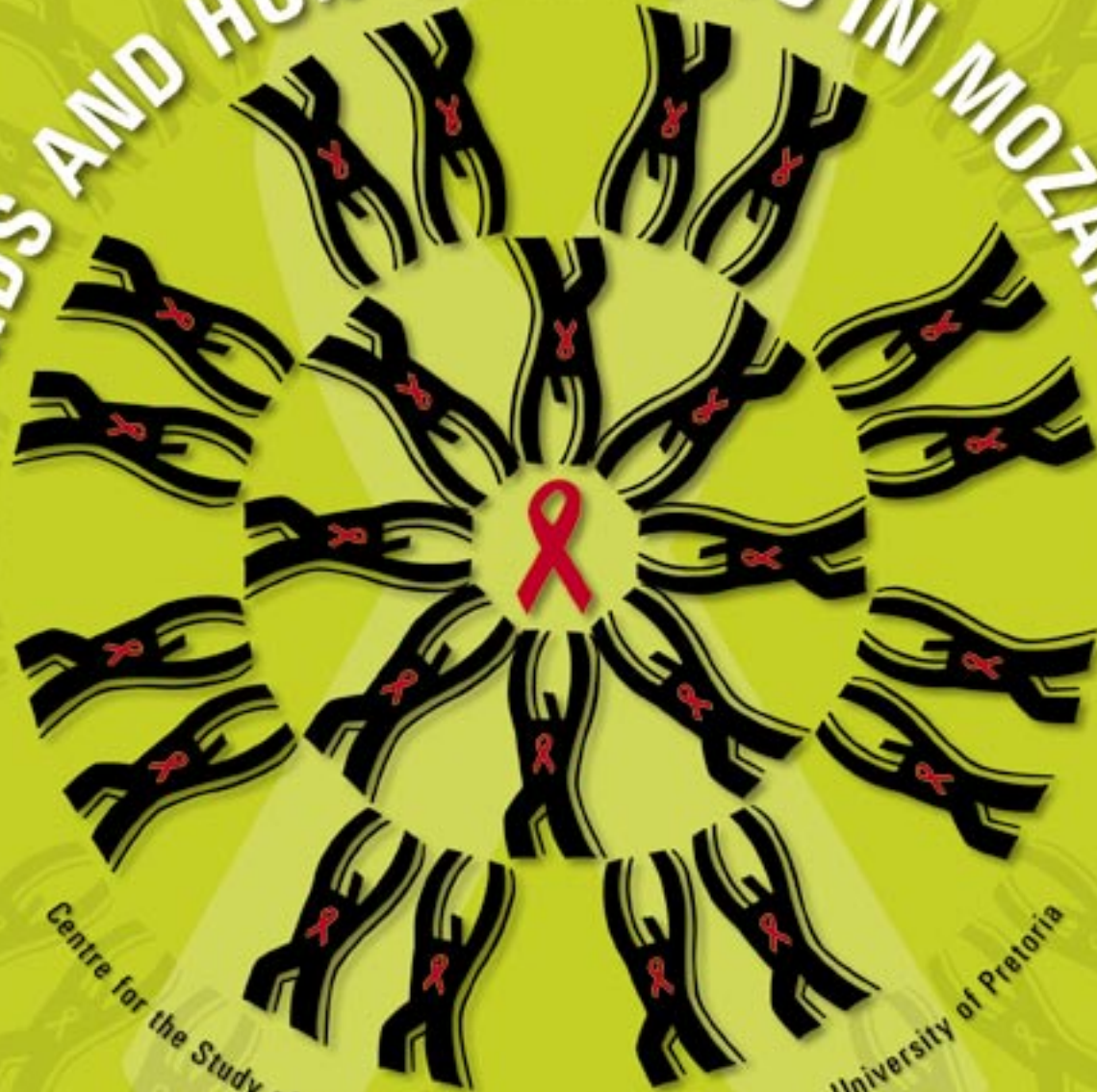


HIV/AIDS AND HUMAN RIGHTS IN MOZAMBIQUE



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1. INTRODUCTION

This country report on HIV/AIDS and human rights in Mozambique 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 Mozambique as they relate to HIV/AIDS and human rights. A national consultant in Mozambique 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 Mozambique, 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 Mozambique, 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.

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 Leopoldo de Amaral, LLM (University of Pretoria), legal consultant.

2. BACKGROUND

Mozambique gained independence from Portugal in 1975. The country has a long coastline and shares borders with six other SADC countries.⁴ Thus, most HIV infections are concentrated along transportation and commerce routes, resulting in a disproportionately high HIV infection rate amongst mobile populations such as miners, truck drivers and migrant workers. Mozambique is one of nine African countries hit hardest by the HIV/AIDS epidemic, with an estimated 1,1 million adults and children living with HIV/AIDS.

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

2.1 Geographical size and population

The following two tables illustrate the size and population of the SADC countries in this study:⁵

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 km²	Zambia	752 614 km ²
Namibia	824 268 km ²	Zimbabwe	390 759 km ²

4 Malawi, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

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

6 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

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 infection⁶

Country	First reporting year	Number of cases
Botswana ⁷	1985	3
Malawi	1985	17
Mozambique	1986	1
Namibia ⁸	1986	1
South Africa	1982	2
Swaziland	1987	1
Zambia ⁹	1984	1
Zimbabwe	1987	119

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

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

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

2.3 HIV prevalence rates

The following 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.¹⁰ 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.¹¹

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 ¹²
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. ¹³ TB co-infection has resulted in an increased mortality rate of TB patients on treatment by over 15%. ¹⁴
Zimbabwe	51 805

¹⁰ 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>.

¹¹ Available at: http://www.unaids.org/hivaidinfo/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."

¹² Southern African Development Community *Health Annual Progress Report 2000-2001*.

¹³ *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.

¹⁴ *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 Mozambique 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.¹⁵ The *Covenant* then continues that state parties, in order to achieve this right, should prevent, treat and control epidemic, endemic, occupational and other diseases.¹⁶ These provisions would clearly apply to HIV/AIDS.

This section also briefly summarises the state reports submitted by Mozambique 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.¹⁷

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.

¹⁵ Article 12(1) of the *ICESCR*.

¹⁶ Article 12(2)(c).

¹⁷ 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

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):¹⁸

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

years. Unfortunately, most African states are behind in submitting reports internationally and regionally.

