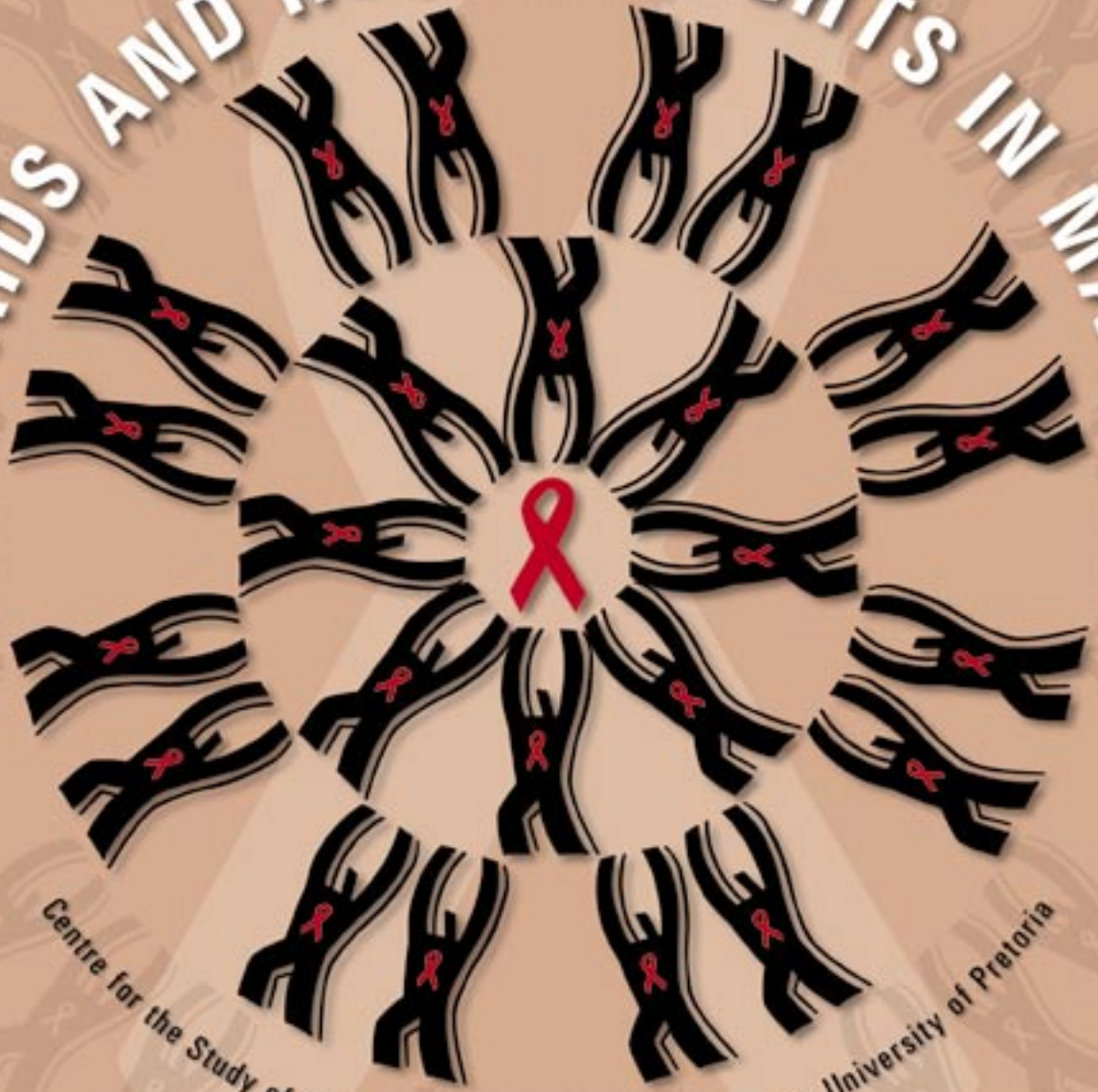
HIV/AIDS AND HUMAN RIGHTS IN MALAWI



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1. INTRODUCTION

This country report on HIV/AIDS and human rights in Malawi is the result of a one-year joint project between the Centre for the Study of AIDS and the Centre for Human Rights, both based at the University of Pretoria, South Africa. The research project was made possible through funds provided by the Open Society Foundation. This report is one of a series of eight reports focusing on HIV/AIDS and human rights in the following countries within the Southern African Development Community (SADC): Botswana, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. These countries have some of the highest and fastest growing rates of HIV/AIDS infection in the world, with the number of reported cases of HIV infection having tripled since the mid-1980s.

This research project was inspired by the need to develop a new approach to the HIV/AIDS epidemic in the SADC, an approach that is rights-based and that guarantees basic human rights to all people living with or affected by HIV/AIDS in the region. The study was guided by the document *HIV/AIDS and Human Rights – International Guidelines*[1] of 1996, adopted by UNAIDS and the Office of the United Nations High Commissioner for Human Rights. The Foreword of these *Guidelines* declares:

> "In the context of HIV/AIDS, an environment in which human rights are respected ensures that vulnerability to HIV/AIDS is reduced, those infected with and affected by HIV/AIDS live a life of dignity without discrimination and the personal and societal impact of HIV infection is alleviated."[2]

The aim of this research report, within the *SADC HIV/AIDS Framework for 2000-2004*, is to assist decision-makers to make informed policy choices for individual SADC countries. It is also intended for legislators, the judiciary, members of non-governmental organisations and people living with or affected by HIV/AIDS. All of these groups need: firstly, to be informed about those human rights in the context of HIV/AIDS that are already protected within their countries; secondly, to be able to identify areas where there is a gap and a need to lobby for change; and finally, to initiate change in an effort to move towards a rights-based approach to HIV/AIDS.

This report is a summary of national HIV/AIDS policies, strategic frameworks, legislation, guidelines and court cases in Malawi as they relate to HIV/AIDS and human rights. A national consultant in Malawi collected the relevant documents, answered a questionnaire that was developed to structure the research, and commented on the final report.[3] This report begins by briefly sketching the HIV/AIDS background for SADC and Malawi, through listing some critical statistics. The report then provides an analysis of the most important international, regional and SADC principles for HIV/AIDS and human rights, providing an overall framework against which the country report should be seen. The country report is a summary of the legal and policy framework for the protection of the human rights of those living with or affected by HIV/AIDS in Malawi, and addresses areas such as labour, health, gender, children, prisons and criminal law. This is followed by a concluding chapter with some recommendations regarding moving towards a rights-based approach to HIV/AIDS in the SADC.

It needs to be emphasised that this study focuses on the legal framework alone and does not set out to establish empirically the extent to which the respective governments are implementing the provisions in place – that is beyond the scope of this study and will require further research. Furthermore, while all efforts have been made to ensure that the information presented is reliable and up-to-date as at the end of 2003, the study's authors do not accept any responsibility for any errors or omissions in the country reports.

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1 Available at: http://www.unhchr.ch/hiv/guidelines.htm

2 The Foreword was written by Peter Piot, Executive Director of UNAIDS, and Mary Robinson, the former United Nations High Commissioner for Human Rights.

3 Shenard Mazengera, LLB (Malawi), LLM (University of Pretoria)

2. BACKGROUND

Malawi gained independence from Britain in 1964. However, multi-party elections were only held almost 30 years later in 1994. Malawi is a landlocked country sharing its borders with Mozambique, Tanzania and Zambia. Malawi has one of the highest HIV infection rates in the SADC region and in the world. Since the first case of AIDS was identified in Malawi in 1985, epidemiological data continues to show a drastic increase in infection.

The tables below provide statistical information on all the SADC countries, with the statistics for Malawi highlighted.

2.1 Geographical size and population

The following two tables illustrate the size and population of the SADC countries in this study:[4]

Geographical size			
Botswana	581 730 km^2	South Africa	1 220 088 km^2
Malawi	**118 484 km^2**	Swaziland	17 365 km^2
Mozambique	801 590 km^2	Zambia	752 614 km^2
Namibia	824 268 km^2	Zimbabwe	390 759 km^2

Population size		
Country	**Total population**	**Adult population**
Botswana	1 564 000	762 000
Malawi	**11 572 000**	**5 118 000**
Mozambique	18 644 000	8 511 000
Namibia	1 788 000	820 000
South Africa	43 792 000	23 666 000
Swaziland	933 000	450 000
Zambia	10 649 000	4 740 000
Zimbabwe	12 652 000	5 972 000

2.2 First reported instances of HIV infection[5]

Country	First reporting year	Number of cases
Botswana[6]	1985	3
Malawi	**1985**	**17**
Mozambique	1986	1
Namibia[7]	1986	1
South Africa	1982	2
Swaziland	1987	1
Zambia[8]	1984	1
Zimbabwe	1987	119

4 Data from *Africa Fact Sheet*, published by African Institute of South Africa, July 1997.

5 According to the *Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections (Update 2002)*, compiled by UNAIDS, UNICEF and WHO. Available at http://unaids.org/hivaidsinfo/statistics/fact_sheets/all_countries_en.html#N

6 Doctors in Princess Marina Hospital in Gaborone documented the first HIV/AIDS case in 1985.

7 Reported by UNAIDS in the *International Partnership against AIDS in Africa - Namibia Country Visit Report*, 1 May-4 June 1999.

8 Reported in the *National HIV/AIDS/STD/TB Policy* published in October 2001 by the Zambian Ministry of Health.

2.3 HIV prevalence rates

Currently 15% of the adult population in Malawi is living with HIV/AIDS.

The tables that follow show the HIV/AIDS prevalence rates in Malawi and seven other SADC countries that formed part of this study. The figures are provided by the UNAIDS/WHO Working Group on Global HIV/AIDS and STI Surveillance, which works in close collaboration with national AIDS programmes.[9] Statistics are also obtained from the *Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections, 2002 Update*, issued by UNAIDS, UNICEF and the WHO.[10]

Population with AIDS

Country	Adults and children	Adults (15-49 years)	Adults (%)	Women (15-49 years)	Children (0-14 years)
Botswana	333 000	300 000	39,9%	170 000	28 000
Malawi	**850 000**	**780 000**	**15%**	**440 000**	**65 000**
Mozambique	1 100 000	1 000 000	13%	630 000	80 000
Namibia	230 000	200 000	22,5%	110 000	30 000
South Africa	5 000 000	4 700 000	20,1%	2 700 000	250 000
Swaziland	170 000	150 000	33,4%	89 000	14 000
Zambia	1 200 000	1 000 000	21,5%	690 000	150 000
Zimbabwe	2 300 000	2 000 000	33,7%	1 200 000	240 000

HIV prevalence rates in young people aged 15-24 years

Country	Female		Male	
	Low estimate	High estimate	Low estimate	High estimate
Botswana	29,99%	44,98%	12,86%	19,29%
Malawi	**11,91%**	**17,87%**	**5,08%**	**7,62%**
Mozambique	10,56%	18,78%	4,41%	7,84%
Namibia	19,43%	29,15%	8,88%	13,32%
South Africa	20,51%	30,76%	8,53%	12,79%
Swaziland	31,59%	47,38%	12,18%	18,27%
Zambia	16,78%	26,18%	6,45%	9,68%
Zimbabwe	26,40%	39,61%	9,9%	14,86%

Tuberculosis (TB) infection rates

Country	TB prevalence for the year 2000 (unless otherwise stated)
Botswana	8 649[11]
Malawi	**22 570**
Mozambique	Unknown
Namibia	10 497
South Africa	One sentinel site (Port Shepstone) outside major urban areas: 52% minimum, 52% median, 52% maximum.
Swaziland	2 143
Zambia	161 056. The average tuberculosis rate between 1964 and 1984 remained constant at 100 per 100 000 people. The rate of TB infections increased dramatically to nearly five-fold to over 500 per 100 000 people due to the impact of HIV/AIDS in 1996.[12] TB co-infection has resulted in an increased mortality rate of TB patients on treatment by over 15%.[13]
Zimbabwe	51 805

9 The estimates are from the *Table of Country-specific HIV/AIDS Estimates and Data, End 2001*, available at www.unaids.org/barcelona/presskit/barcelona%20reports/table.html. The estimates produced by UNAIDS/WHO draw on advice from the UNAIDS Reference Group on HIV/AIDS Estimates, Modelling and Projections. A measure of uncertainty applies to all estimates, depending on the reliability of the data available. Most of the data are from routine sentinel surveillance. For a detailed description of the general methodology used to produce the country-specific estimates, see Annexure 1 at http://www.unaids.org/barcelona/presskit/barcelona%20report/annex1.html.

