VCT) could be encouraged. In 2006, all Botswana High Court judges publicly took the test. Different approaches to the issue of testing *for insurance coverage* were debated: some participants pleaded for a right to test on humanitarian and economic grounds so that such schemes (both State-run and occupational within enterprises) could know the expectations for treatment and plan ahead; others noted that their national schemes included free basic coverage and only required testing for extra benefits when the claimant voluntarily submitted to this (Malawi). It was pointed out that, at the present

stage of testing know-how, requiring one test at any given time was valid only for that period and useless for the long-term. The issue of the confidential nature of this type of medical data was hotly debated in this context. Some enterprises carefully respected the privacy of workers' personnel data, especially where there was an HIV/AIDS workplace agreement and a HIV workplace joint committee. Others, however, had far to go in this area, often due to economic constraints. Opinions were exchanged on no-cost and low-cost methods for preserving confidentiality of medical information (successful, in particular, in mining companies); the Code's advice was useful here. The key appeared to be making the workforce aware of the usefulness of voluntary testing with counselling (VCT). This would influence a change in attitude of certain companies which believed that, if on the one hand they were obliged to provide a healthy and safe workplace, on the other hand they had "the right to know" the health status of their employees.

Some participants considered that, if an employer really wished to get rid of an HIV+ worker, it would use every "legally defensible" device to do so, such as during redundancies due to technological change and retrenchments due to economic downturns, at present common in the African textiles industry. Participants also debated the role of media campaigns and judges as role models in communities. Until everyone was aware of the limited transmission channels of the virus, there needed to be strong support for persons daring to disclose their status and risk stigmatization.

Module 3 – UNAIDS data debunking the myths

Dr. Mugabe gave the good news of the decline of adult infection rates in late 2005 in Haiti, Kenya, Zimbabwe and Burkina Faso, but shared UNAIDS concern that this decline be sustainable. The bad news was that infection rates were increasing in countries like Mozambique and South Africa. He stressed the age profiles (infection peaking for females between ages 20-24 and 25-29 but for males at the 50-55 cohort) and female face of the epidemic in Africa now. Was this explained by older men infecting younger women, leaving a clear message that sexual partners should be from one's own cohort? Economic and societal factors, maybe sexual violence including workplace violence, played a role in this situation. That would have a devastating impact on the world of work and the care economy. Regarding the implications for child labour, of interest to the ILO as a co-sponsor of UNAIDS, if parents were infected and died, the children became orphans and often a cycle of poverty was triggered with a child dropping out of school.

Medically, more was known these days about the disease progression (one South African study had noted lower infection rates linked to male circumcision), treatments (microbicides; but more drug-resistant strains of the virus) and the clear message was that infected workers lived longer with no manifestation of sickness. They were fully productive for up to 10 years after being infected, and accommodation measures at the workplace could prolong useful work contributions. Since the epidemic touched social, economic, ethical and moral dimensions in an unprecedented way, Dr. Mugabe felt that this seminar was timely and extremely important for Sub Saharan Africa.

The Q&A was rich in national examples. In Malawi it appeared that women were more conscious of health care and would readily go to clinics once pregnant, where, with VCT, tests could be carried out. It remained, however, an expense difficult to

meet for most Malawians. The Government had offered free anonymous testing for civil servants, then moved on to a campaign to encourage individuals to come forward for VCT, a phased approach that had had some success. There were queries about UNAIDS methodology behind published infection rates, e.g. in Botswana the 40% rate was for the “adult” population only; in South Africa the rate dropped to 11% when using the “general” population; in Nigeria, as in all UNAIDS published results, the data came from studies run scientifically by the national responsible bodies. The Ethiopian rate had dropped from 6.6% but was still worrying. On UNAIDS’ approach to managing the epidemic, two levels of control were stressed: access to testing for prevention, then treatment. On testing the three Cs of confidentiality, counselling and consent still counted. UNAIDS noted four ways to initiate VCT: client coming forward, provider’s routine offers (e.g. by a health provider at TB clinics as in Botswana), diagnostic testing and mandatory (which was only acceptable anonymously e.g. in blood banks), but should mandatory testing permissible in rape cases? or for prison inmates? Participants also noted that, as infection rates increase, society reacted down to the family level, where fathers asked prospective sons-in-law for HIV-test results. The Nigerian Employers’ Consultative Association (NECA) had engaged in an impressive amount of advocacy (including circulating copies of the ILO Code), peer educator training, prevention support (supplying condoms, workshops and seminars, STI treatment link), including a new initiative to create a databank on the status and real impact of HIV/AIDS in the workplace and on current awareness levels. NECA’s methodology centred on a wide range of target groups (chief executives, training managers, down to cross-sections of workers) and cut across sectors (food and beverage, road transport, agriculture and chemicals, footwear and non-metallic products associations).

