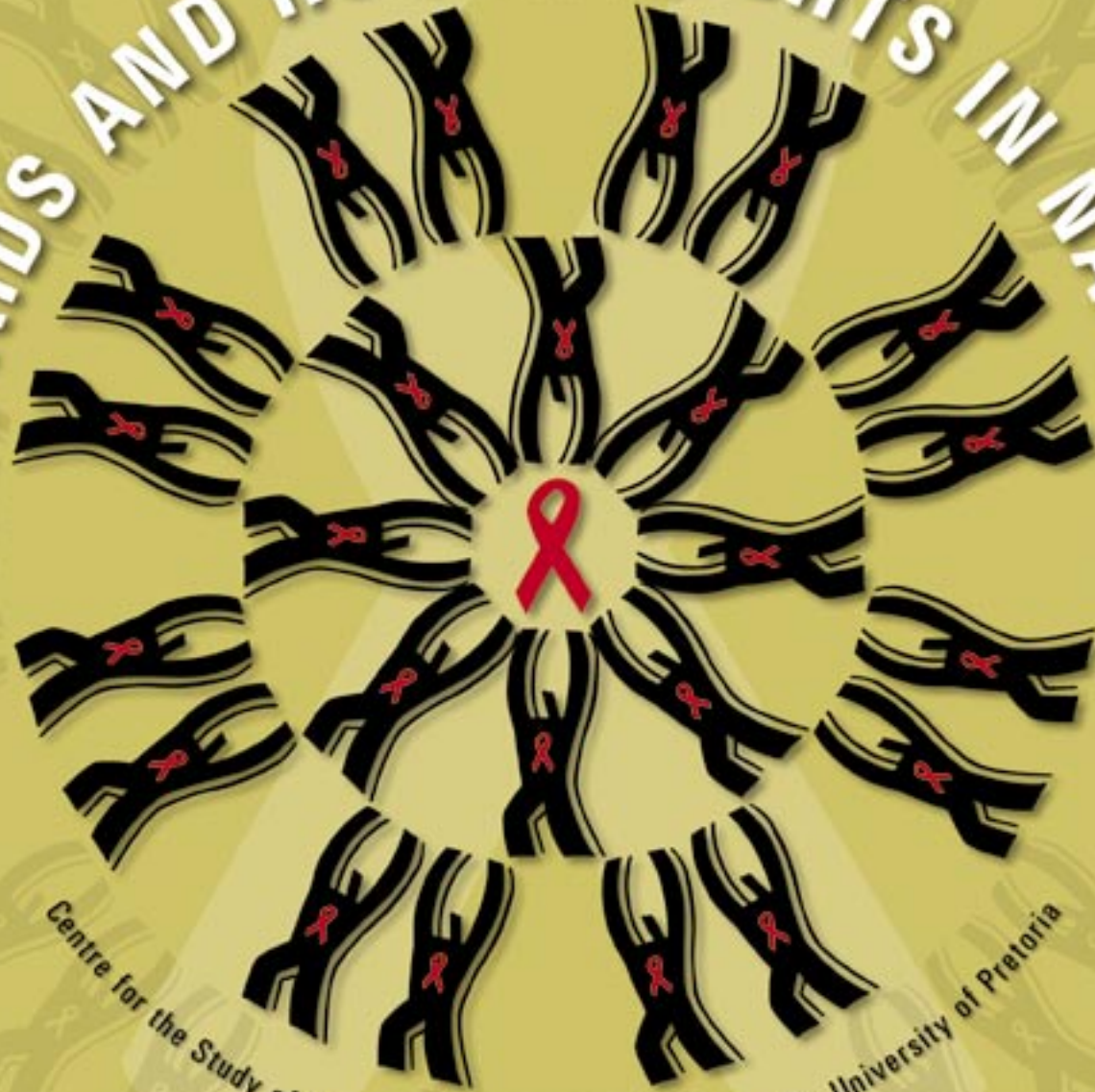


HIV/AIDS AND HUMAN RIGHTS IN NAMIBIA



Centre for the Study of AIDS and the Centre for Human Rights, University of Pretoria



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1. INTRODUCTION

This country report on HIV/AIDS and human rights in Namibia 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 Namibia as they relate to HIV/AIDS and human rights. A national consultant in Namibia 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 Namibia, 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 Namibia, 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 Chiku Mchombu, researcher at the Human Rights and Documentation Centre based at the University of Namibia.