10 Available at: http://www.unaids.org/hivaidsinfo/statistics/fact_sheets/all_countries_en.html#N. The methodology used in updating and compiling these country-specific estimates is summarised in the publication as follows: "In 2001 and during the first quarter of 2002, UNAIDS and WHO worked closely with national governments and research institutions to recalculate current estimates of people living with HIV/AIDS. These calculations are based on the previously published estimates for 1997 and 1999 and recent trends in HIV/AIDS surveillance in various populations. A methodology developed in collaboration with an international group of experts was used to calculate the new estimates on prevalence and incidence of HIV and AIDS deaths, as well as the number of children infected through mother-to-child transmission of HIV. Different approaches were used to estimate HIV prevalence in countries with low-level, concentrated or generalised epidemics. The current estimates do not claim to be an exact count of infections. Rather, they use a methodology that has thus far proved accurate in producing estimates which give a good indication of the magnitude of the epidemic in individual countries. However, these estimates are constantly being revised as countries improve their surveillance and collect more information."

11 Southern African Development Community *Health Annual Progress Report* 2000-2001.

12 *National HIV/AIDS/STD/TB Policy* published in October 2001 by the Ministry of Health of the Republic of Zambia. See par 1.2.3.

13 Ibid, par 1.2.4.

Number of pregnant mothers who are HIV positive								
Country	HIV prevalence in antenatal clinics in urban areas (%)				HIV prevalence in antenatal clinics outside major urban areas (%)			
	Year	Median	Min	Max	Year	Median	Min	Max
Botswana	2001	44,9%	39,1%	55,8%	2001	34,8%	25,8%	50,9%
Malawi	**2001**	**20,1%**	**18,6%**	**28,5%**	**2001**	**16,1%**	**4,5%**	**35,8%**
Mozambique	2000	14,4%	13,0%	15,7%	2000	10,6%	4,0%	31,2%
Namibia	2000	29,6%	28,2%	31,0%	2000	17,3%	6,6%	32,5%
South Africa	2000	24,3%	8,7%	36,2%	2000	22,9%	11,2%	29,7%
Swaziland	2000	32,3%	32,3%	32,3%	2000	34,5%	27,0%	41,0%
Zambia	2001	30,7%	30,7%	30,7%	1998	13,0%	5,2%	31,0%
Zimbabwe	2000	31,1%	30,0%	33,5%	2000	33,2%	13,0%	70,7%

According to the *2002 Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections*, the highest prevalence of HIV infection was recorded amongst women aged 25-29 years.

2.4 AIDS deaths in adults and children in 2001

Botswana	**26 000**	South Africa	360 000
Malawi	**80 000**	Swaziland	12 000
Mozambique	60 000	Zambia	120 000
Namibia	13 000	Zimbabwe	200 000

2.5 Number of HIV/AIDS orphans (up to 14 years) by end of 2001

Botswana	69 000	South Africa	660 000
Malawi	**470 000**	Swaziland	35 000
Mozambique	420 000	Zambia	570 000
Namibia	47 000	Zimbabwe	780 000

3. OVERVIEW OF APPLICABLE INTERNATIONAL, REGIONAL AND SADC LEGAL NORMS

This section examines the international, regional and SADC framework for the protection of human rights, as it relates to HIV/AIDS, to form the backdrop against which the national framework of Malawi should be considered. The international and regional human rights treaties examined do not include any HIV/AIDS-specific provisions. Nevertheless, a number of articles can be highlighted in the various treaties as they indirectly impact on people living with HIV/AIDS or their families. For instance, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* affirms that state parties to the *Covenant* should recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[14] The *Covenant* then continues that state parties, in order to achieve this right, should prevent, treat and control epidemic, endemic, occupational and other diseases.[15] These provisions would clearly apply to HIV/AIDS.

This section also briefly summarises the state reports submitted by Botswana in terms of its obligations under the various treaties that it has ratified, with a specific focus on HIV/AIDS reporting and recommendations made by the treaty monitoring bodies in relation to HIV/AIDS.[16]

Finally, SADC and Organisation of African Unity (OAU)/African Union (AU) HIV/AIDS instruments and policies are discussed, followed by a short discussion on *HIV/AIDS and Human Rights – International Guidelines*, issued by UNAIDS and the Office of the United Nations High Commissioner for Human Rights.

3.1 Applicable international legal norms

There are no HIV/AIDS-specific treaties within the international legal framework. The *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* both came into force in 1976, about four years before the first HIV/AIDS case was documented. Nevertheless, specific provisions of these treaties may be applied to various legal situations affecting people living with or affected by HIV/AIDS. The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* is similar, having been adopted in the early days of the epidemic. The *Convention on the Rights of the Child (CRC)*, however, was adopted in 1989, nearly ten years after the first reported case of HIV/AIDS. The fact that in the CRC no mention is made of HIV/AIDS with respect to children can be viewed as a missed opportunity to develop policy for this vulnerable group.

The status of these treaties is as follows (all dates denote ratification or accession, except when marked with 's,' in which case the treaty has only been signed by the state party):[17]

Country	ICCPR	ICCPR First Optional Protocol	ICESCR	CEDAW	CEDAW Optional Protocol	CRC
Botswana	08/01/2000			12/09/1996		13/04/1995
Malawi	**22/03/1994**	**11/09/1996**	**22/03/1994**	**11/04/1987**	**7/09/2000[s]**	**01/02/1991**
Mozambique	21/10/1993			16/05/1997		26/05/1994
Namibia	28/02/1995	28/02/1995	28/02/1995	23/12/1992	22/12/2000	30/10/1990

14 Article 12(1) of the *ICESCR*

15 Article 12(2)(c).

16 State reporting is a useful tool to monitor a state party's progress in implementing the various provisions of a treaty. Usually, states submit a report shortly after ratifying a treaty (initial report) and thereafter the state must report to the monitoring body every two years. Unfortunately, most African states are behind in submitting reports internationally and regionally.

17 Status of ratification of international human rights treaties as of 02 November 2003 provided by the Office of the United Nations High Commissioner for Human Rights. Available at www.unhchr.ch/pdf/report.pdf. Date accessed: 24 November 2003.

Country	ICCPR	ICCPR First Optional Protocol	ICESCR	CEDAW	CEDAW Optional Protocol	CRC
South Africa	10/03/1999	28/11/2002	03/10/1994[5]	14/01/1996		16/07/1995
Swaziland						06/10/1995
Zambia	10/07/1984	10/07/1984	10/07/1984	21/07/1985		05/01/1992
Zimbabwe	13/08/1991		13/08/1991	12/06/1991		11/10/1990

States parties submit reports to the various treaty monitoring bodies that are established in terms of the treaties. These reports may include details of measures taken by the state to address the issue of HIV/AIDS, but it is not compulsory to report in this form. Treaty bodies in turn examine the state reports and issue Concluding Observations.

In general, international treaties do not have a direct impact on the domestic legal systems of specific countries. These treaties can – and should – guide legislators to draft national laws to fulfil their obligations and to incorporate the treaty rights into domestic legislation. However, it will become clear in Section Four that this has seldom been the case.

Various provisions in the selected treaties that are particularly relevant for HIV/AIDS are described below.

International Covenant on Civil and Political Rights (ICCPR)

- *Article 2*:

  (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

  (3) Each State Party to the present Covenant undertakes:

  (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

  (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

  (c) To ensure that competent authorities shall enforce such remedies when granted.
- *Article 6*: (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- *Article 7*: No one shall be subjected to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
- *Article 17*:

  (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

  (2) Everyone has the right to protection of the law against such interference or attacks.
- *Article 19*: (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the form of art, or through any other media of his choice.
- *Article 22*: Everyone shall have the right to freedom of association with others ...
- *Article 24*: (1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
- *Article 26*: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

First Optional Protocol to the International Covenant on Civil and Political Rights

- *Article 1*: A State Party to the Covenant that becomes a Party to the present Protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received

by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- *Article 2*:
  (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
  (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- *Article 6*: (1) The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
- *Article 7*: The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure in particular: ... (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence ...
- *Article 9*: The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.
- *Article 10*: The States Parties to the present Covenant recognise that: ...(3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.
- *Article 11*: (1) The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions ...
- *Article 12*:
  (1) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
  (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
- *Article 13*: (1) The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms ...
- *Article 15*: (1) The States Parties to the present Covenant recognise the right of everyone: ... (b) To enjoy the benefits of scientific progress and its applications ...

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

- *Article 1*: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
- *Article 2*: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
  (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law

and other appropriate means, the practical realisation of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing law, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions with constitute discrimination against women.

- *Article 10*: States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: ... (f) The reduction of female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely; (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.
- *Article 11*: (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; ... (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
- *Article 12*:

  (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

  (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.
- *Article 14*: (2) States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: ... (b) To have access to adequate health care facilities, including information, counselling and services in family planning; (c) To benefit directly from social security programmes; (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency; ... (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Optional Protocol to the Convention on the Elimination of Discrimination against Women

- *Article 1*: A State Party to the present Protocol ("State Party") recognises the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with Article 2.
- *Article 2*: Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party ...

Convention on the Rights of the Child (CRC)

- *Article 1*: For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.
- *Article 2*:

  (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

  (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, ex-

pressed opinions, or beliefs of the child's parents, legal guardians or family members.

- Article 3: (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
- *Article 6*:

  (1) States Parties recognise that every child has the inherent right to life.

  (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.
- *Article 13*: (1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
- *Article 15*: (1) States Parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly.
- *Article 16*:

  (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

  (2) The child has the right to the protection of the law against such interference or attacks.
- *Article 17*: States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health ...
- *Article 24*:

  (1) States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services;

  (2) States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (f) To develop preventive health care, guidance for parents and family planning education and services.

  (3) States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
- *Article 26*: (1) States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.
- *Article 27*: (1) States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
- *Article 28*: (1) States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
- *Article 33*: States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances ...
- *Article 34*: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.
- *Article 36*: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

3.2 State reporting

Under all treaties, States must report periodically to the Committee established under the treaty.

The Committee on the Rights of the Child considered the initial report of Malawi (CRC/C/8/Add.43), received on 1 August 2000, at its 765th and 766th meetings held on 24 January 2002.[18] In its report, Malawi reported the following in relation to children and HIV/AIDS:

1. Policy guidelines on orphans were adopted in 1991, as the number of orphans increased due to HIV/AIDS. The policy provides for the improvement of the social welfare, care and standard of living of orphans and other children in situations of disadvantage.
2. As part of its sectoral policies and programmes, Malawi has developed the Youth Participation and Reproductive Health Project. This project aims at providing non-formal education to out-of-school youth to enable them to gain some skills. The reproductive health component of the project facilitates the formation of *EDZI TOTO* (i.e. say "no" to AIDS) clubs within communities, where information on health issues related to HIV/AIDS is shared.
3. The *Orphan Care Policy* was put in place in response to an increasing number of HIV/AIDS orphans. The *Policy* encourages community based orphan care support (i.e. extended families, communities and community based organisations) as opposed to institutionalised orphanages. Orphanages are considered a last resort to the problem. Community-based care is considered to be in the best interests of the child and proper for the development of the child.
4. Malawi reported that orphans, destitute children and street children fall into the category of children referred to in Article 20 of the CRC, as children deprived of a family environment. The report noted that the situation of orphans was worsening due to the increasing numbers of deaths of adults, with HIV/AIDS being the main cause of the increase. Most of the orphans are being cared for by their extended families. However, with the increase in the number of orphans compounded by the acceleration of adult mortality and the deterioration of the economic situation, extended families are no longer able to take care of orphans.
5. The report further stated that the government, in collaboration with NGOs, has developed implementing programmes that aim at making a positive impact on child survival and development, such as the National AIDS Control Programme.
6. Malawi reported that about one third of children born of HIV-infected mothers are HIV positive. The key constraints to the survival of children are identified as a lack of financial resources, a lack of capacity to implement health programmes, cultural practices and HIV/AIDS.

The Committee on the Rights of the Child adopted Concluding Observations (CRC/C/15/Add.174) after considering Malawi's initial report, at its 777th meeting on 1 February 2002.[19] The following recommendations were made:

1. That Malawi strengthen its technical co-operation with, amongst others, UNAIDS.
2. While welcoming the adoption of the National Programme of Action for the Survival and Development of Children, and noting that the right to life is included in the *Constitution*, the Committee remained concerned that the programme had not been sufficiently implemented and that the impact of HIV/AIDS, mounting economic challenges and other socio-economic difficulties, as well as traditional practices and witchcraft, continued to threaten the right to life, survival and development of children within the country.
3. While noting the creation of an Orphan Care Programme in 1996, the creation of a National Task Force on Orphans, and the proposed *Bill on Wills and Inheritance*, the Committee expressed concern at the increasing number of children deprived of a family environment, notably due to the spread of HIV/AIDS. The Committee welcomed Malawi's policy of using institutional facilities as a last resort, but remained concerned that the role of the extended family is diminishing, that there is no legislation on foster care, and that the *Adoption of Children Act* does not fully take into consideration the best interests of the child and other relevant provisions of the CRC.
4. While noting the existence of the National AIDS Control Programme, the National Task Force on Orphans and the Orphan Care Programme, the Committee remained extremely

18 Malawi's initial report can be accessed at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.8.Add.43.En?Opendocument. Accessed: 19 September 2002.