Module 4 – Good practice in national legislation: 2 case studies

Mr. Mandoro gave a detailed presentation on the Lesotho Labour Code (Amendment) Bill and the Botswana Code of Good Practice: HIV/AIDS and Employment, against the background of the 1997 SADC Code and the 2001 ILO Code. All texts commenced with general statements of principle and then singled out non-discrimination at work, testing and care issues for greater detail. All had specific provisions on dismissal based on HIV status. The national texts were weak on the gender dimension. Some of them stipulated that they were guidelines of no legal force. Participants added to the presentation with examples of recent BIC cases, which had expanded on the national Code.

The Q&A, again, was the opportunity for sharing a large number of examples: one Nigerian State had recently adopted an AIDS statute, and several provisions were cited and compared with the SADC country examples. Ethiopia also had programmes on HIV/AIDS. Although its Labour Relations Board had heard no cases on this, its conciliators and arbitrators would get training on not only the legal, but the medical facts. Participants were keen to know whether, in the two countries highlighted, collective agreements or workplace policies agreed between employers and workers and their representatives were also part of the regulatory framework. It was pointed out that, in Lesotho for example, every enterprise was to negotiate such an agreement, with measurable enforcement provisions. Labour inspection forms now included a specific question on this, and the Ministry treated HIV/AIDS in the world of work in a serious, holistic way along the lines of modern labour administration, namely

encouraging compliance rather than acting as the “labour police”. Yet in common law jurisdictions, “policy” instruments were not legally binding; the BIC Rules, for example, lacked such force as they had not been published in the Official gazette. Specific exchanges related to the issue of who was liable if it were co-workers who threatened a walk-out/strike because a staff member or a manager is HIV+? Botswana and Nigeria had experienced analogous situations, where removal of one worker to placate the whole workforce might or might not be successful depending on the accompanying order directed at the employer.

Module 5 - Moot court exercises on HIV/AIDS at work

The participants used facts derived from real cases (see under Methodology above) to emit judgements and awards using the ILO Code and relevant ILS. Their group work showed a clear grasp of the international standards that could guide a decision where the national legal framework was weak or unclear (both Convention No. 111 and the “soft law” of the Code). The judgements were very close to the real cases from which the exercises were derived: the Namibian Labour Court case *H.N.N. v. Minister of Defence* Case No. LC 24/98 dated 10 May 2000 and the Bombay High Court case *X v. State Bank of India* Petition No. 1856 of 2002, decided 16 January 2004.

The main comments arising from the moot courts related to the inherent requirements of the jobs in question (sweeper and soldier), legality of pre-employment testing, order as to the disclosure of names in law reports and appropriate review by the employer of its workplace policies to make reference to fighting ignorance and stigma about AIDS. Some participants (Malawi, Nigeria) noted that their tripartite-debated National Policy on HIV/AIDS in the Workplace and the newly approved NIC founding statute could make such outcomes possible if cases were to be lodged in the future. All recognized the need to educate practitioners, judges, arbitrators and the social partners about the virus and its transmission vectors, since a number of comments were made about the legitimacy of an employer dismissing, or removing to a less visible job, an employee who was known to have the virus or AIDS, even if that employee was fit and capable of doing the job in question.