2. BACKGROUND

Namibia shares its borders with South Africa (from which it gained independence in 1990), Botswana, Angola and Zambia. Since the first HIV/AIDS case was reported in 1986 Namibia also shares in the region's escalating HIV infection rate. An estimated 22.5% of the adult population is infected with HIV/AIDS.⁴

The tables below provide statistical information on all the SADC countries, with the statistics for Namibia 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 km ²	Zambia	752 614 km ²
Namibia	824 268 km²	Zimbabwe	390 759 km ²

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

2.2 First reported instances of HIV infection⁶

Country	First reporting year	Number of cases
Botswana ⁷	1985	3
Malawi	1985	17
Mozambique	1986	1
Namibia⁸	1986	1
South Africa	1982	2
Swaziland	1987	1
Zambia ⁹	1984	1
Zimbabwe	1987	119

⁴ Statistics from UNAIDS available at: http://www.unaids.org/hivaidsinfo/statistics/fact_sheets/all_countries_en.html#N.

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

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 I 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 Namibia 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 Namibia 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 norms¹⁸

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):

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 Namibia (CRC/C/3/Add.12), received on 22 January 1993, at its 109th and 110th meetings held on 13 January 1994.¹⁹ Namibia reported that it is “struggling against an exponential surge in the number of AIDS cases.”²⁰ In terms of HIV/AIDS and the mechanisms in place to address the epidemic, Namibia reported the following:

1. The country is fortunate in having a number of non-governmental organisations that are concerned with the problems of children. In addition to supporting the government’s programmes, the existence of these organisations helps to ensure that the delivery of services remains decentralised. Amongst the non-governmental organisations which are involved in issues relating to children are:
 - the Namibia Network of AIDS Service Organisations (NANASO), a group of NGO’s co-ordinating programmes aimed at the prevention of AIDS; and
 - the Namibia Red Cross Society, which includes amongst its programmes day care centres, HIV/AIDS education and feeding schemes.²¹
2. Namibia has developed a unique integrated package of interventions called the Family Life Holistic Empowerment Programme that attempts to strengthen the family as the basic unit of society. For example, the programme promotes healthy lifestyles by integrating issues such as primary health care and HIV/AIDS prevention into family and community life.²²
3. In reporting on child mortality, Namibia noted that HIV/AIDS was an increasing problem. In 1986, there were only four reported cases of HIV/AIDS infection, but 543 cases of HIV/AIDS were recorded in 1990, 1 261 in 1991 and 914 in only the first six months of 1992. The reported cases involve slightly more men than women and the vast majority of re-

ported cases are in the 15 to 44 year age range, the most active age group in terms of reproduction and economic activity. About 12% of all cases reported since 1990 involve people in the 15 to 24 year age range, while about 4% involve children under the age of 5. These figures, alarming as they are, are believed to underestimate the true extent of the problem.²³