19 Concluding Observation available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f1efcdb3678f0d60c1256b590057d86e?Opendocument

concerned at the high incidence and increasing prevalence of HIV/AIDS amongst adults and children and the resulting increasing number of children orphaned by HIV/AIDS. In this regard, the Committee noted concern at the lack of alternative care for these children. The Committee recommended that Malawi:

a. Increase its efforts to prevent HIV/AIDS and take into consideration the recommendations of the Committee adopted on its day of general discussion on children living in a world with HIV/AIDS, as well as the International Guidelines on HIV/AIDS and Human Rights adopted in 1996;
b. Urgently consider ways of minimising the impact upon children of the HIV/AIDS-related deaths of parents, teachers and others, in terms of children's reduced access to family life, to adoption, to emotional care and to education;
c. Involve children in formulating and implementing preventive and protective policies and programmes; and
d. Seek further technical assistance from, amongst others, UNAIDS.

3.3 Applicable regional legal norms[20]

The *African Charter on Human and Peoples' Rights (ACHPR)* was adopted in 1981 but makes no specific reference to HIV/AIDS. The *African Charter on the Rights and Welfare of the Child (ACRWC)* was adopted nearly ten years later, in 1990, but still does not include any reference to HIV/AIDS. It is only within the *Guidelines on State Reporting to the African Committee on the Rights and Welfare of the Child* that mention is made of HIV/AIDS. The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, which has been adopted but is not yet in force, mentions HIV/AIDS in a cursory manner.[20] This is very unfortunate, given the impact of HIV/AIDS on African women.

The status of these treaties in respect of the states under discussion is as follows (all dates denote ratification or accession, except when marked with 's,' in which case the treaty has only been signed by the state party):[21]

Country	ACHPR	ACRWC
Botswana	17 July 1986	
Malawi	**17 November 1989**	**16 September 1999**
Mozambique	22 February 1989	15July 1998
Namibia	30 July 1992	13 July 1999[s]
South Africa	09 July 1996	07 January 2000
Swaziland	15 September 1995	29 June 1992[s]
Zambia	19 January 1984	28 February 1992[s]
Zimbabwe	30 May 1986	19 January 1995

Excerpts from various provisions in the regional treaties that are particularly relevant for HIV/AIDS are listed below.

African Charter on Human and Peoples' Rights (ACHPR)

- *Article 2*: Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
- *Article 4*: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
- *Article 5*: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status ...
- *Article 6*: Every person shall have the right to liberty and to the security of his person ...
- *Article 9*:
  (1) Every individual shall have the right to receive information.
  (2) Every individual shall have the right to express and disseminate his opinions within the law.
- *Article 10*: (1) Every individual shall have the right to free association, provided that he abides by the law.
- *Article 11*: Every individual shall have the right to assemble freely with others. The exercise

20 Article 14(1) states that: "States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:...(d) the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS;..."

21 Status of ratification and signature of the *ACHPR* and *ACRWC* compiled by the University of Minnesota, Human Rights Library as of 1 January 2000. Available at www1.umn.edu/humanrts/instree/afchildratifications.htmland www1.umn.edu/humanrts/instree/ratz1afchr.htm. Accessed: 13 September 2002.

of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics, and rights and freedoms of others.

- *Article 12*: (1) Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
- *Article 15*: Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.
- *Article 16*:

  (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.

  (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.
- *Article 17*:

  (1) Every individual shall have the right to education.

  (2) Every individual may freely take part in the cultural life of his community.

  (3) The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.
- *Article 18*:

  (1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.

  (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

  (3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

  (4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.
- *Article 19*: All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.
- *Article 24*: All peoples shall have the right to a general satisfactory environment favourable to their development.

African Charter on the Rights and Welfare of the Child (ACRWC)

- *Article 3*: Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.
- *Article 4*: (1) In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
- *Article 5*: (1) Every child has an inherent right to life. This right shall be protected by law.
- *Article 8*: Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.
- *Article 10*: No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.
- *Article 11*:

  (1) Every child shall have the right to an education.

  (2) The education of the child shall be directed to: ... (h) the promotion of the child's understanding of primary health care.

  (3) States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular: ...(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
- *Article 14*:

  (1) Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.

  (2) State Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures: (a) to reduce infant and child mortality rate; (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) to ensure the provision of adequate nutrition and safe drinking water; (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;

(e) to ensure appropriate health care for expectant and nursing mothers; (f) to develop preventative health care and family life education and provision of service; (g) to integrate basic health service programmes in national development plans ...

- *Article 21*: (1) States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
- *Article 24*: State Parties which recognise the system of adoption shall ensure that the best interest of the child shall be the paramount consideration ...
- *Article 25*: (2) State Parties to the present Charter: (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include among others, foster placement, or placement in suitable institutions for the care of children;
- *Article 27*: States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:
  (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
  (b) the use of children in prostitution or other sexual practices;
  (c) the use of children in pornographic activities, performances and materials.
- *Article 28*: States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances ...

According to Article 43(1) of the *ACRWC*, state parties must undertake to submit to the African Committee of Experts of the Rights and Welfare of the Child, through the Chairperson of the Commission of the African Union, reports on the measures that have been adopted to give effect to the provisions of the *ACRWC*, and the progress made in the enjoyment of the rights guaranteed in the Charter. The *Guidelines* for reporting specify that the state parties should indicate what measures are in place for children in need of special protection, specifically in reference to AIDS orphans, in terms of Article 26 of the *Charter*.[22] States are also encouraged to provide specific statistical information and indicators relevant to children in need of special protection.[23] The first report under *ACRWC* is due within two years of the state's ratification of the *Charter*, and thereafter reports are due every third year. Unfortunately, not one of the eight countries in this study has submitted reports to date.

3.4 SADC framework for addressing HIV/AIDS

In September 1997, the SADC Council of Ministers adopted the first relevant document addressing HIV/AIDS-related issues, the *Code of HIV/AIDS and Employment in SADC*, as developed by the Employment and Labour Sector. The main objectives of the *Code* are to sensitise employers to the issue of employee rights and HIV/AIDS, and to provide a framework for states to consolidate national employment codes on HIV/AIDS-related issues. It addresses public sector employers, legislators, employees and trade unions.

In August 1999, the 14 member states adopted the *SADC Health Protocol*.[24] Article 10 specifically deals with HIV/AIDS and sexually transmitted diseases (STDs). The article urges states parties to harmonise policies and approaches for the prevention and management of HIV/AIDS and STDs, and to develop regional policies and plans that work towards an inter-sectoral approach to the epidemic.

In December 1999, the SADC HIV/AIDS Task Force adopted the vision document *A SADC Society with Reduced HIV/AIDS*. It was adopted to guide the work of the SADC in the development and implementation of a multi-sectoral *HIV/AIDS Framework for 2000-2004* (hereinafter referred to as the *Strategic Framework*). The *Strategic Framework* is in principle guided by Article 10 of the *SADC Health Protocol*; all SADC sectors agree to use their comparative advantages to address the needs of those sectors and the communities they serve, whether transport,

22 Par 21(g) of the (Adopted) *Guidelines for Initial Reports of State Parties* under the *ACRWC*.
23 Par 22.
24 *SADC Health Protocol*. Available at: http://196.36.153.56/doh/department/sadc/docs/protocol99.html.

mining, tourism, etc. One of the principles that has been acknowledged as important in the development of the *Strategic Framework* is the respect for the rights of individuals.[25]

The only sector in the *Strategic Framework* that specifically mentions stigmatisation and discrimination is the Human Resources Development. This sector aims to provide information to reduce stigma and to change attitudes by, amongst other initiatives, integrating HIV/AIDS education and life skills into school curricula across the region.[26]

In September 2000, the SADC Council of Ministers approved the *Health Sector Policy Framework Document*, as developed by the SADC Health Ministers.[31] A significant part of the programme focuses on HIV/AIDS and sexually transmitted diseases. One of the policy objectives in the programme, geared towards HIV/AIDS control, is to protect and promote the rights of individuals, in particular those living with or most vulnerable to HIV/AIDS.

A month prior to the adoption of the *Health Sector Policy Framework*, the SADC Health Ministers adopted *Principles to Guide Negotiations with Pharmaceutical Companies on Provision of Drugs for Treatment of HIV/AIDS-Related Conditions in SADC Countries*.[32] These principles focus on enabling SADC countries to make informed decisions in their negotiations with pharmaceutical companies and to consider factors such as sustainability, affordability, accessibility, appropriateness, acceptability and equity before accepting offers for free drugs or reduced prices on HIV/AIDS-related drugs.

In July 2003, the SADC Heads of Government signed the *SADC Declaration on HIV/AIDS*.[33] The *Declaration* affirms the commitment to address the pandemic and the issues relating to HIV/AIDS in the SADC region through multi-sectoral intervention. A new *SADC HIV/AIDS Strategic Framework and Programme of Action 2003-2007* was also issued.

3.5 Relevant OAU/AU resolutions on HIV/AIDS

Over the years, the Assembly of Heads of State and Government of the Organisation of African Unity (OAU, now called the African Union or AU) adopted a number of resolutions addressing the HIV/AIDS epidemic. Only those relevant to HIV/AIDS and human rights are discussed here.

In June 1994, the T*unis Declaration on AIDS and the Child in Africa* was adopted by the OAU at the Assembly of Heads of State and Government in Tunis, Tunisia.[30] The *Declaration* declares a commitment to: "Elaborate a national policy framework to guide and support appropriate responses to the needs of affected children covering social, legal, ethical, medical and human rights issues."[31]

In July 1996, at the Thirty-Second Ordinary Session of the Heads of State and Government of the OAU, a *Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa* was adopted by the Assembly.[32] The *Resolution* urged African leaders to implement those declarations and resolutions that had been adopted in the past, specifically referring to the *Tunis Declaration*.

On 27 April 2001, the Heads of State and Government gathered for a special summit devoted specifically to address the exceptional challenges of HIV/AIDS, tuberculosis and other related infectious diseases. This resulted in the *Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases*, and the *Abuja Framework for Action for the Fight against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases*, aimed at implementation of the principles set forth in the Abuja Declaration.[33]

In the *Abuja Declaration*, the Heads of State acknowledged that "stigma, silence, denial and discrimination against people living with HIV/AIDS increases the impact of the epidemic and constitutes a major barrier to an effective response to it."[34] The *Abuja Framework* conceptualises the

25 *Managing the impact of HIV/AIDS in SADC*, August 2000, at page 8. Available at: http://196/36/153/56/doh/department/sadc/docs.
26 Ibid, at p 28.
27 Available at: http://196.36.153.56/doh/department/sadc/docs/framework/html.
28 Available at: http://196.36.153.56/doh/department/sadc/docs/negotiate_principls.html.
29 Available at: http://www.sadc.int/index.php?lang=english&pth=legal/declarations/&page=declaration_on_HIV_AIDS
30 AHG/Decl 1 (XXX) 1994.
31 Par 2(1).
32 AHG/Res 247 (XXXII) 1996. Available at: http://www.onusida-aoc.org/Eng/Abuja%Declaration.html.
33 Available at: http://www.onusida-aoc.org/Eng/Abuja%20Declaration.htm.
34 Par 12.

commitments made in the *Abuja Declaration* into strategies followed by subsequent activities to be implemented by member states in collaboration with all stakeholders. The protection of human rights is recognised as one of the priority areas, and the following strategies are identified:

- develop a multi-sectoral national programme for awareness of and sensitivity to the negative impact of the pandemic on people, especially vulnerable groups;
- enact relevant legislation to protect the rights of people infected and affected by HIV/AIDS and TB;
- strengthen existing legislation to: (a) address human rights violations and gender inequities, and (b) respect and protect the rights of infected and affected people;
- harmonise approaches to human rights between nations for the whole continent; and
- assist women in taking appropriate decisions to protect themselves against HIV infection.

3.6 International guidelines on HIV/AIDS and human rights

In 1996 UNAIDS, in collaboration with the Office of the United Nations High Commissioner for Human Rights, adopted *HIV/AIDS and Human Rights – International Guidelines*. The *Guidelines* focus on three crucial areas: "(1) improvement of governmental capacity for acknowledging the government's responsibility for multi-sectoral co-ordination and accountability; (2) widespread reform of laws and legal support services, with a focus on anti-discrimination, protection of public health, and improvement of the status of women, children and marginalised groups; and (3) support for increased private sector and community participation in the response to HIV/AIDS, including building the capacity and responsibility of civil society to respond ethically and effectively."[35]

The *Guidelines* deal with the following human rights principles:

- *Guideline 1*: Encourage states to adopt a multi-sectoral approach through an effective national framework.
- *Guideline 2*: Enable community organisations to carry out activities in the field of ethics, human rights and law. Consult widely with such organisations in drafting all HIV policies.
- *Guideline 3*: Review and reform public health laws to adequately address HIV/AIDS.
- *Guideline 4*: Review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and address HIV/AIDS without targeting vulnerable groups.
- *Guideline 5*: Enact or strengthen anti-discrimination laws to protect vulnerable groups. Ensure privacy, confidentiality and ethics in research involving human subjects.
- *Revised Guideline 6*: Enact legislation to provide for the regulation of HIV-related goods, services and information in order to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. Ensure that all persons on a sustained and equal basis have access to quality goods, services and information for HIV/AIDS prevention, treatment, care and support, including anti-retroviral and other safe and effective medicines, diagnostics and related technologies for the treatment of HIV/AIDS and related opportunistic infections.[36]
- *Guideline 7*: Implement and support legal support services to educate people affected by HIV/AIDS about their rights, develop expertise on HIV-related legal issues and use means other than courts such as human rights commissions to protect the rights of people affected by HIV/AIDS.
- *Guideline 8*: States, together with communities, should promote an enabling and prejudice-free environment for women, children and other vulnerable groups.
- *Guideline 9*: Promote the distribution of creative education, training and media programmes designed to change attitudes of discrimination and stigmatisation around HIV/AIDS.
- *Guideline 10*: Translate human rights principles into codes of conduct with accompanying mechanisms to implement and enforce these codes.
- *Guideline 11*: States should ensure monitoring and enforcement mechanisms to guarantee and protect HIV-related human rights.
- *Guideline 12*: States should share experiences concerning HIV-related human rights issues at an international level and through UN agencies such as UNAIDS.