Module 6 - Gender Dimension of HIV/AIDS & the world of work

Ms Nyamukapa defined key terms, elaborated the socio-economic considerations, described the international human rights framework and their link to the ILO’s ILS and Code, and explained the national policies and laws of South Africa and Zimbabwe in detail. The new Zimbabwe Labour Act included some gender and HIV/AIDS provisions and cross-referenced the Disabled Persons Act; but the current S.I. 202 of 1998 was gender blind. The 2001 Sexual offences Act criminalized wilful transmission of HIV through sexual intercourse by an infected person, and recognized marital rape. The Deceased Estate Maintenance Act, which covered illegitimate children, might be useful in HIV care cases, as might the forthcoming Domestic Violence Bill and the Class Actions Act. The panoply of South African Acts (Labour, Employment Equity, Basic Conditions of Work, and others) were gender sensitive. They gave wide coverage against HIV-based discrimination and provided for care and treatment; the testing provision on the Employment Equity Act had been litigated and the *PFG Building Glass* case made it clear that requesting permission to test from the Labour Court was only required where the employer had not, in any case, already

solicited consent from the workforce. She stressed the family responsibility leave provisions of the Basic Conditions of Employment Act as good practice for both men and women in carer situations. The way forward included the following challenges: labour laws needed to be gender-aware, there was a need to re-craft maternity rights and benefits, fathers and male partners needed access to paid paternity leave, negotiators needed to be trained on gender equality in collective bargaining, women needed to be better represented in social dialogue structures where HIV/AIDS might be debated, negative aspects of cultural approaches to HIV infection should be revisited and positive aspect of different cultures needed to be promoted, gender-sensitive accommodation measures needed to be better known and included in the regulatory frameworks, but laws were not enough: it was awareness-raising and behavioural change that would finally win the fight against the spread of HIV/AIDS.

The Q&A raised cultural biases that prevailed against men and women sharing responsibilities in the care and support so important for HIV/AIDS, and certain practices such as ‘cleansing’ of HIV-widowers by having sex with other women, that were hindering progress against the spread of the disease. Specific comments covered: the pros and cons of mandatory testing of prostitutes, roles of Gender Commissions and National AIDS Councils, impact of gender-sensitive legislation in practice if there was poor application and monitoring by labour administrations, and low acceptance of male and female condoms, hence the rise of abstinence as a prevention strategy in some African communities.

Module 7 - Role of workers’ and employers’ organizations in the HIV/AIDS pandemic

Mr Mwamadzingo explained why HIV/AIDS was a workplace issue: it mainly affected people in their prime and most productive years, it led to loss of productivity, wasted human resources, higher health costs, lost job due to illness and even child labour in orphaned families. In certain professions, like health care providers, there was an occupational risk that required specific policy measures. That was why the ILO’s Sectoral Activities Department had adopted, with WHO, “Guidelines on HIV/AIDS for Nurses”. Employers’ organizations had reacted in many ways. For example, the International Organization of Employers (IOE) had widely circulated a popular “Employers Handbook on HIV/AIDS”. Participants in the seminar from their national employers’ federations have been active in this area too (BOCCIM-Botswana, EEF-Ethiopia, ALE-Lesotho, ECAM-Malawi, NECA-Nigeria & EMCOZ-Zimbabwe). On the workers’ side, the International Confederation of Free Trade Unions (ICFTU) had assisted its affiliates (represented here by BFTU-Botswana, CETU-Ethiopia, MCTU-Malawi, NLC-Nigeria & ZCTU-Zimbabwe) to undertake workers’ education/IEC on the issue, fight against workplace discrimination and stigmatization generally, negotiate pertinent clauses in collective bargaining agreements (CBAs), develop prevention programmes, provide counseling and engage in social marketing of condoms and STD diagnosis and treatment services.

Momentum had increased in recent years for joint action. He highlighted the important agreement - “Fighting HIV and AIDS Together” - reached 2003 between the ICFTU-African Regional Organization and the IOE-Pan-African Employers’ Confederation, and circulated copies of it. The ILO’s 10th African Regional Meeting (Dec. 2003) saw workers’ and employers’ organizations from African member States

working together to adopt a resolution on the role of social dialogue in addressing HIV/AIDS in the world of work. In 2005 there was the joint IOE/ICFTU statement at the International Labour Conference, as well as a series of consultations to assist national action plans. To date, the areas identified for joint action included. Capacity building, networking, lobbying and shared campaigns, enhanced social dialogue at all levels and in all institutions having impact on the world of work. Yet, in Mr. Mwamadzingo's opinion, difficult areas remained: legally binding provisions where cost implications were paramount, collective bargaining especially in relation to insurance and providing treatment, joint resource mobilization, monitoring and evaluation of measures taken, and antagonistic tendencies of some foreign investors, such as in export processing zones (EPZs) where testing was mandatory for any training over 6 months' duration.