4. The main mode of transmission of HIV in Namibia is heterosexual intercourse, but there are an increasing number of cases in which HIV is passed from mother to child. The President of Namibia in July 1990 launched a National AIDS Control Programme which has had success in raising awareness about HIV/AIDS through widespread and innovative public education campaigns as well as training programmes and workshops for different sectors, including health workers, school personnel, church and community leaders. The emphasis of the programme is on community involvement in prevention and home-based care, community support for HIV-infected persons and persons suffering from AIDS, and children who are orphaned as a result of AIDS. The efforts of the government to combat HIV/AIDS is assisted by the WHO and the Namibia Network of AIDS Service Organisations (NANASO), a group which promotes the co-ordination of HIV/AIDS work amongst Namibian NGOs.
5. Two national surveys conducted in 1991 amongst students and adults indicate that much still has to be done in the area of HIV/AIDS education. The Ministry of Youth and Sport consulted youth leaders about the effectiveness of existing informational materials and approaches in a “Youth against AIDS” initiative, and a ten-day workshop was held to train youth leaders in peer outreach techniques in September 1992, as a joint venture with the Ministry of Health and Social Services. Information on HIV/AIDS as a component of Family Life Education was to be introduced in 1992 as part of the school curriculum. Pilot projects were already under way in 1992, involving teachers, students and their parents in developing HIV/AIDS education that was acceptable to communities, which traditionally did not discuss sexual matters. According to the report, AIDS was frequently featured on television and radio broadcasts and publicly discussed by prominent political and community leaders. In September 1992, National AIDS Week was launched in Windhoek, and was accompanied by

¹⁹ Namibia’s initial report can be accessed at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.3.Add.12.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.3.Add.12.En?Opendocument).

²⁰ Par 21, page 5.

²¹ Par 23 - 24, pages 5 - 6.

²² Par 125, page 21.

²³ Par 231, page 35.

theatre and drama productions on the dangers of casual sex with an aim of extending it into local communities.²⁴

6. With regard to family planning, the report stated that a low level of acceptance of condoms contributed to the spread of HIV/AIDS in Namibia.²⁵
7. The *Abortion and Sterilisation Act No. 2 of 1985* is interpreted to allow for legal abortions in cases where the expectant mother is HIV positive.²⁶
8. In the strategies aimed at children, there has been an emphasis on integrated multi-sectoral approaches, which take into account the complex nature of most social problems, rather than relying on isolated piecemeal approaches. Interventions such as the Family Life Empowerment Programme, the Early Childhood Protection and Development Programme, the Household Food Security Programme and the National AIDS Control Programme have involved a range of government ministries working together with non-governmental and international organisations to develop initiatives that tackle problems in a holistic fashion.²⁷

The Concluding Observations by the Committee on the Rights of the Child (CRC/C/15/Add.14), after considering the initial report, did not make reference to the HIV/AIDS measures undertaken by Namibia.²⁸

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.²⁹ 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):³⁰

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

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

24 Par 265-272, pages 41- 42.

25 Par 277, page 43.

26 Par 286, page 45.

27 Par 503, page 79.

28 Concluding Observations of the Committee on the Rights of the Child are available at [http://www.unhchr.ch/tbs/doc.nst/\(Symbol\)CRC.C15.Add.14En?Opendocument](http://www.unhchr.ch/tbs/doc.nst/(Symbol)CRC.C15.Add.14En?Opendocument).

30 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 ..."

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

- 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*.³¹ States are also encouraged to provide specific statistical information and indicators relevant to children in need of special protection.³² 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*.³³ Article 10 specifically deals with HIV/AIDS and sexually transmitted diseases (STDs). The article urges states parties to harmonise policies and approaches for the prevention and management of HIV/AIDS and STDs, and to develop regional policies and plans that work towards an inter-sectoral approach to the epidemic.

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

32 Par 22.

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

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.³⁴

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.³⁵

In September 2000, the SADC Council of Ministers approved the *Health Sector Policy Framework Document*, as developed by the SADC Health Ministers.³⁶ 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*.³⁷ 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*.³⁸ 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.³⁹ 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.”⁴⁰

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.⁴¹ 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*.⁴²

34 *Managing the impact of HIV/AIDS in SADC*, August 2000, at page 8. Available at: <http://196.36/153/56/doh/department/sadc/docs>.

35 *Ibid.*, at p 28.

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

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

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

39 AHG/Decl I (XXX) 1994.

40 Par 2(1).

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

42 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.”⁴³ 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.”⁴⁴

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.⁴⁵
- *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.