¹⁸ 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.unhcr.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*	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 which 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, expressed 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 Mozambique (CRC/C/41/Add.11) at its 761st and 762nd meetings (see CRC/C/SR.761-762), held on 22 January 2002.¹⁹

Despite a lengthy report, Mozambique made little reference to the HIV/AIDS epidemic. The only references to HIV/AIDS were as follows:

1. Although mortality rates are slowly improving, Mozambique's mortality indicators continue to be high, with an estimated gross mortality rate of 18,6 per 1 000 inhabitants. The infant mortality rate is estimated to be 134 per 1 000 live births, and the maternal mortality rate 1 500 per 100 000 births. HIV/AIDS is a potential cause of mortality; official statistics indicate that about 10% of child mortality is due to AIDS.²⁰
2. Since the end of the armed conflict in Mozambique, infant mortality rates, which used to be the highest in the world, have been declining, but they are still a source of concern, particularly due to the impact of HIV/AIDS.²¹
3. Epidemiological studies conducted in 1997 found that there is a 40% risk of children in Mozambique being infected with HIV by their mothers at birth, or through breast milk. HIV prevalence amongst women varies considerably: In the south of the country, approximately 5% of women are HIV positive; in central Mozambique, this figure rises to 20%; and, in the north, it is 9%. Given the high fertility rates in Mozambique, HIV infection will gradually rise. In response to this pandemic, the authorities have decentralised the AIDS/STD programme and activities have been extended to the distant areas. Simultaneously, the programme has been integrated into the Mother and Child Health and Family Planning Programmes. The approach to the AIDS epidemic has become multi-sectoral, involving various ministries

and government sectors and is supported by a wide variety of partners, including national and foreign NGOs, and UN agencies.²²

The Committee on the Rights of the Child, in considering the initial report of Mozambique, adopted the following Concluding Observations at the 777th meeting on 1 February 2002.²³ The Committee made the following observations:

1. While noting Mozambique's preference for family-based forms of alternative care and a policy of reducing institutionalisation, the Committee was concerned that a very large number of children are in need of alternative care, in particular the many children who have become orphans because of HIV/AIDS. The Committee recommended that Mozambique make every effort to improve alternative care for children, giving particular attention to HIV/AIDS orphans.²⁴
2. While noting Mozambique's efforts in this domain, including the establishment of the National AIDS Council in 2000 and the adoption of a comprehensive multi-sectoral strategic plan to combat HIV/AIDS, the Committee remained deeply concerned at:
 - a) the very serious impact of HIV/AIDS on the cultural, economic, political, social and civil rights and freedoms of children infected with or affected by HIV/AIDS, including the Convention's general principles and with particular reference to their rights to non-discrimination, health care, education, food and housing, as well as to information and freedom of expression;
 - b) the extremely high, and rising incidence of HIV/AIDS infection in the country;
 - c) mother-to-child transmission of HIV/AIDS and related factors, such as the lack of access of mothers to affordable breast-milk substitute, which would help reduce the risk of transmission;
 - d) the situation of children orphaned by HIV/AIDS, who are particularly vulnerable to commercial exploitation, abuse and neglect;
 - e) the continuing lack of knowledge amongst many people of how HIV/AIDS is transmitted and the role of men in terms of inadequate prevention and repeated transmission; and

¹⁹ The initial report of Mozambique can be accessed at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.41.Add.11.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.41.Add.11.En?Opendocument).
Date accessed: 20 September 2002.

²⁰ Par 97, page 26.

²¹ Par 98, page 26.

²² Pars 331 - 333, page 69.

²³ The observations of the Committee on the Rights of the Child can be accessed at: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.C15.Add172.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.C15.Add172.En?Opendocument). Accessed: 20 September 2002.

²⁴ Pars 44-45, page 11-12.

f) the very negative impact of HIV/AIDS on the numbers of professional workers, such as teachers, and ultimately on Mozambique's capacity to develop its human resources.²⁵

The Committee recommended that Mozambique:

- integrate respect for the rights of the child into the development and implementation of its HIV/AIDS policies and strategies on behalf of children infected with and affected by HIV/AIDS, as well as their families, including by making use of the *International Guidelines on HIV/AIDS and Human Rights* with particular reference to children's rights to non-discrimination, health, education, food and housing, as well as their rights to information and freedom of expression;
- conduct a national study on public attitudes, taboos and bias with regard to HIV/AIDS and infected persons in order to strengthen existing policies and programmes with regard to HIV/AIDS;
- continue and strengthen its efforts to address the incidence of HIV/AIDS, through the current multi-sectoral approach, by improving public education on modes of transmission and how to prevent and treat, with particular focus on the training of relevant professionals, such as teachers and civil servants;
- give particular attention to the role of men in the prevention of HIV/AIDS transmission and involve children in discussions on prevention strategies;
- continue and strengthen its assistance to children infected or affected by HIV/AIDS, with particular attention to those who have been orphaned by HIV/AIDS, including the provision of medication for treatment;
- strengthen efforts to reduce mother-to-child transmission of HIV/AIDS, including through voluntary prenatal HIV/AIDS testing of mothers, and assistance to infected mothers in obtaining breast-milk substitutes for their children;
- include children in devising and implementing strategies for HIV/AIDS prevention;
- seek technical and other relevant assistance from UNICEF, UNAIDS and WHO in this regard; and

- take note of the recommendations made by the Committee following its "1998 day of general discussion" on "children living in a world with AIDS."²⁶

3.3 Applicable regional legal norms

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.²⁷ 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):²⁸

Country	ACHPR	ACRWC
Botswana	17 July 1986	
Malawi	17 November 1989	16 September 1999
Mozambique	22 February 1989	15 July 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

²⁵ Par 52, page 15.

²⁶ Par 53, page 15-16.

²⁷ 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 ..."

²⁸ 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/afchilratifications.html and www1.umn.edu/humanrts/instree/ratzlafchr.htm. Accessed: 13 September 2002.

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 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*.²⁹ States are also encouraged to provide specific statistical information and indicators relevant to children in need of special protection.³⁰ 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*.³¹ Article 10 specifically deals with HIV/AIDS and sexually transmitted diseases (STDs). The article urges states parties

29 Par 21(g) of the (Adopted) *Guidelines for Initial Reports of State Parties* under the ACRWC.

30 Par 22.

31 *SADC Health Protocol*. Available at: <http://196.36.153.56/doh/department/sadc/docs/protocol99.html>.