The Q&A session raised issues of general employer-worker workplace cooperation as well as many examples of successful solutions, which bore witness to the Code's insistence on bilateral and tripartite social dialogue to fight the epidemic. Some worker participants bemoaned the reluctance to enter into collective bargaining (Botswana, Malawi), others regretted the defunct national dialogue machinery (Zimbabwe). Yet others noted that divisions within the trade union movement itself had held back joint efforts to fight HIV/AIDS (Lesotho). Good practices included "drop-in centres" with part-time medical doctors, and having model CBAs available to assist parties to negotiate appropriate clauses.

Several employer participants shared successful initiatives, like the Association of Lesotho Employers' commitment of 10% of its budget to fighting HIV/AIDS. Yet members found it difficult to pay subscriptions and budgets were always under threat; and what could be done for the huge informal economy? ALE's excellent work was recognized by its holding of the Chair of the National AIDS Council. Nigeria's NECA agreed that getting funding for HIV was difficult, yet that organization had managed to grasp the attention of certain donors and had produced a number of highly popular campaign materials: Soon there would be an "Employers Manual on how to Manage HIV/AIDS at the workplace". Ethiopia's EEF participated actively in national social dialogue bodies including the Labour Advisory Board which had influence on decisions crucial to workplace productivity and industrial peace. Botswana's BOCCIM also engaged in activities on behalf of its members. Malawi ECAM's hard work with the national unions to arrive at a Workplace Policy was stymied while awaiting adoption of the National HIV/AIDS Policy, but its members were nevertheless keen to see the promotion of corporate social responsibility (CSR) in this area. Some multinationals had introduced ARVs for staff, but the large informal economy and the unemployed had little hope for such assistance; there was little link up to government health programmes. This lively exchange of experiences appeared to inspire several participants for further action back home.

Some judge participants wondered why, if mandatory, non-voluntary testing was being carried out in certain EPZs, why did not the social partners complain through the conciliation and arbitration mechanisms, on to the labour courts? Would employers' and workers' national organizations join together to bring joint test cases? Or class actions? Answers varied. Some considered it better to push for legal reform or negotiated improvements through CBAs first; some thought that EPZs needed some flexibility to attract foreign investment but should nevertheless respect the legal

framework of the host country; others saw the issue as one of weak labour administrations, where inspectors often were persuaded not even to attempt to enter EPZs (evidenced in some textile enterprises). In summary, strong and independent social partners had a better chance of protecting their members' rights; they should be aware of skilled in using the whole gamut of measures to fight HIV/AIDS. Seminars such as this, where strategies could be compared and evaluated were invaluable.

Module 8 – Mini “gender audits”: comparing national texts for gender and workplace sensitivity

This practicum involved 6 national groups in analysing texts from another country/SADC to ascertain how far they went in addressing gender issues (not only substantive provisions, but language and tone) and their appropriate strategies for involving workers' and employers' organizations. The results were as follows:

Group	Gender awareness?	Workplace strategy/ role for social partners?	Good practice worth highlighting?
1: South African Code of Good Practice under the Employment Equity Act	√	√	Coverage of discrimination; care with wording (he/she; equity); reasonable accommodation; costs analyses
2: Namibia's Guidelines for implementing the national AIDS Code	× (but refers to Constitution)	√	Affirmative action in nominations to various boards
3: SADC Code	×	√	Basic principles; no testing for training
4: Zimbabwe's S.I. 202 of 1998 Labour Relations (HIV/AIDS) Regulations	×	√	Sanctions
5: Botswana's Code of Good Practice: HIV/AIDS & Employment	√	√	5 sections devoted to workers & employers
6: Ethiopia's Labour Proclamation	√ (but refers to « sex » only)	√	Gender mainstreamed

Module 9 – Legal & procedural issues relevant to complaints concerning HIV/AIDS in the world of work