43 Par 12.

44 See Foreword in the *Guidelines*.

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

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

4.1 National legal system: General background

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

On 21 March 1990, Namibia declared its independence and the SWAPO leader Sam Nujoma became the first President of the Republic of Namibia. Namibia is a multi-party democracy with a *Constitution* that entrenches a Bill of Rights in Chapter 3. Article 1(1) of the *Constitution of Namibia* declares that: “Namibia is a sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.” Article 1(6) affirms that the *Constitution* is the supreme law of Namibia.

The Namibian legal system is founded on Common Law and Roman Dutch Law. The courts are structured in a three-tiered system, consisting of the Supreme Court, the High Court and the Lower Courts. The courts are independent and subject only to the constitutional rule of law.

The Supreme Court is the highest court. It is headed by a Chief Justice who is assisted by other judges appointed by the President on the recommendation of the Judicial Service Commission.⁴⁶ The Supreme Court is followed by the High Court, consisting of the Judge-President and other judges appointed by the President on the recommendation of the Judicial Service Commission. Lower courts are established by Acts of Parliament and have the jurisdiction and procedures prescribed by the respective Act. The Office of the Ombudsman is also charged with the protection of basic human rights and freedoms and serves as a watchdog against corruption and injustice in the country. The Ombudsman is a lawyer or judge appointed by the President, on the recommendation of the Judicial Service Commission. He/she has wide-

ranging powers, including the right to subpoena and question persons and the right to refer matters to the courts, as circumstances require.

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

In 1987, an AIDS Advisory Committee was established to advise the government on HIV/AIDS-related matters. Shortly thereafter, a National AIDS Control Programme (NACP) was launched, followed by a *Short Term Plan for Prevention and Control of AIDS*, covering the period 1990-1992. A *Medium Term Plan I (MTPI)* was launched in April 1992 outlining strategies and priorities for the period of 1992-1998. These plans focused on prevention, raising awareness about HIV/AIDS, surveillance of the epidemic, strengthening of STD management, blood screening and aimed to prevent discrimination against PLWHAs. *MTPI* was co-ordinated by the NACP of the Ministry of Health and Social Services (MOHSS).

In 1996, an External and Intersectoral Evaluation Team was established to review the implementation of *MTPI*. This resulted in a restructuring of the National AIDS Committee (NAC) into the National Multi-sectoral AIDS Coordinating Committee (NAMACOC), and the creation of the National AIDS Co-ordination Programme (NACOP), which replaced the NACP. NAMACOC is placed outside the Ministry of Health and Social Services to foster a multi-sectoral approach. Nevertheless, the Ministry of Health and Social Services is expected to provide technical support to all government sectors when requested to do so.

The *National Strategic Plan on HIV/AIDS (Medium Term Plan II - 1999-2004) (MTP II)* was developed and launched in March 1999. The *Strategic Plan's* objectives include ensuring that Namibians

⁴⁶ The Judicial Service Commission consists of the Chief Justice, or the presiding officer of the Supreme Court, (a judge nominated by the

President), the Attorney General and two representatives from the legal profession.

living with HIV/AIDS and their families are not subjected to any form of discrimination, and, that each sector in this regard reviews its policies to eliminate any form of discrimination.⁴⁷

The Ministry of Justice in terms of *MTP II* is responsible for the development and review of all laws, policies and guidelines to determine their appropriateness in dealing with HIV/AIDS and human rights. The Ministry of Justice must strive to achieve the following:⁴⁸

- preventing discrimination on the basis of real or perceived HIV status
- advocating for the rights of those infected and affected with HIV/AIDS
- spearheading public education campaigns on human rights and HIV/AIDS
- developing educational materials on human rights and HIV/AIDS within the Namibian legal framework.