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, 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.³²

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.³³

In September 2000, the SADC Council of Ministers approved the *Health Sector Policy Framework Document*, as developed by the SADC Health Ministers.³⁴ 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*.³⁵ 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*.³⁶ 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 *Tunis 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.³⁷ 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."³⁸

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.³⁹ 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*.⁴⁰

32 *Managing the impact of HIV/AIDS in SADC*, August 2000, at page 8. Available at: <http://196.36.153.56/doh/department/sadc/docs>.

33 *Ibid*, at p 28.

34 Available at: <http://196.36.153.56/doh/department/sadc/docs/framework/html>.

35 Available at: http://196.36.153.56/doh/department/sadc/docs/negotiate_principles.html.

36 Available at: http://www.sadc.int/index.php?lang=english&pth=legal/declarations/&page=declaration_on_HIV_AIDS.

37 AHG/Decl I (XXX) 1994.

38 Par 2(1).

39 AHG/Res 247 (XXXII) 1996. Available at: <http://www.onusida-aoc.org/Eng/Abuja%20Declaration.html>.

40 Available at: <http://www.onusida-aoc.org/Eng/Abuja%20Declaration.htm>.

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.”⁴¹ The *Abuja Framework* conceptualises the 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.”⁴²

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.⁴³
- *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.

41 Par 12.

42 See Foreword in the *Guidelines*.

43 *Guideline 6* was revised in 2002 and is available at: <http://www.unhcr.ch/hiv/g6.pdf>.

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

4.1 National legal system: General background

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

Mozambique is a republic with a semi-presidential constitutional democracy and a multi-party system.⁴⁴ Section 1 of the *Constitution* of Mozambique reads: “The Republic of Mozambique is an independent sovereign, unitary and democratic state of social justice.”⁴⁵ Section 6 (d) proclaims that one of the fundamental aims of the Republic shall be: “The defence and promotion of human rights and of the equality of citizens before the law.” Part 2 of the *Constitution* deals with fundamental rights, duties and freedoms and is divided into Four Chapters.⁴⁶ The President and the Members of Parliament are elected by popular vote by secret ballot to serve a term of five years. The President is the head of the government and appoints the Cabinet.

The domestic legal system is the Roman-German or Civil Law or the Continental Law System. This system was inherited by Mozambique from the former colonial power, Portugal. Most of the legislation (particularly the Codes) in force in Mozambique were also inherited from Portugal but are subject to the rules and principles in the *Constitution*.

The Supreme Court, presided over by the Chief Justice, is the highest court in Mozambique.⁴⁷ The Supreme Court is the court of final appeal. The *Constitution* has made provision for other courts such as the Administrative Court, Customs Courts, Maritime Courts, Marshal Courts, Labour Courts⁴⁸ and the Constitutional Council.⁴⁹ The Constitutional Council and the Labour

Courts are not yet established. The Supreme Court currently replaces and acts as the Constitutional Council on electoral issues and constitutional matters.

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

The first AIDS case was diagnosed in Mozambique in 1986. Shortly thereafter, the government engaged in an educational campaign on HIV/AIDS through the Ministry of Health. This was followed in 1988 by the creation of a National AIDS Commission with 50 members. The creation of the HIV/AIDS Epidemic Alert System followed in 1990. In 1995, a programme known as the National Programme for Combating STD/AIDS was established to integrate the control of sexually transmitted diseases into the programmes against HIV/AIDS. In 1998, an Inter-Ministerial AIDS Commission involving eight ministries was created, and the Ministry of Health created the National Programme to Fight AIDS and implemented a short-term plan, followed by three medium-term plans. In March 2000, following on the last medium-term plan, the government published the multi-sectoral Mozambique *National Strategic Plan to Combat STDs/HIV/AIDS* for the period 2000-2002.⁵⁰ The government also established a National Council to assist in the implementation of the *National Strategy (Conselho Nacional do Combate ao Sida)*.

The guiding principles of the *Strategic Plan* do not directly include any reference to human rights. Two guidelines are significant and link indirectly to human rights:⁵¹

- Guideline 3.2.2.2 entitled: “The human beings giving the greatest cause for concern: priority vulnerable groups.” Priority individuals and social groups that have been identified are girls,

⁴⁴ See Section 77 of the *Constitution*.

⁴⁵ The *Constitution* was adopted by the Mozambican Parliament in November 1990.

⁴⁶ Chapter 1 deals with general principles; Chapter 2 deals with rights, duties and freedoms; Chapter 3 deals with economic and social rights and duties; and Chapter 4 deals with guarantees of rights and freedoms.

⁴⁷ Section 168(2) of the *Constitution*.

⁴⁸ Section 167 of the *Constitution*.

⁴⁹ See Chapter 8, Sections 180-184 of the *Constitution*.

⁵⁰ This *Strategic Plan* is currently in the process of being updated.

⁵¹ See page 27 of the *Strategic Plan*.

highly mobile adults, PLWHAs and orphans.

- Guideline 3.2.2.4 entitled: “Involving people living with HIV/AIDS.” This focuses on providing PLWHAs with employment, which will reduce marginalisation and give PLWHAs better socio-economic support.

The only further mention of human rights principles is in Section 3.3.5.10 where the strategies for the Ministry of Justice are outlined.⁵² This Section reads as follows:

“In keeping with its mandate, the Ministry of Justice will be responsible for helping to implement integrated activities in the political area, and approving legislation concerning human rights protection for PLWHAs ...The Ministry will carry out a survey of situations for which there is no legislation [such as]: discrimination against PLWHAs; the prohibition of promoting condoms in prisons; the Mother and Child Statute; succession rights to orphans’ property; decriminalising prostitution; sexual violence against women and children; judicial responsibility of health workers to respect bio-security; and confidentiality concerning HIV status.”

In November 2000, the *Action Plan to Fight HIV/AIDS in Mozambique - Resource Requirements for 2001-2003* was released. This document operationalises the strategies put forth in the *Strategic Plan*. With regard to human rights, the Action Plan declares: “The government of Mozambique is committed to enacting legislation protecting the basic human rights of people living with HIV/AIDS.”⁵³ However, no further reference is made to human rights in the *Action Plan*.