Ms Bhoola's presentation covered confidentiality, procedural issues, locus standi of independent contractors, representation including legal aid and pro bono legal practitioner possibilities, in-court practices such as using affidavits and control of badgering of witnesses, expert evidence, burden of proof and remedies/sanctions. She stressed that, despite some relatively well-known cases that were milestones in fighting HIV-based discrimination (such as the Constitutional Court case *Hoffmann v. SA Air (2000) 21 ILJ 2357 (CC)*), stigma still surrounded HIV infection, especially in the world of work. In South Africa, some innovations on the statute side included: new Guidelines under the Occupational health & Safety Act of 1993 explaining how to claim for occupational HIV infection; Medical Schemes Act of 1998 which prohibited registered medical scheme from unfairly discriminating by refusing to provide minimum cover for HIV/AIDS. And on the common law side: protection of confidentiality extended to informal (golf course game) disclosure of HIV status (the High Court case *Vuuren v. Kruger 1993 (4) SA 842 (A)*); confidentiality extended where HIV status indirectly revealed in a book (the *Patricia de Lille biography case (2005) Case No.02/24948*, on appeal). Appropriate relief had to be based on the facts, balance the interests of the different parties, redress the wrong committed, deter future violations, be an order/award/direction that could be complied with and one that was fair to all who might be affected by it. Examples included the Namibian Labour Court case used in the seminar, where the employer was ordered to test the applicant and offer him employment if the CD count and viral load were acceptable for that particular job; the order to remove copies of the offending biography from book sales and compensation in the *de Lille* case; and the order to reinstate with 4 months' back pay in the BIC case *Diau v. Botswana Building Society Case No. IC 50/2003*.

The participants had a rich exchange on remedies. In some jurisdictions, reinstatement was automatic if a violation was found (Ethiopia, Malawi). In Lesotho, the Department for Dispute Prevention and Resolution (DDPR) could award damages, like the Labour Court, so parties risked forum shopping. On representation, lawyers were excluded from the DDPR but retained their role in the labour Court. In Zimbabwe and South Africa there was a full range of appropriate orders available covering reinstatement, return to another post, back pay, compensation for loss, damages, orders regarding undertaking of training and workplace policies and punitive damages. No one was in favour of criminalizing HIV-related offences in the workplace, and wanted to know which ILO Conventions required such penalties.

However, some participants returned to the discussion of the employers right to know, as well as the fact that workplaces were not hospices. Even when employers understood the progressive nature of the disease, was it fair to shift the State's responsibility for care and support of HIV+ persons to the private sector by requiring reinstatement? What interesting solutions existed in African countries to help off-set the cost of keeping a progressively sicker and sicker worker on the job, and accommodating the enterprise around the needs of that person? How were social security reforms handling the challenge of HIV treatment? Several participants noted that industrial tribunal and labour court judgements were often appealed and overturned on the issue of proportionality of the award. Comments were also strong

on the varying approaches of specialised labour jurisdictions and High Courts – this seminar should be repeated for High Court judges as well.

All agreed on the courts' discretion to issue name suppression orders if a complainant so requested. In case complainants were ignorant of such possibilities, other judicial officers could routinely offer this information at the time of lodging. Likewise, all agreed on the courts' discretion to accelerate conciliations and hearings to accommodate sick or dying complainants.

Module 10 – Dispute prevention & dispute resolution (ADR)

Mr. Matthewson outlined the obstacles to dispute settlement, modern approaches including prevention, characteristics of effective systems and stressed the value of alternative dispute resolution (ADR). The extensive list of typical obstacles to the effective settlement of labour disputes rang true with all participants, especially the employers and workers. Usually, parties to a dispute could use avoidance, power/force, consensus or rely on rights based on some independent standard (like a labour law) to settle the matter for them. The most effective system was one which favoured consensus and a win-win approach. In such a system there were many styles: conciliation/mediation, negotiation, joint problem solving, responsibility by objectives, the use of facilitation, fact-finding, arbitration, and recourse to adjudication through tribunals and courts. Hybrid processes included Med-Arb for out-of-court settlements, Arb-Med and advisory arbitration. In some jurisdictions the various stages were compulsory, in others, voluntary. The overall value of ADR rested on the fact that it

- focussed on interests, then rights, then power
- empowered the social partners
- was rooted in history
- demonstrated fairness and empathy
- ensured speedy settlement
- sought settlement at the source
- was credible for enforcement
- reduced the outbreak of disputes by encouraging dialogue, educating, targeting problem issues for special attention and building relationships
- offered a seamless and integrated method