35 See Foreword in the *Guidelines*.

36 Guideline 6 was revised in 2002 and is available at: http://www.unhchr.ch/hiv/g6.pdf

4. LEGAL FRAMEWORK FOR THE PROTECTION OF HIV/AIDS AND HUMAN RIGHTS IN MALAWI

4.1 National legal system: General background

4.1.1 The form of government and the domestic legal system within the country

Malawi has been a constitutional democracy since 1994. It was previously a one-party dictatorial regime. In 1993, a referendum was held which changed the form of government from a single-party system to a multi-party system. A new *Constitution* was adopted in 1994. The *Constitution* is the supreme law of the country and any act of government or any law that is inconsistent with the provisions of the *Constitution* is declared invalid.[37] The Constitution binds the executive, legislative and judicial organs of the state.[38] Chapter 3 lists fundamental principles upon which the *Constitution* is founded whilst Chapter 4 guarantees specific human rights. It also establishes important bodies such as the Human Rights Commission, the Office of the Ombudsman and the Law Commission.

Malawi's legal system is largely based on English Common Law, with some influence of customary law. The Supreme Court is the highest court, followed by the High Court and the Magistrates' Court.

4.1.2 Human rights provisions within the National HIV/AIDS Strategic Framework and the National HIV/AIDS Policy

In October 1999, the Ministry of Health and Population published the *Malawi National HIV/AIDS Strategic Framework 2000-2004*. This was an attempt at a multi- sectoral national response and a move away from the almost exclusively bio-medical focus from previous Medium Term Plans.[39] The *Strategic Framework* highlighted economic, cultural, social, legal, gender and ethical factors related to HIV/AIDS. These are in turn analysed and presented in the *National Policy on HIV/AIDS*.

Some of the human rights principles guiding policy formulation and programme design are listed in Section 3.3 of the *Strategic Framework*, including:

- People living with HIV/AIDS have the right to protection against discrimination and stigmatisation and should have equal access to education, health, employment and other services, whilst at the same time playing their rightful role in HIV/AIDS prevention and care work.
- Laws should protect PLWHAs, widows, widowers and orphans.
- Informed consent should be obtained before any test is performed to diagnose a person's HIV status; the result should remain confidential; appropriate pre- and post-test counselling should be provided; and disclosure should only be made with the full consent of the individual concerned on a need-to-know basis.
- HIV prevention and HIV/AIDS management need to attend to issues of gender, human rights, law, and socio-economic variations amongst communities. These pose unique and ever-changing challenges to programmes and exacerbate the course and impact of the epidemic.[40]

In various other sections of the *Strategic Framework*, reference is made to either specific human rights such as the right to non-discrimination or to aspects of human rights in general. The Strategic Planning Unit of the National AIDS Control Programme functioning under the Ministry of Health and Population published a brochure entitled *Malawi's National Response to*

37 Article 5 of the *Constitution*.
38 Article 4 of the *Constitution*.
39 The first *Medium Term Plan (MTP)* dealt specifically with a blood screening policy and a strategy for public education on HIV/AIDS. *MTP I* covered the period 1989-1993. It was followed by *MTP II* which covered the period 1993-1998 and incorporated social, psychological and economic dimensions into its approach.
40 See pages 16-17 of the *Strategic Framework*.

HIV/AIDS for 2000-2004: Combating HIV/AIDS with Renewed Hope and Vigour in the New Millennium. This brochure is a simplified, plain-English summary of the *Strategic Framework* for the Malawian population.

In October 2002, the Malawi National AIDS Commission released a draft *National Strategic Framework HIV/AIDS Programme for Monitoring and Evaluation*. This is designed to allow Malawi to track its progress towards the stated goals and objectives laid out in the *Strategic Framework*.

In November 2002, the Malawi National AIDS Commission published the first draft of the *Malawi National HIV/AIDS Policy.* The overall aim is "to provide the necessary legal and administrative framework for the implementation of a rights-based, expanded, multi-sectoral national response to the HIV/AIDS epidemic." The specific objectives of the *National Policy* include:[41]

- enabling the review and revision of existing legislation, and the enactment of new legislation to adequately address HIV/AIDS-related issues;
- ensuring the observation of human rights, including gender and cultural sensitivity, in the response to HIV/AIDS;
- providing for the special needs of women, men and children living with HIV/AIDS, orphans and other marginalised groups; and
- facilitating the creation of an enabling environment to reduce HIV/AIDS-related stigma and discrimination, and to ensure that PLWHAs play an active role in HIV/AIDS prevention and care.

The *National Policy* aims to use human rights principles in shaping Malawi's response to the HIV/AIDS epidemic. The *National Policy* is clear that HIV/AIDS is a human rights issue, and that human rights violations fuel the epidemic. It commits Malawi to "working within a human rights framework, in accordance with the international instruments to which Malawi is signatory, as well as the International Guidelines on HIV/AIDS and Human Rights of 1998 as amended in 2002".[42] In Section 7.3 of the *National Policy*, provision is made for the promotion and intensified training of all officials involved in the justice system in HIV/AIDS and the law, to ensure that the correct human rights approach to HIV/AIDS is followed.

4.1.3 Domestication of international and regional human rights treaties

Malawi follows a dualistic approach to the implementation of treaties. Treaties must be transformed into domestic law through the adoption of legislation before the courts or competent authorities can apply them.

The Ministry of Foreign Affairs is primarily responsible for overseeing Malawi's treaty obligations. However, at the domestic level there are no proper institutional arrangements to ensure compliance. For instance, neither the Ministry of Justice or the Human Rights Commission appear to have any recognised role in the implementation of human rights instruments. Currently, there is no specific legislation relating to the treaties ratified.

4.2 HIV/AIDS-specific regulations

4.2.1 Litigation on HIV/AIDS and human rights within domestic courts

There are no documented cases in any courts in Malawi on HIV/AIDS and human rights.

4.2.2 National legislation that addresses (directly or indirectly) issues in relation to HIV/AIDS

- *Constitution of the Republic of Malawi*
- *The Public Health Act of 1968*
- *Labour Relations Act, No. 4C, 1996*
- *Pharmacy, Medicines and Poisons Act, No. 15 of 1988* (First published 27th May 1988).

4.2.3 HIV/AIDS policies, guidelines and programmes

- *National HIV/AIDS Policy*, 2002 Draft
- *National HIV/AIDS Strategic Framework, 2000-2004*
- Draft 2002 *National Strategic Framework HIV/AIDS Programme for Monitoring and Evaluation*
- *Code of Ethics and Professional Conduct*, Medical Council of Malawi, 1990
- *Code of Conduct on HIV/AIDS and the Workplace*
- *Draft Policy on HIV/AIDS in the Workplace*, October 2001.

41 See page 3 of the *Malawi National HIV/AIDS Policy.*

42 See page 34 of the *Malawi National HIVAIDS Policy.*

The National AIDS Commission is primarily responsible for HIV/AIDS policies and programmes in Malawi. The Commission is under the Ministry of Health and Population Services.

4.2.4 Domestic incorporation of the International Guidelines on HIV/AIDS and Human Rights

The International Guidelines were incorporated into the Draft National HIV/AIDS Policy. The first draft of the *National HIV/AIDS Policy* (November 2002) states that Malawi is committed to: "working within a human rights framework, in accordance with the international instruments to which Malawi is signatory, as well as the *International Guidelines on HIV/AIDS and Human Rights* of 1998 as amended in 2002."[43] It appears that the *International Guidelines* were used primarily to ensure that no one is forced to undergo an HIV test in the workplace, and will further be incorporated in the *National HIV/AIDS Policy.*[44]

4.2.5 HIV/AIDS within the government's social assistance plan

There is currently no specific form of social security or assistance for PLWHAs. Generally, all Malawians can access free medical services and medication for essential drugs at government hospitals; however, this policy excludes ARVs, which must be purchased. There is an *Orphan Policy* within the Ministry of Gender, which outlines interventions to assist orphans, including the provision of school fees and other assistance through their respective local government offices. Malawi does not have a social security system in place. Therefore, disability pensions, social grants to needy children and mothers, or unemployment social grants are non-existent. Nevertheless, Malawi is addressing the issue; Section 8(5)(3) of the *National HIV/AIDS Strategic Framework 2000-2004* recognises the need for: "establishing flexible welfare and credit schemes which will support PLWAs, orphans, widows and widowers, including medical cover and funeral arrangements."[45]

4.3 Health sector

4.3.1 HIV/AIDS and the right of access to health care

The right of access to health care is not protected in the *Constitution*. The only provision that refers to health care is Section 30(2), which provides: "The state shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure."

Between 1986 and 1995, the National AIDS Control Programme (NACP) of the Ministry of Health and Population Services engaged in various activities such as:

- raising awareness and engaging in training on HIV/AIDS and related issues;
- providing educational materials, public displays, and guidelines on HIV/AIDS in hospitals and health centres;
- distributing free condoms using Ministry of Health facilities; and
- reducing the social impact of HIV/AIDS, by amongst other activities, protecting the rights of PLWHAs.

The National AIDS Commission has replaced the NACP.

4.3.2 HIV testing, notification and confidentiality

HIV/AIDS is not a notifiable condition under the *Public Health Act of 1968* (last amended in 1981). Section 11 of the *Public Health Act* lists TB and yellow fever as notifiable diseases. Section 12 makes it possible for the Minister of Health to declare that any infectious disease other than those specified in Section 11 is to be made notifiable under the *Act*. According to Section 2.2.6 of the draft *National Policy*, the government is planning to draft legislation to include HIV/AIDS amongst notifiable public health conditions. Notification will not include the identification of the individual. Section 7.2.1 of the *National Policy* deals with testing for HIV. The following are planned:

43 See page 4 of the *Malawi National HIV/AIDS Policy*.
44 According to Dorenn Nsanje, Policy Officer for the National AIDS Commission.
45 See page 36 of the *Strategic Framework*.

- enacting legislation permitting HIV testing without consent where anonymous unlinked testing for surveillance purposes is conducted; testing of blood, body fluids and other body tissues for transfusion or transplant; testing of a person accused of a criminal offence where a suspected exchange of bodily fluids has occurred; and diagnosis of an unconscious patient in the absence of a parent or guardian;
- ensuring that no HIV testing is carried out for adoption or travel purposes; and
- ensuring that testing of patients for the perceived protection of health care workers is not permitted.

In terms of confidentiality and partner notification, Section 7.2.2 recommends the revision of the *Public Health Act* to make it mandatory for HIV-positive persons and for persons diagnosed with an STD to inform their sexual partners. The Section also proposes that the *Act* should provide for penalties for failure to inform.

4.3.3 Patients' rights

Patients can rely on the rights guaranteed in the *Constitution*. Section 19 protects the dignity of all people and provides, amongst other rights, that no person shall be subjected to medical or scientific experimentation without his/her informed consent. Section 21 entrenches the right to privacy.

Amongst the policy statements listed in Chapter 3 of the draft *National Policy*, the following is stipulated in reference to ethics in the health profession: "Health care and other service providers and their professional bodies in Malawi shall formulate and uphold professional ethics on non-discriminatory service provision and respect for the privacy and confidentiality of personal data."[46]

The draft *National Policy* also states that HIV status is not to be used to deny access to social services, including health care, education and religious services. Furthermore Section 7.2.2 specifically states that the government must revise the *Public Health Act* to include detailed provisions for the protection of the rights of patients, and mentions the promulgation, promotion and enforcement of a patient rights charter. Section 7.4.5 deals with the law and ethics relating to health care workers. The *National Policy* further suggests the review and revision of the *Medical Practitioners and Dentists Act* to clarify the professional limits of paramedics based on international standards, taking into account local resource constraints.[47] In addition to the rules already governing these professionals, it is recommended that the Government promulgate new regulations governing not only the professional conduct of health care workers, but also defining professional misconduct and the consequences thereof.