4.1.3 Domestication of international and regional human rights treaties

Mozambique has a dualist system for incorporating treaties. A treaty or an agreement becomes the law in Mozambique when its ratification or accession is followed by its publication in the National Gazette (*Boletim da República* or “BR”). The *Constitution* distinguishes between international treaties (*tratados*) and agreements (*acordos*), and both the legislative and the executive are assigned different roles with respect thereto.

Regarding international treaties, it is the responsibility of the Council of Ministers and the Cabinet to prepare the conclusion of such treaties;⁵⁴ the President of the Republic (the Head of the Government) to conclude such treaties;⁵⁵ and the Parliament to ratify such treaties.⁵⁶ After ratifying the treaty, Parliament sends the treaty by means of a resolution with the text of the treaty attached to it directly to the National Printing Office for publication in the National Gazette.

With respect to international agreements, it is the responsibility of the Council of Ministers to conclude, ratify and adhere to such agreements. The Prime Minister sends the agreement for publication to the National Printing Office. After being published in the National Gazette, an international instrument becomes law and it can be invoked or enforced through the courts and the executive. Nevertheless, many of these treaties and agreements require the state to incorporate or enact domestic legislation and since this is not often done, the treaty provisions remain out of reach for the general population.

There is no government department with primary responsibility for the implementation of human rights treaties. The government issues decrees to give effect to international treaties in domestic law. Currently, there is a Commission in Parliament, called the Commission for Legal Affairs, Human Rights and Legality (*Comissão dos Assuntos Jurídicos, Direitos Humanos e Legalidade* or “CAJDHL”) which drafts and proposes to Parliament laws aimed at implementing the principles enshrined in the Bill of Rights in the Constitution. There is, however, no indication that the Commission is engaged in proposing the adoption of laws implementing international instruments.

4.2 HIV/AIDS-specific regulations

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

To date no court cases in Mozambique have dealt specifically with issues regarding HIV/AIDS. Some judges have reported that people allude to their HIV status during trials in order to sensitise the judge to their plight.⁵⁷

⁵² See page 48 of the *Strategic Plan*.

⁵³ See page 6 of the *Action Plan*.

⁵⁴ Section 153 (1)(f).

⁵⁵ Section 123 (b).

⁵⁶ Section 135 (2)(k).

⁵⁷ Interviews held with Judges Hirondina, Maputo City Judicial Court and Carmen Sales, Maputo Province Judicial Court.

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

- *Constitution of the Republic of Mozambique*
- Law no 5/02 of 13 February (general principles of protection against discrimination of employees or candidates, in employing people living with HIV/AIDS)
- Law no 4/98 of 14 January, National Medical Drug Book
- Decree no 22/99 of 4 May
- Decree no 14/87 of 20 of May, General Statute of Public Servants (*Estatuto Geral dos Funcionários do Estado* or “EGFE”)
- Decree no 42/2000 of 31 October, amends Article 141 of EGFE
- Ministerial Order no 183-A/2001 of 18 December, Norms of the National Health Service Organisation for HIV/AIDS and Guideline Principles for the Treatment of HIV/AIDS-infected People
- Resolution no 27/2000 of 31 October, ratifying the *SADC Protocol on Health*
- Ministerial Order no 8/2000 of 9 August
- Ministerial Dispatch of 22 December 2000
- *Política do Governo Sobre a Organização do Sistema Nacional para o Atendimento a Pessoas Vivendo com HIV/SIDA e Tratamento Antiretroviral* of December 2001.

4.2.3 HIV/AIDS policies, guidelines and programmes

- *National Strategic Plan to Combat STDs/HIV/AIDS 2000-2002 – Quality and Coverage*, March 2000
- *Action Plan to Fight HIV/AIDS in Mozambique – Resource Requirements for 2001-2003*, 30 November 2000
- *Action Plan for the Reduction of Absolute Poverty (2001-2005)*, April 2001
- *Relatório do Seminário para definir a Evolução de da Epidemia do HIV/SIDA em Moçambique* (Report of the Seminar to Define the Evolution of the HIV/AIDS Epidemic in Mozambique), 10 August 1999
- *O Sistema Prisional em Moçambique, Programa das Nações Unidas para o Desenvolvimento (PNUD), Programa de Apoio ao Sistema da Justiça*, Maputo, 2000.

The Ministry of Health is primarily responsible for HIV/AIDS policies and programmes through the National Programme of Control of Sexually Transmitted Diseases and AIDS (*Programa Nacional de Controle de Doenças de Transmissão Sexual e do Síndrome de Imunodeficiência Adquirida* or “PNC/DTS/SIDA”), together with the Directorate of Health and the National Council on AIDS (*Conselho Nacional de Combate ao SIDA* or “CNCD”), which reports directly to the Office of the Prime Minister.

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

According to the UNAIDS delegation in Maputo, the government is aware of the document *HIV/AIDS and Human Rights – International Guidelines*. Several pieces of domestic legislation have been modelled on these *International Guidelines* in recent years. The government also signed the *Paris AIDS Declaration* in 1994 prior to the introduction of the *International Guidelines*. A pledge was made to respect the fundamental rights and liberties of all those infected by HIV/AIDS, irrespective of their circumstances, whilst fighting against poverty, stigmatisation and discrimination.⁵⁸

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

The following criteria must be met to qualify for social security in Mozambique:

1. registration as an employee with the National Institute of Social Security (*Instituto Nacional de Segurança Social*); and
2. payment of a monthly contribution towards the allocated fund.

Currently, the contribution is 7% of the monthly salary for employees from the private sector.⁵⁹ Only those who contribute monthly are granted a monthly subsidy.

Former military employees or their families, army personnel and public servants automatically qualify for disability grants, but private sector employees or sole entrepreneurs have to fulfil certain requirements to qualify for the grant from Social Security. While HIV/AIDS is not directly referred to as a disability, HIV-positive employees may be entitled to a disability grant in certain cases. Generally the unemployed are not entitled to a grant.