4.1.3 Domestication of international and regional human rights treaties

International instruments are self-executing in Namibia. Article 144 of the *Constitution* reads as follows: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

There is no government department with primary responsibility for the ratification of treaties, although the Ministry of Foreign Affairs usually plays a role in the deliberations leading to treaty ratification. The Inter-Ministerial Committee on Human Rights, which falls under the Ministry of Justice, also plays a role by assisting in the compilation of country reports as required by various human rights treaties to which Namibia is a state party; participating in training programmes aimed at training officials in the compilation of the periodic reports; and procuring copies of the various treaties and documents relevant for the compilation of such reports.

4.2 HIV/AIDS-specific regulations

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

There have been cases dealing with HIV/AIDS and workplace issues at the Magistrate and District Labour Court levels. These cases primarily addressed issues of non-discrimination on the grounds of HIV/AIDS status under the *Labour Act*.⁴⁹ The only reported case, *Haindongo Nghidipohamba Nanditume v Minister of Defence*,⁵⁰ specifically dealt with pre-employment HIV testing and was decided by the Labour Court on 10 May 2000.

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

- *Constitution*
- *Combating of Rape Act, 2000 (Act 8 of 2000)*
- *Medical Funds Act, 1995 (Act 23 of 1995)*⁵¹
- *Defence Amendment Act, 1990 (Act 20 of 1990)*⁵²

4.2.3 HIV/AIDS policies, guidelines and programmes

1. *Guidelines to the Clinical Management of HIV and AIDS* - Ministry of Health and Social Services
2. *University of Namibia HIV/AIDS Policy*, 22 June 2001
3. *Guidelines for Counselling of HIV/AIDS and STDs*
4. *Policy on HIV/AIDS Confidentiality, Notification, Reporting and Surveillance* - Ministry of Health and Social Services (January 2002)
5. *Short Term Plan for the Prevention and Control of AIDS – NAMIBIA – June 1990-May 1991* - Ministry of Health
6. *Guidelines for the Implementation of National Code on HIV/AIDS in Employment – Government Gazette – 3 April 1998*
7. *The National Strategic Plan on HIV/AIDS (Medium Term Plan II) 1999-2004*
8. *Policy on HIV/AIDS – Namibia National Teachers’ Union (NANTU) – 1 Dec 2000.*

47 See pages 9 and 11 of MTP II.

48 Appendix D, page 17 of MTP II.

49 No transcripts are available for these cases. Information from an interview held with Mr Tenu Avafia, Project Lawyer, AIDS Law Unit - Legal Assistance Centre, Namibia.

50 Case No. LC 24/98. Discussed in greater detail in the section on equality and non-discrimination.

51 In *The Government Gazette of the Republic of Namibia* (28 December 1995).

52 In *The Government Gazette of the Republic of Namibia* (4 December 1990).

The Ministry of Health and Social Services, through the National AIDS Co-ordination Programme (NACOP), is primarily responsible for HIV/AIDS policies. In the private sector, the Namibia Chamber of Commerce and Industry (NCCI) introduced a programme called “Managing the Risk – Mobilising the Private Sector”. The main objectives are to reduce the impact of HIV/AIDS on corporate Namibia by mobilising this sector to invest in prevention, care and support programmes.

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

The Namibian government has taken cognisance of the *HIV/AIDS and Human Rights – International Guidelines*. In February 2001, the Ministry of Defence organised a conference on HIV/AIDS and Human Rights and representatives of UNAIDS from Geneva were present to explain the implementation of the *International Guidelines*. The *International Guidelines* were subsequently used to draft the Ministry of Defence *HIV/AIDS Policy* and Parliament used the *Policy* to formulate the *National Defence Bill*.

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

The 1992 *Policies and Guidelines for HIV/AIDS Prevention and Control – Positive Responses and Choices* states in reference to employee benefits that “pension rights and other occupationally related benefits should not be harmed by the disclosure of one’s HIV status.”⁵³

The Social Security Commission was established by Parliament under the *Social Security Act* No 34 of 1994. The social security system provides for maternity leave, sick leave and death benefits to its members and for the establishment of a National Medical Benefit Fund and a National Pension Fund to provide universal medical aid cover and old age pensions respectively to all employees. No mention is made of HIV/AIDS within the provisions on “employees rights and obligations” issued by the Social Security Commission. A number of other policy documents in Namibia do, however, refer to HIV/AIDS specifically with respect to social and employment benefits.