In July 1990, the Medical Council of Malawi published a *Code of Ethics and Professional Conduct*. Although this *Code* does not specifically refer to HIV/AIDS, it does include principles guiding professional conduct that could be directly applicable to situations dealing with HIV-positive patients.[48]

4.3.4 Access to essential HIV/AIDS drugs

According to Section 2.2.2 of the draft *National Policy*, the government aims to provide access to affordable anti-retroviral (ARV) therapy and treatment to those who are eligible. Thus, the treatment is not intended to be free but rather to be available at affordable prices. Drugs such as ARVs are currently available at subsidised rates in government hospitals. According to the Ministry of Health and the National AIDS Commission, there is no specific policy regulating access to HIV/AIDS drugs. However, the government tries to make available basic drugs for treatment of opportunistic infections such as TB. The Pharmacy, Medicines and Poisons Board has to regulate the manufacturing of generic drugs.[49] At present there are no specific agreements with pharmaceutical companies for the manufacture of generic drugs.

4.3.5 Medical trials on human subjects

Section 19 of the *Constitution* is as follows: "No person shall be subjected to medical or scientific experimentation without his or her consent." The *Pharmacy, Medicines and Poisons Act* regulates clinical trials in Section 42.66. These provisions do not, however, extend to trial subjects and do not include specifications requiring informed consent. The Act does not include any specific reference to HIV/AIDS.

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46 Chapter 3, Subsection (iii) of the *National Policy*. See page 16.

47 For more regulations on this issue, see page 37 of the *National Policy*.

48 For example, see Section 42, which deals with the abuse of professional confidence.

49 Regulatory authority is in terms of Sections 35, 49 and 66 of the *Pharmacy, Medicines and Poisons Act* No. 15 of 1998.

4.3.6 Condoms

Condoms are generally easily accessible in Malawi; some are available free of charge whilst others can be bought at affordable prices (equivalent to R1 for a pack of three).

The *National HIV/AIDS Strategic Framework 2000-2004* lists the following activities to be undertaken to encourage safe sex practices.[50]

- strengthening co-ordination in the procurement, quality control and distribution of condoms to the general population, for specific target groups and in specific social settings where sex is likely to be practised; and
- conducting ongoing meetings and discussions with community leaders and members of various institutions on the role of condoms in HIV prevention to promote acceptance, correct and consistent use.

Section 2.1.3 of the draft *National Policy* deals with the government's commitment to the distribution and promotion of male and female condoms. The government aims to ensure access to condoms for men, women, and young people, including those in prisons and mental institutions. With regard to regulating the quality of condoms, the government has entrusted the Malawi Bureau of Standards with the task of monitoring and regulating quality control.[51] Further provisions relating to condoms are set out in Section 7.4.1 of the *National Policy*.

4.3.7 HIV/AIDS and the mentally ill

The *National Policy* specifically mentions that the government must ensure that all responses to HIV/AIDS consider the implications for people with disabilities, plan for more effective responses based on models of international best practices, and also enact legislation to protect the rights of people with disabilities.[52] In addition, Section 2.1.3(c) states that the government shall ensure that all people in mental institutions have access to condoms.[53]

Further protection for mentally ill and disabled women is provided by Section 139 of the *Penal Code*, which states that: "Any person who, knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which proves that the woman or girl was an idiot or imbecile, shall be guilty of a felony and shall be liable to imprisonment for 14 years, with or without corporal punishment."

4.4 Equality and non-discrimination

4.4.1 The Constitution and the right to equality and non-discrimination

The *Constitution* of Malawi guarantees the right to equality. Section 20 states as follows: "Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status." There is no specific mention of prohibition of discrimination on the grounds of HIV status. The right to equality and non-discrimination regarding people living with HIV/AIDS has never been tested in the courts.

4.4.2 Specialised legislation on equality and non-discrimination

No special legislation on equality and non-discrimination exists currently, although the Law Commission is considering the possibility of revising legislation to include gender equality and the prevention of discrimination against women. HIV/AIDS is not being addressed directly by the Commission.

In terms of non-discrimination and stigmatisation, the *Strategic Framework* lists the following in terms of actions to be taken:[54]

- documenting and disseminating case studies on issues and experiences of discrimination of PLWHAs and affected families;

50 Section 10.5.2 of the *Strategic Framework*.
51 See page 10 of the *National Policy*.
52 Section 4.10, page 24 of the *National Policy*.
53 See page 10 of the *National Policy*.
54 Section 8.5.5 of the *Strategic Framework*, page 37.

- institutionalising policies that protect people living with HIV/AIDS against discrimination, stigmatisation and denial of work-related privileges and benefits;
- strengthening organisations of PLWHAs and support groups to champion the rights and responsibilities of PLWHAs;
- building the capacity of health and other training institutions to provide education on the rights of PLWHAs and affected families; and
- strengthening capacity for legal support of PLWHAs in communities and in employment.

Chapter 3 of the draft *National Policy* addresses issues of stigma and discrimination against people living with HIV/AIDS. Specifically, the *National Policy* provides for[55] sector policymakers such as labour, corporate and social services to draft policy provisions focusing on non-discrimination against PLWHAs, and for the same policymakers to take steps to eliminate stigma in their institutions and in the implementation of their sectoral mandates.

4.5 Labour rights

4.5.1 HIV/AIDS in the workplace

Labour rights are broadly protected in the *Constitution* and specifically in the *Labour Relations Act (LRA)*, No. 16 of 1996. Section 31(1) of the *Constitution* states that: "Every person shall have the right to fair and safe labour practices and to fair remuneration". Generally, the LRA protects employees against discriminatory practices and contains provisions on dispute settlement, dismissal, etc. Chapter VII of the LRA establishes an Industrial Relations Court to deal with employment-related issues. The general provisions of the *Constitution* and those of the LRA may be read to apply to HIV-related issues in the workplace.

The draft *National Policy* outlines the following guidelines in an effort to eliminate workplace discrimination based on HIV status and to enhance workplace prevention:[56]

- The government of Malawi in consultation with experts in the field of HIV/AIDS should provide the relevant regulatory framework and revise labour laws and other legislation where necessary.
- This revision should include those laws applicable to non-discrimination, equality, occupational safety and health, medical confidentiality and privacy of employees' data.

In Section 7.2.1, the *National Policy* recommends the enactment and/or revision of legislation to require HIV testing for recruitment to the following fields of employment in the public sector: army, police, immigration and correctional services. The testing requirement for these categories of potential employees is premised on security requirements.[57]

The government of Malawi has promulgated a *Code of Conduct on HIV/AIDS and the Workplace*, which is intended to act as a guide for employers, trade unions and employees. Amongst the broad goals declared in the *Code*, the following relate directly to the protection of human rights:

- eliminating unfair discrimination in the workplace based on HIV/AIDS status;
- promoting a non-discriminatory workplace in which people living with HIV/AIDS are able to be open about their HIV status without fear of stigma or rejection; and
- creating a balance between the rights and responsibilities of all parties.

With respect to HIV testing, the *Code* declares that: "there should be no compulsory HIV testing for employment purposes as it is unnecessary and imperils the human rights and dignity of workers, provided that outside the workplace testing may be carried out as there are public health reasons why testing should take place."[58] In summary, the *Code* declares that persons with HIV/AIDS should have the legal right to confidentiality about their HIV status in all aspects of their employment. The *Code* emphasises the right to privacy of all persons with HIV/AIDS. It also contains provisions addressing workplace safety, education and information dissemination, gender-specific programmes, and dismissal and grievance procedures. Specifically, it states that: "Standard grievance handling procedures in organisations, in labour and civil law that apply to all workers should apply to HIV-related grievance and that personnel

55 Subsections (vi) and (vii) of the *National Policy*, page 16.
56 Chapter 6 of the *National Policy*, page 29.
57 Page 32 of the *National Policy*.
58 Section 10.1, page 20 of the *Code*.

dealing with HIV-related grievances should protect the confidentiality of the employee's medical information."[59]

In October 2001, the Ministry of Labour and Vocational Training in partnership with Project HOPE published the draft *Malawi Policy on HIV/AIDS in the Workplace*. This *Workplace Policy* is similar in its provisions to those of the *Code* and is seen as the first step towards legislation. The *Workplace Policy* includes two Appendices: Appendix A is a set of guidelines for enterprises, and Appendix B deals with employment (HIV/AIDS) regulations and determines that compulsory pre-employment or employment testing for HIV is not permitted. Furthermore, no employer may terminate the employment of an employee on the grounds of HIV status or family responsibilities. The *Workplace Policy* also provides that: "any person who contravenes any provision of these Regulations shall be guilty of an offence and liable to a fine not exceeding K30,000 or to imprisonment for a period not exceeding six months."[60]

4.5.2 HIV/AIDS and medical schemes

There is currently no legislation in place to regulate medical schemes in Malawi. The *Code of Conduct on HIV/AIDS and the Workplace* declares: "Government, employers and employee representatives should ensure that occupation benefits are non-discriminatory and sustainable and provide support to all employees, including those with HIV infection."[61] Some of the principles in relation to employee benefits include:

- Medical scheme information on the medical status of an employee should be kept confidential.
- Medical schemes and health benefits linked to employment should be non-discriminatory. Private and public health financing mechanisms should provide standard benefits to all employees regardless of their HIV status.
- Counselling and advisory services should be made available and should inform all employees of their rights and benefits from medical aid life insurance, pension and social security funds.
- Employees with HIV/AIDS should not be unfairly discriminated against in the allocation of employee benefits.
- Programmes and schemes should provide similar benefits for workers with HIV/AIDS as for workers with other serious illnesses. Benefits should include free access to public health services or the reimbursement of medical care and health-related expenses associated with the management and control of infection.

The 2001 *Workplace Policy* has similar provisions.[62]

4.5.3 Insurance and HIV/AIDS

Section 7.2.1 of the draft *National Policy* states: "Government shall revise the Insurance Act to permit testing for insurance purposes and promulgate protocols dealing with practice and procedures for such tests to ensure pre- and post-test counselling."[63]

Section 10.6 of the *Code of Conduct on HIV/AIDS and the Workplace* recommends the following in terms of life and other insurance:[64]

1. HIV testing should not be required as a condition of eligibility for national social security schemes, general insurance policies, occupational schemes and health and life insurance.
2. Insurance companies should not require HIV testing before agreeing to provide cover for a given workplace. Costs and revenue estimates and actuarial calculations must be based on available epidemiological data for the general population.

Generally, however, insurance companies do require testing for life insurance and do not provide life cover for those who test HIV positive.

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59 Section 16, page 26 of the *Code*.

60 Section 13, page 5 of draft Appendix B of the *Workplace Policy*.

61 Section 13(1) page 24 of the *Code*.

62 Section 7(1) of the *Workplace Policy*, for instance, declares that, "Subject to any other law to the contrary, the HIV status of an employee shall not affect his eligibility for any occupational insurance or other benefit schemes provided for employees by an employer."

63 See page 32 of the *National Policy*.

64 Section 10.6.1-10.6.2, page 22 of the *Code*.

4.6 Gender rights

4.6.1 Legal status of women and the role of cultural practices

Section 24 of the *Constitution* declares:

(1) Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right –
   a) to be accorded the same rights as men in civil law, including equal capacity –
   (i) to enter into contracts;
   (ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;
   (iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and
   (iv) to acquire and retain citizenship and nationality.

(2) Any law that discriminates against women on the basis of gender or marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as –
   a) sexual abuse, harassment and violence;
   b) discrimination in work, business and public affairs; and
   c) deprivation of property, including property obtained by inheritance.

There are a number of customary practices that may increase women's vulnerability to HIV infection. These include:

- *chokolo* (wife inheritance)
- *mitala* (polygyny)
- *kusasa fumbi* (sex between a widow and the brother to the deceased)
- *chinamwali* (initiation ceremony which usually encourages sex)
- *fisi* (sex with a young initiate).

One of the main objectives of the *Strategic Framework* is to bring about change in the socio-cultural and economic environment for women and men in order to address gender imbalances and reduce the spread and impact of HIV/AIDS.[65] Chapter 4 of the *Strategic Framework* specifically deals with culture and HIV/AIDS. It aims to develop the capacity of communities to eliminate or modify cultural values, beliefs and practices that facilitate the spread of HIV. The *Strategic Framework*, for example, advocates the review of practices such as initiation rites, widow inheritance and death cleansing in an effort to find alternative options in the exercise of these rites that will reduce the risk of HIV infection, and further aims to build capacity amongst communities to identify and modify values that promote casual sex and predispose men and women to HIV infection. Furthermore, the *Strategic Framework* identifies the orientation of traditional and religious leaders to gender issues and human rights and the principles of choice and human dignity as "major actions" that need to be undertaken.[66]

The draft *National Policy* requires periodic inspection of unsterilised skin piercing materials in informal settings. The Ministry of Health and Population will be responsible for sensitising communities on the dangers of using unsterilised skin piercing materials. The government is committed to ensuring that traditional initiation counsellors incorporate sexual and reproductive health education into their programmes, traditional and cultural rites of passage, and initiation processes.[67]

The *National Policy* also aims to protect and empower people through a review of customary and religious practices. Section 5.1 specifically states that the government shall, through partnership with traditional leaders, promote and encourage monogamous marriages instead of polygynous marriages. The government will also aim to review and revise the *Divorce Act* with the intention of providing for the "irretrievable breakdown of marriage" as one of the grounds for divorce.[68] These changes contribute to the effort to minimise the risk of HIV infections due to multiple partners.