The *Action Plan For the Reduction of Absolute Poverty (2001-2005)* states with reference to social justice: “The state is concerned with ensuring respect for the equality of rights and opportunities for all citizens and segments of society ...The state is responsible for providing support for their participation in the normal life of society and protection for those at risk of falling into destitution and delinquency.”⁶⁰ The *Plan* identifies children, women, the elderly and the handicapped as the main target groups for social action. It also states, however, that financial resource restrictions limit the state’s ability to provide subsidised basic health and education services to the population.⁶¹

4.3 Health sector

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

Section 94 of the *Constitution* states: “All citizens shall have the right to medical and health care, within the terms of the law, and shall have the duty to promote and preserve health.” It is clear that the enjoyment of this right is subject to the law in place (*nos termos da lei*). The right to health care in Mozambique cannot be directly applied or enforced through the courts. To date, this has not been challenged in court.

The Ministry of Health has established countrywide Sentinel Posts for Voluntary Testing and Group Counselling (*Gabinete de Atendimento e Teste Voluntario* or “GATV”). These efforts are directed mainly at youth. The government provides free condom distribution in rural areas and has developed a policy on the importation and sale of anti-retroviral drugs. In order to assist those infected, the Ministry of Health has also established specialised medical clinics, known as *Hospital de Dia* (Day Hospitals). Government is set to start a pilot project to provide anti-retroviral drugs to pregnant women in public hospitals. The government, in acknowledging the potential risk of infection to medical personnel, has put in place legislation that guarantees assistance to medical personnel infected in the line of duty.⁶² This legislation also regulates the use of anti-retroviral drugs within the national health system.

Within the Ministry of Health, a structure called the NPC STD/AIDS co-ordinates the governmental response. The NPC STD/AIDS aims, as a general objective, to prevent HIV infection and provide health care to PLWHAs and their families, focusing on the following six components:⁶³

- the prevention of sexually transmitted diseases through diagnosing and treating STDs and by promoting condom use;
- the prevention of HIV transmission via blood;
- health care and social support for PLWHAs;
- programme planning and management;
- monitoring and assessment of the Programme; and
- epidemiological surveillance.⁶⁴

The *Action Plan For the Reduction of Absolute Poverty (2001-2005)*, published in April 2001, recognises the fight against HIV/AIDS as one of the main objectives to protect productivity, which will only be achieved by addressing the problems in the health sector. It specifically highlights the following as principal measures to be undertaken:⁶⁵

- focusing on preventative measures, including the treatment of STDs, counselling and voluntary testing, controlling blood transfusions and testing for syphilis;
- establishing and operating VCT centres; and
- carrying out education and information campaigns on HIV/AIDS and the distribution of condoms to HIV-positive persons.

4.3.2 HIV testing, notification and confidentiality

HIV/AIDS is not a notifiable disease in Mozambique. Furthermore, there is no national policy in place to regulate voluntary HIV testing. Certain principles pertaining to testing are nevertheless incorporated in different pieces of legislation. For example, Law 5/2002 provides in Article 4 that forcing prospective employees or employees to undergo compulsory HIV testing is

⁶⁰ See page 84 of the *Action Plan For the Reduction of Absolute Poverty*.

⁶¹ Ibid.

⁶² Ministerial Order 183-A/2001 of 18 December.

⁶³ See page 13 of the *National Strategic Framework*.

⁶⁴ For more on the areas of responsibility, aims, strategic plans and animating projects within the Ministry of Health, see Section 3.3.5.1 of the *National Strategic Framework*.

⁶⁵ See page 54 of the *Action Plan for the Reduction of Absolute Poverty*.

prohibited, and Decree 42/2000 of 31 October stipulates that compulsory testing of public servants is illegal.

The right to privacy and integrity is protected by the *Constitution*;⁶⁶ nevertheless, relevant authorities can be notified of a person's health status when the law requires it,⁶⁷ or when the information is needed for prevention purposes.⁶⁸ The government has established Sentinel Posts throughout the country and the HIV/AIDS test results emanating from these posts are reported to the Ministry of Health for prevention purposes. The results are used to compile statistics and the identities of volunteers are kept confidential. Pre- and post-test counselling is available at these sites.

4.3.3 Patients' rights

Article 5 of Law 5/2002 stipulates that medical personnel from both the public and private spheres are under an obligation to keep a person's HIV status confidential. Breaching this Article can result in a penalty corresponding to the value of fifty times the minimum wage (currently about US\$35) or an even harsher sentence. Efforts to extend the protection of patients' rights are also evident in the *Strategic Plan*. As part of the general strategy to "overcome social obstacles: social acceptance of the national response and access to marginalised groups," the *Strategic Plan* envisions the formulation of guidelines concerning the ethical norms of health care workers.⁶⁹

4.3.4 Access to essential HIV/AIDS drugs

In 2000, the government adopted the *National Guideline Policy on the Use of Anti-Retroviral Drugs and the Treatment of Opportunistic Infections*, Ministerial Order 183-A/2001 of 18 December. It defines the norms that apply within the National Health Service Organisation for the treatment of PLWHAs and principles to orientate the treatment of opportunistic diseases. The Order also includes technical guidelines on the administration of ARVs.

The treatment of STDs and opportunistic infections and the provision of counselling services to HIV-infected people are amongst the core activities identified for the realisation of the objectives of the *National Strategic Plan to Combat STDs/HIV/AIDS*. More specifically, the *Action Plan to Fight HIV/AIDS* in Mozambique identifies that increased access to health care facilities is required generally, but also in the workplace, at schools, in community centres and other similar venues.⁷⁰

4.3.5 Medical trials on human subjects

There are no regulations in place in Mozambique to protect the rights of volunteers in medical experiments. The *Constitution*, however, guarantees the right to physical integrity.⁷¹

4.3.6 Condoms

The distribution of condoms increased from 2 million to 20 million between 1990 and 1998.⁷² In 1995, a programme for the social marketing of condoms was initiated. This project sells condoms and reaches sex workers, prisoners and soldiers amongst others.⁷³ The government only provides condoms free of charge in rural areas. Condoms must be purchased in urban areas, and prices vary. There is a unique brand of condoms available countrywide, called *Jeito* ("Manner"). A pack of three costs 1 000 MT (one thousand meticals). The female condom is more expensive and is rarely available in pharmacies.