Participants agreed with Mr. Matthewson that the common themes in debates over labour disputes in recent times involved their over-legalization. The introduction of Codes of Good Practice (including those devoted to handling HIV/AIDS in employment as used in this seminar) was a big step forward for a number of SADC countries; East and West African jurisdictions were looking at such experiences too. And yet many participants believed that parties to a dispute preferred a court decision, not only for its finality, but also because society was deeply attached to the rule of law after years of repressive regimes. The low level of confidence in labour administration systems, including conciliation services, was often behind this attitude. The ILO's various technical cooperation projects - such as Improving Labour Systems in Southern Africa/ILSSA - had recognized the dire need for capacity building and had carried out top-class training and professional upgrading for conciliators, mediators and arbitrators in Botswana, Lesotho, Malawi, Namibia, Swaziland and Zambia. Other recently concluded programmes had also invested in local expertise for ADR,

such as the Post-Graduate Diploma in Conflict Resolution offered jointly by the Universities of Namibia, Cape Town and Zimbabwe. The various labour law reforms in southern African countries, with ILO assistance, had helped create fresh dispute prevention and resolution bodies. They were often styled on South Africa's Commission for Conciliation, Mediation and Arbitration; participants were familiar with the success of such institutions, which had gained the confidence of workers and employers. Such bodies had reduced the workload on tribunals and courts, and were also sensitive to the HIV/AIDS impact in the cases lodged with them.

Evaluation and closing

All 23 participants completed an Evaluation Questionnaire. On a scale of 1 (poor) to 4 (excellent in all respects), 11 replied "excellent", 11 replied "very good" & one rated the seminar as "good" (citing logistics issues). Regarding learning methodology, all respondents found the practicums, especially the moot court exercises, to be useful and enjoyable; a small number specifically requested more moot court exercises in future seminars. In the comments section, several called for a follow-up training next year, with or as a similar activity only for High Court/Appeal Courts which often overturn labour courts' decisions related to HIV. Three said more time was needed as the programme was too intensive. Generally, the atmosphere during the seminar had been warm and highly participatory, thus providing an excellent enabling environment for achieving its objectives. The participants also completed a baseline survey/multiple choice questionnaire so that the programme managers can track use of the knowledge gained over time. In summary, the participants left better informed about HIV/AIDS and the world of work and more strongly committed to making their labour justice systems work in favour of mitigating the effects of the epidemic.

At the conclusion of the seminar the Botswana Industrial Court delegation, in the name of all participants, thanked the ILO team for its hard work and commitment to providing assistance to English-speaking Africa for improving laws and the application of legislation in the fight against HIV/AIDS in the workplace. Ms Hodges, on behalf of the local Office, resource persons and DIALOGUE Department thanked all present for their hard work, made possible by the Swedish Government's solid commitment to mitigating the effects of the epidemic in Africa, as demonstrated by this Programme. The ILO was pleased that the participants had enjoyed the meeting and looked forward to seeing Industrial Tribunal and Labour Court judgements the richer for using ILS and the 2001 Code of Practice when faced with HIV-related cases. She concluded by returning to the list of "Participants' Expectation" list and checked that, not only had the purpose of the seminar had been achieved, but that the expectations had been fulfilled. Participants all agreed.

Annex A

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INTERNATIONAL LABOUR OFFICE PROGRAMME



Project to mitigate the impact of HIV/AIDS in sub-Saharan Africa through enhanced compliance with the legal framework: Southern African Subregional Seminar on HIV/AIDS and Employment Issues for Labour Courts (RAF/05/59/SID)

(Hotel Sheraton, Pretoria, South Africa, 15-18 May 2006)
Botswana, Ethiopia, Lesotho, Malawi, Nigeria, South Africa, Zimbabwe