Traditional and religious leaders are considered pivotal to bring about change in communities where customary practices are exercised. There is a need to sensitise traditional and religious leaders to the inherent dangers that customary practices hold in the light of HIV/AIDS.[69] The *National Policy* states that practices such as widow inheritance, death cleansing, forced sex for young girls coming of age, newborn baby cleansing, and circumcision (*jando*/*mdulidwe*) should

65 See page 18 of the *Strategic Framework*.
66 Culture and HIV/AIDS is discussed on pages 19-21 of the *Strategic Framework*.
67 See Section 4.4 of the *National Policy*.
68 See Section 5.1, Subsections (i) and (ii) on page 25 of the *National Policy*.
69 Section 5.2 of the *National Policy*.

be stopped or modified in order to reduce the risk of HIV transmission. Male circumcision should be done safely to avoid HIV infection, and the government should enact legislation to ban female genital mutilation and the custom forcing young girls to have sex when coming of age.[70] Other customary practices such as consensual adultery for childless couples, wife and husband exchange (*chimwanamaye*), ear piercing and tattooing that could potentially spread HIV, should be addressed either by discouraging communities from engaging in them or by sensitising communities how to practisce them safely.[71]

In June 2002, a Malawi-based NGO called Women's Voice conducted a research study focused specifically on issues of human rights (in particular women's rights) and HIV/AIDS.[72] The study found that the following traditional practices in Malawi enhanced the vulnerability of women to HIV infection: the practice of *chokolo* (wife inheritance) which was cited most frequently, polygyny, *mbirigha* (a practice whereby a man is offered another wife from the same family because of his good behaviour), arranged marriages, *mbulu* (a practice whereby a man is not allowed to have sex with his wife for six months after a child's birth) and early marriages.[73] These practices all place women in a more vulnerable position in society and therefore increase their risk of HIV infection. In addition, the study found that women had some knowledge of human rights, but no knowledge of the relationship between human rights and HIV/AIDS infection.[74] Sexual rights were related to men only, confirming that women have little or no control over sexual matters, which renders them vulnerable to dangerous customary practices.

4.6.2 Legislation and policies protecting women and the most vulnerable in society

The Ministry of Gender, Youth and Community Services has issued a *Gender Policy* that provides details of multi-sectoral approaches to the reduction of gender imbalances in Malawi. The *Strategic Framework i*dentified the following goals and actions to be taken to attempt to change the socio-cultural and economic environment to address gender imbalances and reduce the spread and impact of HIV/AIDS:

- developing capacity for women and men, boys and girls to identify, analyse and take action on cultural, political, social and religious norms, values and practices which are disempowering and entail gender discrimination and exclusion;
- collating and disseminating information on factors that make women and girls more vulnerable to HIV infection than their male counterparts:
- advocating for the review of existing legislation and policies affecting women such as those pertaining to land inheritance, marriage, labour, housing and credit schemes; and
- strengthening mechanisms and capacity for enforcement of existing gender and human rights legislation by various public, private, religious and non- governmental organisations.

According to Section 4.1 of the draft *National Policy*, the following legislative and educational measures are to be taken by the government to protect women against HIV/AIDS:[75]

- a review of the *Penal Code* to criminalise marital sexual abuse to protect women who know, or have reasonable grounds to believe that they are at risk;
- a review of the *Divorce Act* to provide irretrievable breakdown of marriage as one of the grounds for divorce, to take account of the situation where there is a real risk of infection with HIV;
- enacting legislation to criminalise gender-based violence in any form, in order to protect women and girls from STDs;
- enacting legislation to recognise marriage by repute and permanent cohabitation to provide for custody of children by women and inheritance of property by women and children in such households; and
- ensuring increased access by women and young girls to accurate and comprehensive information, education and counselling on HIV/AIDS.

4.6.3 Administering ARVs to rape survivors

Section 2.2.5 of the *National Policy* states that victims of accidental occupational exposure and rape shall receive free VCT and short-term anti-retroviral prophylaxis.[76] At present, however,

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70 Section 5.3 of the *National Policy.*

71 Section 5.4 of the *National Policy.*

72 *An Assessment of Women's Vulnerability to HIV/AIDS in Nkhata Bay, Malawi.*

73 See page 14 of the Study.

74 See graph on page 16 and discussion on pages 15, 16 and 23 of the Study. Respondents identified the following as important human rights: the right to property, the right to life, freedom of expression, the right to marry, freedom of movement, access to health services, freedom to join a political party of their choice and the right to education.

75 See page 17 and 18 of the *National Policy.*

76 See Sections 145-147 of *Penal Code.*

hospitals and the police[77] do not have a specific policy, and rape survivors' access to ARVs will depend on the availability of the drugs at the particular hospital or health centre.

4.6.4 Commercial sex workers

In Malawi, sex work is illegal.[78]

Section 6.5.3 of the *Strategic Framework* recognises the importance of: "Initiating debate and seeking broad consensus on crucial legal and policy areas such as the legalisation of prostitution as a key intervention to address gender imbalances."[79]

Section 4.6 of the *National Policy* addresses issues with respect to sex workers and HIV/AIDS, and includes the following, amongst others:[80]

- government and partners shall ensure that, as citizens of Malawi, male and female sex workers access their rights, including their right to freedom of association; and
- the Ministry of Health and Population shall ensure that sex workers have access to confidential and respectful health care, particularly sexual and reproductive health, life skills, female and male condoms, and treatment and care in the case of sex workers living with HIV/AIDS.

The government's long-term plans include the review and revision of existing legislation to decriminalise sex work to reduce the vulnerability of male and female sex workers and thereby reduce the spread of HIV.

4.6.5 Homosexuality and HIV/AIDS

Same sex relationships are criminalised by the *Penal Code* in Sections 153, 154 and 156. However, the *National Policy,* in Section 4.9, provides for the drafting of guidelines for an effective response to promoting prevention and care in terms of HIV infection for people in same sex relationships. It further states that: "Government and partners shall put in place mechanisms to ensure that HIV/AIDS/STI prevention and care services can be accessed by women, men and youth in this vulnerable group."[81] The *National Policy* states in Section 7.1.2 that traditional leaders should be sensitised with a view that, in the long term, prostitution, sodomy and same sex sexual practices may be decriminalised for proper management of the HIV/AIDS epidemic. It also states that: "The government shall promote the empowerment of commercial sex workers and same sex sexual partners to enable them to make informed decisions about their sexual life."[82]

4.7 Children's rights

4.7.1 Health care, orphans and HIV/AIDS

There is no consistent programme on the prevention of mother-to-child transmission (PMTCT) of HIV/AIDS. The *Strategic Framework* highlights issues such as the high cost of ARVs and the lack of knowledge amongst women on the use of breast milk substitutes, as obstacles that must be overcome for an effective PMTCT programme. The *Strategic Framework* suggests the following actions:[83]

- providing adequate and accurate information on availability and use of anti-retroviral drugs and breast milk substitutes to HIV infected women so that they can make informed choices;
- developing a national policy with regard to mother-to-child HIV transmission and guidelines in the use and management of therapies; and
- supporting regional efforts through such bodies as the Organisation of African Unity (OAU, now the AU) and the Southern African Development Community (SADC) to influence collaboration in research and supply of anti-retrovirals.

According to the National Policy, anti-retroviral treatment is not free for HIV-positive pregnant mothers but the government strives to provide access to affordable antiretroviral treatment to prevent MTCT.[84]

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77 According to the HIV Coordinator at the Police Headquarters, rape victims are simply referred to hospitals for general treatment.
78 See sections 145 - 147 of *Penal Code.*
79 See page 30 of the *Strategic Framework*.
80 Section 4.6, page 21 of the *National Policy.*
81 See page 23 of the *National Policy.*
82 Page 31 of the *National Policy.*
83 Section 10.5.4, page 45 of the *Strategic Framework*.
84 Section 2.1.4 of the *National Policy.*

The government has developed policy guidelines for the care of orphans and widows. An Orphan Care Task Force is in operation at national level, whilst at district level there are Orphan Technical Sub-Committees incorporating community leaders who deal with orphan care and support activities at the local level. The *Strategic Framework* highlights the following needs in terms of orphan care and protection:[85]

- reviewing and enforcing all laws and policies that help to protect the interests of orphans, widows and widowers;
- monitoring closely the implementation of various laws and policies in the public and private sectors to safeguard orphans, widows and widowers;
- building confidence amongst orphans, widows and widowers to appeal to existing laws and policies for their protection and support;
- strengthening the provision of psychosocial counselling, care and support to orphans, children in HIV/AIDS-affected families, widows and widowers, particularly at community and family levels; and
- building capacity for communities and families to provide educational support to schoolgoing orphans and safeguarding them from delinquent behaviour that puts them at risk of HIV infection, social and physical harm.

In addition to the *Strategic Framework* recommendations, the *National Policy* recommends the following to protect HIV/AIDS orphans:

- the enactment and review of existing legislation to ensure that orphans are protected from any form of abuse, violence, slavery, exploitation, discrimination and trafficking;
- putting in place measures to ensure the protection of the inherited property of orphans until they attain majority age; and
- the government shall ensure that orphans infected with HIV/AIDS are accorded the same rights as other children to be fostered, adopted or placed in institutions.

Section 23 of the *Constitution* guarantees the rights of children but no reference is made to health care, and it appears that children in Malawi living with HIV/AIDS do not have adequate access to health facilities.

4.7.2 HIV/AIDS and the educational system

Section 25 of the *Constitution* guarantees all persons the right to education and specifies that primary education should consist of at least five years of education. The *Education Act* was enacted in 1969 and does not contain any provisions on non-discrimination or other human rights-related issues.

Formal primary and secondary school curricula include HIV/AIDS education. In addition, social studies emphasise human rights and obligations. The *Strategic Framework* aims to build on these efforts to develop and promote a culture of communication within the family, schools and religious organisations about issues of sex, sexuality and HIV/AIDS/STDs.[86] Section 5.5.3 of the *Strategic Framework* deals with the development of positive democratic values amongst youth, stating that: "Many youth today misinterpret democracy. They view democracy, human rights and freedoms as doing as one pleases without regulation,"[87] and this misunderstanding, according to the *Strategic Framework*, leads to increased casual sexual relationships. The *Strategic Framework* therefore stresses the importance of:

- the development of gender-sensitive human rights materials for learners, with a deliberate emphasis on their duties and responsibilities to the government and to fellow citizens;
- supporting and strengthening human rights education in formal and non-formal institutions and in youth organisations;
- enforcing laws relating to rape, sexual harassment, discrimination towards PLWHAs, alcohol and drug abuse and access to public places of entertainment to protect children and youth;
- promoting equal access for boys and girls to educational institutions, training programmes, youth leadership schemes, business enterprise, health and related facilities; and[88]
- promoting the development and implementation of curricula on sex and sexuality in formal and non-formal education programmes for youth and adults nationwide.[89]

85 See Chapter 9, pages 40-41, of the*Strategic Framework*.
86 Section 5.4 of the*Strategic Framework*.
87 See page 24 of the *Strategic Framework*.
88 See page 25 of the *Strategic Framework*.
89 Section 10.5.2, page 44, of the *Strategic Framework*.

Section 4.4 of the draft *National Policy* states that: "Government and partners shall ensure that children are introduced to youth-friendly sexual and reproductive health information, education and communication, including HIV/AIDS/STI information, appropriate to their age and needs, to equip them with knowledge and skills to protect them from HIV/STI infection." It also requires thee government to incorporate and enforce reproductive and sexual health education as well as life skills and peer education into the school curriculum.[90]

4.8 Criminal law and HIV/AIDS

There are no HIV/AIDS specific provisions in the law. There are currently no guidelines directing judicial officers to impose harsher sentences on HIV-positive rapists.

One of the major objectives of the *National Policy* is the promotion of general criminal law, rather than HIV specific criminal codes, to deal with the transmission of HIV through sexual offences. The following recommendations have been made:[91]

- the revision of the *Penal Code* to make marital sexual abuse a criminal offence;
- the revision of existing legislation to provide for compulsory testing of an accused person. Test results will be kept confidential until after conviction when it may be used as an aggravating factor in sentencing;
- revising the *Penal Code* to make it a criminal offence for a woman or a girl to indecently assault or rape a man or a boy;
- revising the *Penal Code* to include in the definition of rape the situation where sexual intercourse takes place through the anus without consent;
- including in the definition of rape the penetration of the anus or vagina using instruments, fingers, the tongue and other objects or limbs without consent;
- using generic law as opposed to the enactment of HIV-specific criminal law to punish indecent assault and rape; and
- providing free VCT and post-exposure prophylaxis for all sexual assault survivors.