Section 3.3.4.2 of the *Mozambique National Strategic Plan to Combat STDs/HIV/AIDS 2000-2002* sets out the specific strategies for the promotion of condom usage. Four strategic stages are highlighted:⁷⁴

- establishing a consultancy group for the promotion of condoms, involving the business sector;
- assessing the way in which condoms are promoted amongst young people, highly mobile people and sex workers in urban and rural areas, and their relevance to the social and cultural obstacles identified in the national survey;
- ensuring that condoms may be purchased through the General State Budget for the period the

66 Section 71.

67 For instance to determine if a rape suspect is infected by a sexual disease, the Judge can order the relevant health institution to notify the Court of the suspect's HIV/AIDS status.

68 Law n° 5/2000, Article 5.

69 See page 35 of the *Strategic Plan*.

70 Page 4 of the *Action Plan*.

71 1990 *Constitution*, Section 70.

72 See page 13 of the *National Strategic Framework*.

73 *Ibid*.

74 See page 39 of the *National Strategic Framework*.

Strategic Plan is in place; and

- supervising and training professionals and activists involved in the promotion of sex education for partners on the distribution and sale of condoms.

One of the five core activities in the *National Strategic Plan* is the massive distribution and availability of condoms according to the *Action Plan to Fight HIV/AIDS in Mozambique – Resource Requirements for 2001-2003*. The *Action Plan* states that: “in addition to the purchase of condoms, in-depth consideration will be given to logistics issues for distribution and the identification of points of availability.”⁷⁵

4.3.7 HIV/AIDS and the mentally ill

Section 68 of the *Constitution* of Mozambique guarantees: “Disabled citizens shall enjoy fully the rights enshrined in the *Constitution*, and shall be subject to the same duties, except those rights and duties which their disability prevents them from undertaking.” Despite the absence of specific regulations designed for the protection of this group, it is likely that the general provision in Section 68 will offer some basic protection.

4.4 Equality and non-discrimination

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

Section 66 of the *Constitution* guarantees the right to equality of all citizens before the law. According to this provision, citizens shall enjoy the same rights, and shall be subjected to the same duties regardless of colour, race, sex, ethnic origin, place of birth, religion, educational level, social position, the legal status of their parents, or their profession. Section 67 guarantees the right of equality to men and women in all spheres of political, economic, social and cultural domains. Health status or HIV status is not one of the listed grounds for equality and non-discrimination. The non-discrimination clause can, however, be interpreted to protect people with HIV/AIDS on grounds such as “social position” or “equality in all spheres”. The fact that HIV/AIDS is not included as one of the grounds for non-discrimination has not yet been challenged in court.

4.4.2 Specialised legislation on equality and non-discrimination

The only legislation apart from the *Constitution* that deals with non-discrimination is Law No 5/2002 of 13 February, which identifies “general principles of protection against discrimination of employees or candidate employees living with HIV/AIDS at the local work.” The legislation is relatively new and must be effectively disseminated to create public awareness. Law 18/92 of 14 October provides for the establishment of a specialised court to address issues of non-discrimination with regard to employees or candidate employees. This court has not yet been established.

4.5 Labour rights

4.5.1 HIV/AIDS in the workplace

Section 88 of the *Constitution* declares that: “Work shall be a right and a duty of all citizens, regardless of sex.” Section 89(3) states that: “Employees may only be dismissed in accordance with the law.” No mention is made of HIV status or any other ground of non-discrimination in the workplace. Law No 5/2002 of 13 February was passed to fill the gap with respect to the protection of employees against discriminatory practices in the workplace. Article 4 of Law No 5/2002 prohibits forcing prospective employees or employees to undergo compulsory HIV testing. Similarly, Decree 42/2000 of 31 October determines that compulsory testing of public servants is illegal.

In terms of the *Action Plan to Fight HIV/AIDS in Mozambique 2000-2002*, the Ministry of Labour is supposed to focus on three areas in its planning efforts:⁷⁶

- the development of the framework of labour law in Mozambique related to HIV/AIDS issues;
- collaboration with neighbouring countries to ensure that Mozambique’s legislation is on par in relation to regional legislative frameworks with respect to these issues; and
- essential activities in the fight against HIV/AIDS within the mining sector.

⁷⁵ See page 4 of the *Action Plan*.

⁷⁶ See page 12 of the *Action Plan*.

4.5.2 HIV/AIDS and medical schemes

There is no medical schemes legislation in place in Mozambique. Health care workers⁷⁷ and public servants receive a structured regime of medical intervention if they become infected with HIV in the performance of their duties.⁷⁸

4.5.3 Insurance and HIV/AIDS

There is no general policy on HIV testing for life insurance within the insurance industry in Mozambique. Nevertheless, blood tests are usually conducted, including an HIV test. These tests are not accompanied by the requirements of informed consent or pre- and post-test counselling. The insurance companies have the discretionary power to grant life insurance, and often applicants are not informed of the real reasons for rejection. There are currently no HIV/AIDS-specific life insurance policies available.

4.6 Gender rights

4.6.1 Legal status of women and the role of cultural practices

Section 67 of the *Constitution* states that women and men are equal before the law and in all spheres of the political, economic, social and cultural domains. The *Constitution* further states that while it promotes the values and cultural practices of the people, the practice cannot directly or indirectly violate the written laws of the country. Nevertheless, customary rules and traditions that amount to discrimination against women such as polygyny are common. Female genital mutilation is not a general or widespread practice in Mozambique. Male ritual initiation practices such as male circumcision are a common practice, especially in rural areas where almost 70% of the population lives. It appears that cultural practices play a crucial role in the spread of HIV in rural areas. For example, the media have reported that in certain areas of the country, some priests and traditional leaders have been advising their followers not to accept condoms that are distributed by the government, alleging that they might bring bad luck to the community.

Some cultural obstacles identified by the National Strategic Framework for 2000-2002 are the following:⁷⁹

- polygamy;
- early marriages;
- sexual 'purification' of widows, also known as pita kufa or kutchinga.

These have not been challenged in court to date.

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

There are no special measures, either policy or legislation, in place to protect women and other vulnerable groups. NGOs and the government are currently disseminating information relating to HIV and sexual practices throughout the country. Rape, sexual assault and physical violence are addressed in the *Criminal Code* of Mozambique, but there are no provisions for harsher sentences for HIV-positive rapists. Domestic violence, which includes psychological violence, is not yet criminalised.

4.6.3 Administering ARVs to rape survivors

There are no measures in place to administer anti-retroviral drugs to women who have been raped. However, various stakeholders are lobbying the government and Parliament to provide drugs to raped women.