Time	MONDAY, day 1	TUESDAY, day 2	WEDNESDAY, day 3	THURSDAY, day 4
09h00	<p>OPENING & ORIENTATION GENERAL WELCOME <i>Ms Judica Amri-Makhetha, Director, ILO-Pretoria (read by Mr. Mwamadzingo)</i></p> <p><u>KEYNOTE ADDRESS</u> <i>The Hon. R. Zondo, Judge President of SA Labour Appeals Court</i></p> <p><u>FROM ILO HQ</u> <i>Ms Jane Hodges, Department of Social Dialogue, Labour Law and Administration, ILO-Geneva</i></p> <p><u>PRACTICAL ARRANGEMENTS</u> Seminar objectives, documentation and methodology Presentation of Participants & resource persons</p>	<p><u>HIV/AIDS IN SUB-SAHARAN AFRICA – THE LATEST DATA & ELIMINATING THE MYTHS</u></p> <p><i>Dr. Mugabe, Country Director for South Africa, UNAIDS</i></p>	<p><u>THE GENDER DIMENSION OF HIV/AIDS & THE WORLD OF WORK</u></p> <p><i>GENDER KNOWLEDGE QUIZ POWERPOINT PRESENTATION</i></p> <p><i>Ms Nyamukapa, Resource person, Zimbabwe</i></p>	<p><u>SPECIAL PROCEDURAL ISSUES RELATING TO COMPLAINTS CONCERNING HIV/AIDS</u></p> <ol style="list-style-type: none"> 1. Confidentiality of evidence 2. Hearing issues, including non disclosure of names etc. 3. Expert evidence, especially from the medical profession 4. Relevant rules/bench advice on cross examination 5. Burden of proof issues etc. <p><i>Ms Bhoola, Resource person, SA</i></p>
10h30				
10h30-11h00	<u>REFRESHMENTS</u>	<u>REFRESHMENTS</u>	<u>REFRESHMENTS</u>	<u>REFRESHMENTS</u>

11h00 - 12h30	<u>GENERAL PRESENTATION OF THE ILO. STANDARD-SETTING AND INTERNATIONAL LABOUR STANDARDS (ILS) RELEVANT TO HIV/AIDS</u> Ms C. Balima, SRO-Harare	<u>GOOD PRACTICE IN NATIONAL LEGISLATION – CASE STUDIES OF BOTSWANA & LESOTHO</u> Mr. L. Mandoro, SRO-Harare	<u>THE GENDER DIMENSION OF HIV/AIDS & THE WORLD OF WORK (CONT'D)</u> Ms Nyamukapa	<u>DISCUSSION BY EACH JUDGE PRESIDENT OF PROCEDURAL ISSUES</u> Ms Bhoola
12h30-14h00	<u>LUNCH</u>	<u>LUNCH</u>	<u>LUNCH</u>	<u>LUNCH</u>
14h00 - 15h30	<u>NATIONAL INTEGRATION OF ILS: CONSTITUTIONAL FRAMEWORKS AND LEGAL TRADITIONS:</u> <i>Roundtable of existing systems of incorporation of ILS within national legal frameworks and implications for judicial use – Current experiences of Labour Courts and tribunals on HIV/AIDS</i> Ms C. Balima	<u>PRACTICUM No.1</u> <i>Moot Court exercise: 2 groups examine facts of 2 'real' cases and write up their decisions</i> Ms Hodges	<u>TRIPARTITE PANEL ON WORKPLACE STIGMA & DISCRIMINATION BASED ON HIV/AIDS</u> <i>The role of workers' & employers' organisations</i> Mr. Mwamadzingo, ILO-Pretoria	<u>ADR TOOLS FOR ADJUDICATORS & THEIR RELEVANCE TO HIV/AIDS</u> Mr. G. Matthewson, Chief Technical Adviser, ILSSA Project based in ILO-Pretoria <u>EVALUATION & CLOSING</u> Ms Hodges
15h30-16h00	<u>REFRESHMENTS</u>	<u>REFRESHMENTS</u>	<u>REFRESHMENTS GROUP PHOTO</u>	<u>REFRESHMENTS</u>
15h00 - 17h30	<i>Roundtable cont. review of best practices</i> <u>ILO'S CODE OF PRACTICE FOR LABOUR JUDGES & MAGISTRATES</u> Ms Hodges	<i>Moot Court exercise (cont'd) : Plenary presentations followed by revelation of the original Court decisions</i> Ms Hodges	<u>PRACTICUM No.2</u> <i>Case studies: 6 groups examine texts of 6 HIV/AIDS labour laws from point of view of gender & workplace sensitivity.Plenary report back & debate</i> Ms Hodges & Ms Nyamukapa	Departures
18h30	Welcome Reception	-	-	