4.9 HIV/AIDS and prisons

The absence of a national policy on HIV testing and education in prisons is due to the official position that no sex occurs in prisons. It is estimated that 40% of the current prison population is HIV positive.[92] HIV status is kept confidential and there is no separation of HIV-positive prisoners from the rest of the prison population. Access to anti-retroviral drugs is limited to those who can afford it. Section 2.1.3 (c) of the *National Policy*, states that: "Government shall ensure that all men, women, young people including people in prisons and mental institutions have access to condoms any time they need one."[93]

Other crucial measures identified include the following:[94]

1. The development of prison guidelines on HIV/AIDS that are in keeping with the *HIV/AIDS and Human Rights - International Guidelines* and the World Health Organisation *Guidelines on HIV Infection and AIDS in Prisons*.[95]
2. The Ministry of Home Affairs shall prohibit quarantine, segregation, isolation and separation of prisoners on the basis of HIV status.
3. The Ministry of Home Affairs shall ensure that prisoners access minimum basic rights in accordance with international guidelines, which include but are not limited to confidential health care, including information, education and communication. Also included are voluntary counselling and testing; counselling for emotional, mental and social crises; anonymous access to condoms and dental dams (oral sex barriers); access to treatment and care; voluntary participation in clinical trials; and rehabilitation and planning for integration back into the community on release.

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90 See page 20 of the *National Policy.*

91 See Chapter 7, page 30, of the *National Policy.*

92 This estimate is taken from a study of HIV transmission and the care of prisoners with HIV/AIDS in Malawi Prisons, conducted in 1999 by Penal Reform International.

93 See page 10 of the *National Policy.*

94 See page 21-22 of the National Policy.

95 This task is designated to the Ministry of Health and Population in collaboration with the Ministry of Home Affairs.

4. The Ministry of Home Affairs shall ensure that prisoners who are already on or wish to go on ARVs and can afford to purchase them, are able to do so.
5. The Ministry of Home Affairs shall ensure that prisoners have the right to apply for early release, where they, their children and/or spouses are in terminal stages of HIV/AIDS.
6. The Ministry of Home Affairs shall ensure that prisoners have the same rights as all research participants to ethical treatment and participation in biomedical and social science research based on informed consent.

5. CONCLUSIONS AND RECOMMENDATIONS

This research project has shown that although HIV/AIDS has not been included in any international or regional treaties, relevant resolutions and guidelines do exist, and specific provisions in the major treaties will apply to the situations of people living with or affected by HIV/AIDS. Some states have included the measures that they undertook to address HIV/AIDS in their state reports, and the treaty monitoring bodies have often commented on these efforts in Concluding Observations. Clearly, most, if not all, of the eight SADC countries surveyed have yet to incorporate treaty obligations into domestic legislation. It is also clear that most countries still operate with a policy-based approach to HIV/AIDS, rather than a rights-based approach, even though the UNAIDS and OHCHR *HIV/AIDS and Human Rights – International Guidelines* offers guidance to move from policy to rights.

It is against this background that the country reports should be analysed. Firstly, the aim is to identify those human rights principles that already exist which can assist with the adoption of a human rights-based approach, and secondly, to identify and make recommendations where the governments' responses have not included human rights.

Three general trends should be highlighted:

- Firstly, the HIV/AIDS responses in the various countries from the reporting of the first case in the mid-1980s has followed a very similar approach. Initially, in each country the Ministry of Health co-ordinated the response through a short-term plan, which focused mainly on issues of blood screening. This was followed by one or more medium-term plans in the mid- to late 1990s, ultimately heralding the multi-sectoral approach adopted by all the countries by the end of the 1990s. Thus, all eight countries adopted national strategic frameworks on HIV/AIDS and all except South Africa, Namibia and Mozambique adopted further national policies on HIV/AIDS to give effect to the goals in the strategic frameworks. To varying degrees, this development from short-term plans to multi-sectoral strategic frameworks was also accompanied by a gradual inclusion of human rights provisions in the HIV/AIDS discourse. This coincided with an overall trend in the SADC countries to adopt new constitutions with a bill of rights. For example, new constitutions were adopted by Namibia in 1990, and by both South Africa and Malawi in 1994.

- Secondly, the legislative frameworks analysed indicate overwhelmingly that in addressing the HIV/AIDS epidemic, and affording protection to the rights of those affected or infected, states elect to respond by introducing policies, codes or guidelines, rather than legislation. This means that government interventions are not legally binding and generally cannot be enforced in the courts. Thus, people living with or affected by HIV/AIDS have few specific enforceable rights. Obligations with respect to human rights are further minimalised by states' reluctance to transform ratified human rights treaties into domestic legislation.

- Thirdly, where legislation does address HIV/AIDS issues, it tends to be limited to the areas of criminal law and labour law. Countries are inclined to promulgate criminal laws that try to "contain" the disease based on a model of "control" over the spread of the disease. Botswana, Namibia, South Africa and Zimbabwe have amended their criminal laws to provide for harsher sentencing of HIV-positive sexual offenders, whilst Zimbabwe has also criminalised the deliberate transmission of HIV. Swaziland and Zambia have declared that they will follow suit in the near future. With the exception of South Africa (in relation to homosexuality), governments have targeted homosexuals and commercial sex workers, groups that are already stigmatised in society, by criminalising their behaviour. In terms of labour legislation, governments have attempted to secure economic stability by focusing on the "economic active," people between the ages of 19 and 45 years, which is the age group that is hardest hit by the epidemic. Mozambique, Namibia, South Africa and Zimbabwe have adopted workplace legislation that outlaws discrimination on the basis of HIV status, prohibits pre-employment testing and secures medical benefits for HIV-positive employees. These efforts with respect

to labour rights are commendable; however, governments' efforts should not end with employment, but rather with an attempt to guarantee human rights in all spheres.

To guide governments toward a more inclusive human-rights-based response, the following steps are recommended:

- Those countries that have not developed a national HIV/AIDS policy to complement the national strategic framework should do so.
- In revising the current strategic frameworks and national policies (usually revised every two or five years), the inclusion of human rights provisions in all spheres/sectors should be a priority. Currently, most frameworks merely mention discrimination and stigmatisation.
- Countries should comply with international and regional treaty obligations and domesticate the provisions of these treaties through national legislation.
- Countries should review and revise national legislation on social assistance and security to provide specifically for AIDS orphans, families caring for people with AIDS, and people living with AIDS. This would avoid the difficulties of interpreting claims in terms of disability grants.
- Countries should develop a separate national policy on voluntary HIV testing, pre- and post-test counselling and factors affecting confidentiality (such as informing an HIV-positive person's partner of his/her status), and avoid the principle of shared confidentiality.
- Countries should develop legislation protecting the rights of volunteers in medical trials testing the effects of new HIV drugs and vaccines. Legislation should also regulate the treatment of HIV-positive patients by private and public health care services, specifically prohibiting discrimination against HIV-positive patients.
- HIV/AIDS-specific legislation prohibiting discrimination on the grounds of HIV status should be developed for all spheres.
- Where countries have not developed HIV/AIDS-specific legislation for the workplace, this must be made a priority, focusing on issues such as non-discrimination against HIV-positive employees, prohibition of pre-employment HIV testing, offering medical benefits that cater for the special needs of HIV-positive employees, and ensuring that employees have access to information and educational programmes on HIV/AIDS.
- Governments should ensure that national strategic frameworks and policies address the needs of the mentally ill and the disabled. Currently, only Botswana has undertaken a programme to ensure that people with disabilities have access to HIV/AIDS education and information.
- Where legislation does not already exist, states need to legislate on the rights and treatment of orphan children and children in difficult circumstances.
- Governments need to focus on the provision of HIV/AIDS medicines. The focus to date has been on negotiations with pharmaceutical companies for price reductions. The possibility of compulsory licensing and importation (production) of generic substitutes has not received much attention. The exceptions allowed for under the WTO's *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* should be exploited fully.
- Legislation should be promulgated to regulate public and private medical schemes in an effort to ensure that people living with HIV/AIDS are not discriminated against or excluded.
- Governments should investigate ways of addressing the issue of restrictions on HIV-positive persons applying for and being granted life insurance.
- Customary practices that increase the risk of HIV infection in women and men should be addressed through a comprehensive approach, including involving traditional leaders and healers, sensitising communities about the dangers of such practices, suggesting alternatives, and ultimately legislating against harmful (inhuman and degrading) practices.
- Practices that put women in a vulnerable position in society and increase their risk of HIV infection – such as domestic violence and restrictive inheritance laws – should be made a priority and legislation must be adopted to secure women's rights.
- Steps should be taken to decriminalise commercial sex work and homosexuality.
- Only Botswana and South Africa have specific policies on HIV/AIDS and prisons. The other countries in this study have included some guidelines in their national policies or strategic frameworks, but with the special conditions prevailing in prisons that increase the risk of HIV infection, every country should adopt a separate policy or legislation on HIV/AIDS and prisons. Issues that should be addressed include the dissemination of education on HIV/AIDS and STDs, voluntary testing and counselling, non-segregation of prisoners, condom distribution, and access to treatment for opportunistic infections.
- The lack of capacity to develop appropriate legislative frameworks has been invoked by states to explain the legislative impasse. A comprehensive model code on HIV/AIDS should be developed, providing a general framework for states to develop a specific legislative response to the pandemic.
- Heads of state need to take an active lead in the lobbying and reform efforts regionally and internationally.

6. BIBLIOGRAPHY

6.1 Legislation and policy documents

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- *Malawi National HIV/AIDS Policy, 2002 Draft*
- *Malawi National HIV/AIDS Strategic Framework, 2000-2004*
- *Draft 2002 National Strategic Framework HIV/AIDS Programme for Monitoring and Evaluation*
- *Pharmacy, Medicines and Poisons Act, No. 15 of 1988*
- *Code of Ethics and Professional Conduct, Medical Council of Malawi, 1990*
- *The Public Health Act of 1968, Cap. 34:01*
- *Penal Code*
- *Code of Conduct on HIV/AIDS and the Workplace*
- *Draft Malawi Policy on HIV/AIDS in the Workplace, October 2001*
- *Labour Relations Act, No. 16 of 1996*
- *SADC Declaration on HIV/AIDS*
- *SADC Health Protocol*
- *SADC HIV/AIDS Framework for 2000-2004*
- *SADC Health Sector Policy Framework, 2000*
- *Principles to Guide Negotiations with Pharmaceutical Companies on Provision of Drugs for Treatment of HIV/AIDS-Related Conditions in SADC Countries*
- *Code on HIV/AIDS and Employment in SADC, 1997*
- *Tunis Declaration on AIDS and the Child in Africa, OAU, 1994*
- *1996 OAU Resolution on Regular Reporting of the Implementation Status of OAU Declarations on HIV/AIDS in Africa*
- *2001 Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases*
- *Abuja Framework for Action for the Fight against HIV/AIDS, Tuberculosis and Other Related Infectious Diseases*
- *UNAIDS and OHCHR HIV/AIDS and Human Rights - International Guidelines, 1996*

6.3 Books and articles

- *UNAIDS, UNICEF and WHO Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections, 2002 Update*
- *Women's Voice, 2002, An Assessment of Women's Vulnerability to HIV/AIDS in Nkhata Bay, Malawi*

ANNEXURE:
HIV/AIDS and human rights in SADC – summary of findings

	Botswana	Malawi	Mozambique	Namibia	South Africa	Swaziland	Zambia	Zimbabwe
Form of government	Constitutional democracy	Constitutional democracy	Semi-presidential constitutional democracy	Constitutional democracy	Constitutional democracy	Absolute monarchy with no Constitution	Constitutional democracy	Constitutional democracy
Domestic legal system	English Common law and Roman-Dutch law	English Common law	Civil or Continental law system inherited from Portugal	English Common law and Roman-Dutch law	Roman-Dutch law and English Common law	Roman-Dutch law and Swaziland customary law	English Common law	Roman-Dutch law and English Common law
***National HIV/AIDS Strategic Framework* (*NSF*): time frame, human rights provisions**	*2003-2009 NSF* does refer to human rights	*2000-2004 NSF* does refer to human rights	*2000-2002 National Strategic Plan to Combat STDs/HIV/AIDS* makes almost no reference to human rights	*1999-2004 National Strategic Plan on HIV/AIDS* (*MTPII*) refers to human rights	*2000-2005 HIV/AIDS/STD Strategic Plan for South Africa* refers to human rights	*2000-2005 Swaziland National Strategic Plan for HIV/AIDS* refers to human rights	*2002-2005 National HIV/AIDS/STI/TB Intervention Strategic Plan* refers to human rights	*2000-2004 NSF* provides for human rights
National HIV/AIDS Policy: human rights provisions	2002 *National AIDS Policy* refers to human rights	2002 *Draft Malawi National HIV/AIDS Policy*. Policy refers to human rights with emphasis on rights based approach.	None	None	None	1998 *Swaziland Policy Document on HIV/AIDS and STD Prevention and Control* refers to human rights	2002 *National HIV/AIDS/STI/TB Policy* refers to human rights	1999 *National HIV/AIDS Policy* refers to human rights
HIV/AIDS jurisprudence	Yes	None	None	Yes	Yes	None	None	None
HIV/AIDS specific legislation[1]	Yes. (In realm of criminal law)	None	Yes (Labour law)	Yes	Yes	None	Yes	Yes
Government awareness of UNAIDS guidelines on HIV/AIDS and human rights	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Social security and PLWHA	No specific assistance is provided for PLWHA. Revising the *National Destitute Policy* to cater for PLWHA and orphans does form part of the *NSF* for 2003-2009	No special provisions are made to cater for the social assistance needs of PLWHA.	No special provisions are made to cater for the social assistance needs of PLWHA.	Social assistance is provided for PLWHA in terms of a disability grant and a special grant for HIV/AIDS orphans.	PLWHA can qualify for a disability grant in terms of the *Social Assistance Act*. In August 2002 the *National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS* were published.	No special provisions, *NSF* however refers to access to social services for PLWHA.	No special provisions, do qualify for assistance applicable to all Zambians.	No special provisions, do qualify under general *Social Security Act*.