4.6.4 Commercial sex workers

The law is silent on the prohibition of commercial sex work. The police usually arrest sexual workers on grounds other than prostitution. Sex workers receive counselling and condoms from NGOs and have also, at least in Maputo, a medical clinic that operates at night where they can get medical assistance and counselling. The Mozambique *National Strategic Plan to Combat STDs/HIV/AIDS for 2000-2002* identifies the need for political action in the preparation and adoption of an alternative law concerning commercial sex and its protection. Section 3.3.4.3 of the *National Strategic Plan* deals with strategies to improve the national response in

⁷⁷ Ministerial Order 183-A/2001 of 18 December.

⁷⁸ Decree No 42/2000 of 31 October, amended Article 141 of the General Statute for Public Servants.

⁷⁹ See page 22 of the *Strategic Plan*.

the area of commercial sex workers. The strategies are aimed at increasing education projects for truck drivers and sex workers, and defining an access strategy for the two vulnerable groups to health services and the condom distribution and sale system.⁸⁰

4.6.5 Homosexuality and HIV/AIDS

Male homosexuality is illegal in terms of Sections 70 and 71 of the *Penal Code*, which criminalise male homosexuality and provide for a penalty of up to 3 years imprisonment in a “re-education institution” where hard labour is used to alter the prisoners “aberrant behaviour”. The *Penal Code* is silent as to the legal status of lesbians.

4.7 Children’s rights

4.7.1 Health care, orphans and HIV/AIDS

In order to reduce mother-to-child transmission of HIV, the government is engaging in pilot projects in certain hospitals to assess the social and cost implications of full-scale implementation, before expansion to other public hospitals. The drugs are naturally accessible for people who can afford to pay for them.

Section 3.3.5.3 of the *National Strategic Plan* sets out the strategies to be followed within the Ministry for the Co-ordination of Social Action. These strategies are specifically geared towards children and especially orphans. Amongst other strategies, it is stated that the Ministry “must prepare a national strategy to mobilise community support for orphans and families affected by HIV/AIDS, integrated in the community based support programme.”⁸¹

4.7.2 HIV/AIDS and the educational system

The *National Strategic Plan* notes that themes related to HIV/AIDS should have been introduced into the school curricula more than a decade ago, but implementation has been delayed and no reasons have been provided for the delay.⁸² The *National Strategic Plan* incorporates a

strategy for organising regional seminars with actors to adopt strategies to integrate sex education into schools. It also aims to adopt the *National Guidelines on Gender Issues and Education* for partners and young people.⁸³

Section 3.3.5.2 of the *National Strategic Plan* identifies the following responsibilities for the Ministry of Education: providing education for the prevention of STDs/HIV/AIDS; education for girls; support for staff and students with HIV; and, ensuring the training of teachers on the prevention of HIV/AIDS. It also mentions that the Ministry must “assess the progress made by the ‘Education for Girls’ project, before it is extended from Nampula, Sofala and Zambezia provinces into Manica and Maputo.”⁸⁴ The importance of introducing information on HIV/AIDS into the formal education curriculum, training and supporting teachers in HIV/AIDS education and extending outreach to youth in and out of school is reiterated in the *Action Plan to Fight HIV/AIDS in Mozambique*.⁸⁵

The *Action Plan For the Reduction of Absolute Poverty (2001-2005)* clearly states that education is a basic human right and also includes a commitment to fight HIV/AIDS through schools.⁸⁶

4.8 Criminal law and HIV/AIDS

The criminal law does not address the issue of harmful HIV-related behaviour. Various civil society organisations have called for the criminalisation of high-risk HIV behaviour and legislation is being considered.⁸⁷

4.9 HIV/AIDS and prisons

There are no statistics available on the rate of HIV infection amongst prisoners. The last UNDP report on the prison system in Mozambique reported that malaria, diarrhoea, skin and lung

80 See page 40 of the *National Strategic Plan*.

81 Page 43 of the *National Strategic Plan*.

82 See page 15 of the *National Strategic Plan*.

83 See page 36 of the *National Strategic Plan*.

84 See page 43 of the *National Strategic Plan*.

85 See page 5 of the *Action Plan*.

86 Page 3 of *Action Plan for the Reduction of Absolute Poverty*.

87 Interview held with the President of the Parliamentary Commission on Legal Matters, Human Rights and Legality, Maputo, July 2002.

diseases are the most common sicknesses amongst prisoners.⁸⁸ The same report estimated that 4% of the prison population suffered from sexually transmitted diseases, and 12% of prisoners suffer from other common diseases (including HIV/AIDS). However, a more recent study undertaken by the Ministry of Health and the Ministry of Justice, focusing on one male and one female prison, revealed through voluntary testing that the average rate of HIV infection is 32% amongst a sample of 109 volunteers.⁸⁹ This study recommended the following:

- initiate a programme of education and communication regarding HIV/AIDS amongst inmates, guards and family members;
- improve access to clinics, especially for the treatment of STDs;
- create conditions for continuous counselling, confidentiality and voluntary testing amongst prisoners;
- engage in more research to improve the understanding of sexuality and the use of contraceptives in prisons; and
- engage in more research on the use of drugs in prisons.

The Ministry of Justice is responsible for the implementation of essential activities to reduce the impact of AIDS in prisons in terms of Section 3.3.5.10 of the *National Strategic Plan to Combat STDs/HIV/AIDS 2000-2002*. These essential activities include: “STD treatment, education for partners, promotion of condom use, counselling, voluntary confidential tests and treatment of opportunistic diseases.”⁹⁰ In addition, the Ministry of the Interior has a two-step approach focusing on the establishment of a framework for the distribution of condoms, education and research regarding HIV/AIDS issues related to the police and prison system.⁹¹

Currently, measures that are in place with respect to HIV/AIDS and prisons include informing prisoners about the dangers of unprotected sex and the free distribution of condoms. There is no policy on HIV testing in prisons and there is no separation of prisoners. Prisoners do not have access to anti-retroviral drugs.

88 PNUD, “O Sistema Prisional em Mocambique”, *Programa de Apoio ao Sector da Justica*, Maputo, 2000.

89 Ministerio da Justica e Ministrei da Justica, “A Situacao do HIV/SIDA nas Prisoes”, Maputo, February 2002.

90 Page 48 of the *National Strategic Plan*.

91 See page 12 of the *Action Plan*.

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 8 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.