For example, the *MTP II* makes the Ministry of Health and Social Services, together with the Social Security Commission, responsible for ensuring that those affected and infected with HIV/AIDS are provided with information regarding social benefits, services and assistance and that they have access to such benefits and services under the *Social Services Act and Social Security Act*.⁵⁴

Further, the guidelines issued by the Ministry of Labour in 1998 for the implementation of the *National Code on HIV/AIDS and Employment*, state in Section 6.7.1 that: “government, employers and employee representatives should ensure that occupational benefits are non-discriminatory and sustainable and provide support to all employees, including those with HIV infection.” It continues that information which benefits schemes have about the medical status of an employee should be kept confidential and that medical schemes and health benefits linked to employment should be non-discriminatory.⁵⁵

In practice, the social security system allows for people living with HIV/AIDS who are too ill to seek employment to qualify for a disability grant. The grant is administered and paid out by the Social Services Department of the Ministry of Health and Social Services. An individual who is applying for the grant must have his/her doctor provide evidence (usually in a prescribed form) that he/she cannot work due to illness. Social Services will pay 60% of his/her salary for a period of six months (the maximum amount payable is N\$3 000.00). After six months, the amount will be reduced and paid for a further one- and-a-half years. After two years, the doctor must provide further evidence and a lump sum of N\$2 500.00 will be paid. People who have to look after children that have been orphaned by HIV/AIDS can claim an allowance of N\$100.00 per month per child, as well as an amount of N\$100.00 per month for their own expenses.

⁵³ Section 4.5.8, page 9.

⁵⁴ Appendix D, page 4 of *MTP II*.

⁵⁵ Sections 6.7.2-6.7.3.

4.3 Health sector

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

The *Constitution* refers to public health in terms of state policy and not as a fundamental right. Chapter II, Article 95, reads as follows: “The state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: ... (j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.” This merely directs government to develop appropriate policies and it is unlikely that an HIV-positive person can use Article 95 to force the government to provide health care or ARV drugs.

However, Namibia has signed a number of international agreements such as the Constitution of the World Health Organization (WHO), and it is envisioned that these will provide guidance on access to health matters in the future. According to the *MTP II*, the Ministry of Health takes responsibility to co-ordinate the prevention and control of HIV/AIDS in the country and the Ministry must provide technical support to all sectors when requested to do so. Other specific actions for the Ministry of Health and Social Services in terms of the *MTP II* include to:⁵⁶

- co-ordinate, implement and evaluate the impact of the National Response;
- facilitate and co-ordinate training on HIV/AIDS;
- conduct surveillance studies periodically;
- programme and distribute condoms through the public sector;
- provide health and medical services;
- establish a counselling support services network; and
- provide care and support to those infected and affected by HIV/AIDS.

In 2002, the Ministry of Health and Social Services established pilot projects in Oshakati and Windhoek Hospitals for the reduction of mother-to-child transmission of HIV by providing voluntary testing, counselling and the provision of anti-retroviral drugs.

4.3.2 HIV testing, notification and confidentiality

In terms of Namibian public health legislation, HIV/AIDS is not a notifiable disease. In practice, however, the Ministry of Health and Social Services implements a system of anonymous reporting whereby all facilities within the Ministry of Health and Social Services, civil society and the private sector are required to maintain and submit a “notifiable disease report” on a monthly basis.