1 None of the eight countries that formed part of the study have a comprehensive HIV/AIDS specific law in place. This section was answered in reference to sections of existing or new legislation that included specific reference to HIV or AIDS.

	Botswana	Malawi	Mozambique	Namibia	South Africa	Swaziland	Zambia	Zimbabwe
Constitutional protection of the right to health	None	Equal access to basic health services is incorporated in the right to development, section 30(2) of the *Constitution*.	Article 94 of the *Constitution* guarantees the right to health subjected to the law in place.	Article 95 of the *Constitution* refers to public health but as a matter of state policy and not as a fundamental right.	Article 27(1)(a) of the *Constitution*.	*Constitution* is suspended, the drafting of a new *Constitution* is underway.	The right to health care is provided for under the *Directive Principles of State Policy* incorporated in Part IX of the *Constitution*.[2]	None
HIV/AIDS as a notifiable disease	No	No, although it is foreseen in the draft *National HIV/AIDS Policy* of 2002.	No	No	No	Yes	Yes	No
Rights of HIV positive patients	No HIV specific guidelines exist currently within the health profession, according to Bonera[3] a policy is in the pipeline.	No special protection exists currently but it is foreseen in the draft *National HIV/AIDS Policy* of 2002.	Ethical guidelines for health workers are foreseen in the *2000-2002 National Strategic Plan*.	HIV specific guidelines and a *Namibian Charter on HIV/AIDS* exist. (non-binding)	Protected by the 2001 HPCSA guidelines on the *Management of Patients with HIV Infection or AIDS* and the *SAMA Guidelines on Human Rights, Ethics and HIV*.	None	No special provisions.	Provisions within the (non-binding) *Patient's Charter*.
Constitutional and legislative protection of equality and non-discrimination	Section 15 of the *Constitution* lists grounds for non-discrimination (non-exhaustive list). HIV is not a listed ground. No special legislation addressing discrimination exists.	Section 20 of the *Constitution* lists grounds for non-discrimination (non-exhaustive list). HIV is not a listed ground. No special legislation addressing discrimination exists.	Section 66 of the *Constitution* lists grounds for non-discrimination (exhaustive list). HIV is not a listed ground. Law no 5/2002 deals specifically with discrimination against employees and candidate employees and HIV/AIDS is covered by the law.	Section 10 of the *Constitution* lists grounds for non-discrimination (exhaustive list). HIV is not a listed ground. Section 107(1) of the *Labour Act* lists grounds of non-discrimination in employment. Although it does not include HIV status, see the Labour Court ruling on exclusion.[4]	Section 9(3) of the *Constitution* lists grounds for non-discrimination (non-exhausted list). HIV is not a listed ground. Specialised legislation on non-discrimination: *Promotion of Equality and Prevention of Unfair Discrimination Act* no 4 of 2000, section 34 provides for the possibility of including HIV status as a ground for non-discrimination.	Swaziland does not have a *Constitution* although negotiations around the drafting of a *Constitution* with a bill of rights are being considered.	Section 23 of the *Constitution* lists grounds for non-discrimination (exhausted list). HIV is not a listed ground. No special legislation addressing discrimination exists.	Section 23 of the *Constitution* lists grounds for non-discrimination (exhausted list). HIV is not a listed ground. *Statutory Instrument* 202 of 1998 prohibits discrimination on the basis of HIV status in the workplace.

2 The Directive Principles of State Policy are not in themselves binding and are subject to the availability of funds under article 110.

3 Botswana Network on Ethics, Law and HIV/AIDS.

4 *Haindongo Nghidipohamba Nanditume v Minister of Defence* Case No. LC 24/98.

	Botswana	Malawi	Mozambique	Namibia	South Africa	Swaziland	Zambia	Zimbabwe
HIV/AIDS and the workplace: discrimination and pre-employment testing	Labour legislation does not address discrimination on the ground of HIV status and there are no legislative provisions on pre-employment HIV testing.	Labour legislation does not address discrimination on the ground of HIV status and there are no legislative provisions on pre-employment HIV testing.	Law no 5/2002 outlaws discrimination on the ground of HIV status in employment and prohibits pre-employment HIV testing.	Guidelines were promulgated in terms of section 112 of the Labour Act for the implementation of the *National Code on HIV/AIDS in Employment* and for application of relevant provisions of the *Labour Act* in respect of HIV/AIDS. The guidelines outlaws discrimination on HIV status and pre-employment testing for HIV.	Article 6 of the *Employment Equity Act* no 55 of 1998 lists HIV status as a ground for non-discrimination. HIV testing of an employee is prohibited by section 7(2) unless justifiable by the Labour Court in terms of section 50(4).	Labour legislation does not address discrimination on the ground of HIV status and there are no legislative provisions on pre-employment HIV testing.	Labour legislation does not address discrimination on the ground of HIV status and there are no legislative provisions on pre-employment HIV testing. The Defence Force requires HIV tests and do not recruit HIV positive candidates.	*Statutory Instrument* 202 of 1998 prohibits discrimination based on HIV status in the workplace and states that pre-employment testing should not be required except where fitness for work is a precondition to the offer of employment. *Labour Relations Amendment Bill* of 2001 includes HIV status as a ground for non-discrimination.
Legislative protection of PLWHA in medical schemes	No	No	No	No, although the *2002 Health Plan* provides policy protection in terms of the Aid for AIDS benefit scheme.	Yes	No	No	No
HIV/AIDS and insurance policies	No legislative regulation, policies for PLWHA determined by companies at higher premiums or not at all.	Currently no legislative protection, the issuing of policies is up to the private company (no granting of life insurance to HIV positive people).	No legislative regulation of the insurance industry, life insurance policies do not cover PLWHA.	No legislative regulation of the insurance industry.	No legislative regulation of the insurance industry. The Life Office's Association's *HIV Testing Protocol* clearly states that life insurance will not be granted to people who test HIV positive. Those companies that do offer special packages do it at higher premiums or limit the amount of insurance.	No legislative regulation of the insurance industry.	No legislative regulation of the insurance industry.	No legislative regulation of the insurance industry.
Existence of cultural practices that enhance spread of HIV	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Legality of commercial sex work	Illegal	Illegal	Illegal	Illegal	Illegal	Illegal	Illegal	Illegal
Legality of same sex relationships	Illegal	Illegal	Illegal	Illegal	Legal	Illegal according to common law offence of sodomy, last case tried in 1983. Lesbianism seems legal according to 1992 judgment.[5]	Illegal	Illegal

5 Mngomezulu case discussed on http://www.mask.org.za/SECTIONS/AfricaPerCountry/ABC/swaziland/swaziland_index.html.

	Botswana	Malawi	Mozambique	Namibia	South Africa	Swaziland	Zambia	Zimbabwe
HIV education in schools: non-discrimination in schools	HIV/AIDS education (for pupils and teachers) is provided for in the 1998 *Policy on HIV/ AIDS Education*, the *National Strategic Plan* and the *National Policy on HIV/AIDS*.	HIV/AIDS education is included in formal primary and secondary school curriculae. This effort is expanded upon in the NSF and *National HIV/AIDS Policy*.	NSF sets forth the policy on education in schools whilst also declaring that implementation has been delayed.[6]	*National Teachers Union Policy on HIV/AIDS* (2000) together with the *National Policy on HIV/AIDS* for the education sector (4th draft) 2002 provides for HIV education in schools and non-discrimination.	1999 *National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions*. The *South African Schools Act* protects learners from unfair discrimination.	NSF provides for integration of HIV education in pre-schools, schools and institutions of higher learning and provides for training of teachers.	HIV/AIDS education is integrated in the school curricula. No special training is provided for teachers. No specific policy on non-discrimination in schools exist.	AIDS education was introduced in schools in 1993. HIV/Life Skills Desk in Ministry of Education trains teachers and co-ordinates HIV teaching in schools. *National Policy on HIV* includes provisions on non-discrimination in schools.
Criminal legislation on HIV/ AIDS	Harsher sentencing for HIV positive rapists in terms of the *Penal Code (Amendment) Act* No 5 of 1998.	No HIV/AIDS specific provisions in the Malawi criminal law rather the 2002 *National HIV/AIDS Policy* aims to promote the use of generic criminal law and not HIV specific criminal codes and to apply HIV status only as a mitigating or aggravating factor.	No HIV/AIDS specific provisions in Mozambique criminal law.	Harsher sentencing for HIV positive rapists provided in the *Combating of Rape Act* of 2000.	*Criminal Law Amendment Act* of 1997 provides for harsher sentences for HIV positive rapists. *Criminal Procedure Second Amendment Act* – more difficult to obtain bail in rape cases involving HIV positive accused. New *Sexual Offences Bill* and *Compulsory HIV Testing of Alleged Sexual Offenders Bill* tabled in 2003.	No HIV/AIDS specific provisions in Swaziland criminal law although the *Public Health Bill* envisages penalties for knowingly transmitting HIV.	No HIV/AIDS specific provisions in Zambian criminal law. Rape carries life sentencing in the *Penal Code* regardless of HIV status. *National AIDS Policy* recommends criminal-ising of wilful HIV transmission.	*Sexual Offences Act* No 8 of 2001, harsher sentencing for HIV positive rapists and criminalizing of deliberate transmission of HIV.
HIV/AIDS and prisons: education, testing, condoms and separation	The following policies are in place; *National Policy on HIV testing and education in prisons*, the *Health Care Delivery Policy*, a *Policy on HIV/ AIDS/STD for inmates* and a *HIV/AIDS Policy and Procedure Manual for Prison Staff and their families*.	No official policy on HIV/AIDS in prisons the only reference to prisons is found in the 2002 draft *Malawi National HIV/AIDS Policy*. Addressing issues such as voluntary testing and counselling, non-segregation of prisoners and the distribution of condoms.	No official policy on HIV/AIDS in prisons guidelines are however included in the *National Strategic Plan on HIV/ AIDS*. Prisoners have access to education on HIV/AIDS and condoms. Prisoners are not separated.	No official policy on HIV/AIDS in prisons. Non-separation of HIV positive inmates. Condoms are not distributed. AIDS campaign training inmates to counsel fellow inmates exist, voluntary testing is provided.	2002 *Policy on Management Strategy of HIV/ AIDS in Prisons*: 1) Voluntary testing, counselling and education. 2) Non-segregation. 3) Condoms are distributed.	The *Swaziland National Strategic Plan on HIV/ AIDS* and the *Policy Document on HIV/AIDS* set forth guidelines on prisons on education, non-separation and voluntary testing and counselling. Condoms are not distributed.	No official policy on HIV/AIDS in prisons exist. Condoms are not distributed in prisons, prisoners are not separated.	Prisons are addressed in the National Policy on HIV/AIDS: 1) Voluntary testing and counselling together with education is provided. 2) Condoms are not distributed. 3) HIV positive prisoners are not separated.

The table above is not conclusive as to all the findings of the study for certain areas analysing access to essential HIV/AIDS drugs, the rights of volunteers in HIV/AIDS medical trials, condom distribution or discussions around legislation and policies protecting women and the most vulnerable in society could not be comparatively tabled. For a discussion on these areas the individual country reports should be accessed.

6 Page 15 of the *Mozambique National Strategic Plan on HIV/AIDS*.

The University of Pretoria established the Centre for the Study of AIDS in 1999 to 'mainstream' HIV/AIDS through all aspects of the University's core business and community-based activities. Its mission is to understand the complexities of the HIV/AIDS epidemic in South Africa and to develop effective ways of ensuring that all the students and staff of the University are prepared both professionally and personally to deal with HIV/AIDS as it unfolds in South African society.

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