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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 refers to human rights	2000-2004 NSF refers 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 legislation¹	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 <i>National Destitute Policy</i> 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 <i>Social Assistance Act</i> . In August 2002 the <i>National Guidelines for Social Services to Children Infected and Affected by HIV/AIDS</i> 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 <i>Social Security Act</i> .

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 <i>Constitution</i> .	Article 94 of the <i>Constitution</i> guarantees the right to health subjected to the law in place.	Article 95 of the <i>Constitution</i> refers to public health but as a matter of state policy and not as a fundamental right.	Article 27(1)(a) of the <i>Constitution</i> .	<i>Constitution</i> is suspended, the drafting of a new <i>Constitution</i> is underway.	The right to health care is provided for under the <i>Directive Principles of State Policy</i> incorporated in Part IX of the <i>Constitution</i> . ²	None
HIV/AIDS as a notifiable disease	No	No, although it is foreseen in the draft <i>National HIV/AIDS Policy</i> 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 <i>National HIV/AIDS Policy</i> of 2002.	Ethical guidelines for health workers are foreseen in the <i>2000-2002 National Strategic Plan</i> .	HIV specific guidelines and a <i>Namibian Charter on HIV/AIDS</i> exist. (non-binding)	Protected by the 2001 HPCSA guidelines on the <i>Management of Patients with HIV Infection or AIDS</i> and the <i>SAMA Guidelines on Human Rights, Ethics and HIV</i> .	None	No special provisions.	Provisions within the (non-binding) <i>Patient's Charter</i> .
Constitutional and legislative protection of equality and non-discrimination	Section 15 of the <i>Constitution</i> lists grounds for non-discrimination (non-exhaustive list). HIV is not a listed ground. No special legislation addressing discrimination exists.	Section 20 of the <i>Constitution</i> lists grounds for non-discrimination (non-exhaustive list). HIV is not a listed ground. No special legislation addressing discrimination exists.	Section 66 of the <i>Constitution</i> 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 <i>Constitution</i> lists grounds for non-discrimination (exhaustive list). HIV is not a listed ground. Section 107(1) of the <i>Labour Act</i> 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 <i>Constitution</i> lists grounds for non-discrimination (non-exhausted list). HIV is not a listed ground. Specialised legislation on non-discrimination: <i>Promotion of Equality and Prevention of Unfair Discrimination Act</i> 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 <i>Constitution</i> although negotiations around the drafting of a <i>Constitution</i> with a bill of rights are being considered.	Section 23 of the <i>Constitution</i> lists grounds for non-discrimination (exhausted list). HIV is not a listed ground. No special legislation addressing discrimination exists.	Section 23 of the <i>Constitution</i> lists grounds for non-discrimination (exhausted list). HIV is not a listed ground. <i>Statutory Instrument 202 of 1998</i> 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 <i>National Code on HIV/AIDS in Employment</i> and for application of relevant provisions of the <i>Labour Act</i> in respect of HIV/AIDS. The guidelines outlaw discrimination on HIV status and pre-employment testing for HIV.	Article 6 of the <i>Employment Equity Act</i> 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.	<i>Statutory Instrument</i> 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. <i>Labour Relations Amendment Bill</i> 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 <i>Health Plan</i> 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 <i>HIV Testing Protocol</i> 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 <i>Policy on HIV/AIDS Education</i> , the <i>National Strategic Plan</i> and the <i>National Policy on HIV/AIDS</i> .	HIV/AIDS education is included in formal primary and secondary school curricula. This effort is expanded upon in the NSF and <i>National HIV/AIDS Policy</i> .	NSF sets forth the policy on education in schools whilst also declaring that implementation has been delayed. ⁶	<i>National Teachers Union Policy on HIV/AIDS</i> (2000) together with the <i>National Policy on HIV/AIDS</i> for the education sector (4th draft) 2002 provides for HIV education in schools and non-discrimination.	1999 <i>National Policy on HIV/AIDS for Learners and Educators in Public Schools, and Students and Educators in Further Education and Training Institutions</i> . The <i>South African Schools Act</i> 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 coordinates HIV teaching in schools. <i>National Policy on HIV</i> includes provisions on non-discrimination in schools.
Criminal legislation on HIV/AIDS	Harsher sentencing for HIV positive rapists in terms of the <i>Penal Code (Amendment) Act No 5 of 1998</i> .	No HIV/AIDS specific provisions in the Malawi criminal law rather the 2002 <i>National HIV/AIDS Policy</i> 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 <i>Combating of Rape Act of 2000</i> .	<i>Criminal Law Amendment Act of 1997</i> provides for harsher sentences for HIV positive rapists. <i>Criminal Procedure Second Amendment Act</i> – more difficult to obtain bail in rape cases involving HIV positive accused. New <i>Sexual Offences Bill</i> and <i>Compulsory HIV Testing of Alleged Sexual Offenders Bill</i> tabled in 2003.	No HIV/AIDS specific provisions in Swaziland criminal law although the <i>Public Health Bill</i> envisages penalties for knowingly transmitting HIV.	No HIV/AIDS specific provisions in Zambian criminal law. Rape carries life sentencing in the <i>Penal Code</i> regardless of HIV status. <i>National AIDS Policy</i> recommends criminalising of wilful HIV transmission.	<i>Sexual Offences Act No 8 of 2001</i> , 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; <i>National Policy on HIV testing and education in prisons</i> , the <i>Health Care Delivery Policy</i> , a <i>Policy on HIV/AIDS/STD for inmates</i> and a <i>HIV/AIDS Policy and Procedure Manual for Prison Staff and their families</i> .	No official policy on HIV/AIDS in prisons the only reference to prisons is found in the 2002 draft <i>Malawi National HIV/AIDS Policy</i> . 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 <i>National Strategic Plan on HIV/AIDS</i> . 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 <i>Policy on Management Strategy of HIV/AIDS in Prisons</i> : 1) Voluntary testing, counselling and education. 2) Non-segregation. 3) Condoms are distributed.	The <i>Swaziland National Strategic Plan on HIV/AIDS</i> and the <i>Policy Document on HIV/AIDS</i> 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 <i>National Policy on HIV/AIDS</i> : 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.



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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