In January 2002, the Ministry of Health and Social Services released the document entitled *Policy on HIV/AIDS: Confidentiality, Notification, Reporting and Surveillance*.⁵⁷ The *Policy on HIV/AIDS* is based on universally recognised human rights standards. Section 3.2 declares:⁵⁸ “Several years of experience in addressing the HIV/AIDS epidemic have confirmed that the promotion and protection of human rights constitute an essential component in preventing transmission of HIV and reducing the impact of HIV/AIDS. The protection and promotion of human rights are necessary for:

- the protection of the inherent dignity of persons affected with and affected by HIV/AIDS;
- the achievement of the public health goals of reducing vulnerability to HIV infection;
- lessening the adverse impact of HIV/AIDS on those affected;
- preventing new infections;
- protecting the general public; and
- empowering individuals and communities to respond to HIV/AIDS.”

Section 3.4.1 of the *Policy on HIV/AIDS* states that health care workers are ethically and legally required to keep all patient information confidential and may only reveal the information with the patient’s consent. Breach of this obligation should result in professional peer disciplinary measures.⁵⁹ The *Policy on HIV/AIDS* encourages voluntary partner notification and permits involuntary partner notification only after the following has complied with:⁶⁰

- “the HIV/AIDS-positive person in question has been thoroughly counselled as to the need for partner notification;

⁵⁶ See Appendix D page 11 of the *MTP II*.

⁵⁷ The consultative process to draft this policy had already begun in 1999 but Cabinet only adopted it officially in January 2002.

⁵⁸ See page 7 of the *Policy on HIV/AIDS*.

⁵⁹ Page 8.

⁶⁰ Page 9.

- the HIV/AIDS-positive person has refused to notify or consent to the notification of his/her partner(s);
- a real risk of HIV/AIDS transmission to an identifiable partner(s) exists;
- the HIV/AIDS-positive person is given reasonable advance notice of the intention to notify; and
- follow up is provided to ensure support to those involved as necessary.”

The 1992 *National HIV/AIDS Policies and Guidelines - Positive Responses and Choices* reaffirms that HIV testing should be undertaken, with a few exceptions, only with the informed consent of individuals and only after pre- and post-test counselling has taken place.⁶¹ With regard to confidentiality and informing other health professionals, sexual and/or needle-sharing partners of a HIV-positive individual, the *Policy and Guidelines* states that counselling in these cases, together with informed consent, is extremely important.⁶²

In June 2001, the Ministry of Health and Social Services issued *Guidelines for Counselling of HIV/AIDS and Sexually Transmitted Diseases*. The focus on counselling is consistent with some of the major strategies set forth in the *MTP II*. The *Guidelines for Counselling* is for health workers who already have basic knowledge of HIV/AIDS counselling. The following areas are addressed in relation to HIV/AIDS: the concept of counselling; counselling techniques; the process of counselling (including pre- and post-test counselling); the need for confidentiality in counselling and guidelines on informing sexual partners.

4.3.3 Patients' rights

Several ethical guidelines have been issued by the Ministry of Social Services, Directorate Primary Health, that regulate the behaviour of doctors and health care workers towards patients, including *Guidelines for Counselling of HIV/AIDS and Sexually Transmitted Diseases*; *Guidelines for Clinical Management*; *Guidelines on Counselling*; and *Guidelines on Home Based Care and Nursing*.

61 Sections 4.1.4.1 - 4.1.4.3

62 Section 4.1.4.6. Disclosure of the HIV status to a sexual or needle-sharing partner can be undertaken by either the patient or health professional, usually only after the necessary informed consent is obtained. Disclosure can only be undertaken in exceptional circumstances by a health professional without obtaining the necessary consent. See Section 4.1.4.7.

In 2000, the Legal Assistance Centre issued the *Namibian Charter on HIV/AIDS* with the aim of promoting a human rights-based approach to HIV/AIDS.⁶³ The *Charter* addresses the following issues: equal protection of the law and equal access to public and private facilities and benefits; liberty, autonomy, security of the person and freedom of movement; privacy and confidentiality; counselling and testing; partner notification and reporting; gender; children and adolescents; vulnerable groups; children orphaned by AIDS; prisoners; adequate standard of living; access to education; access to appropriate information and sex education; access to health care and appropriate treatment; research and clinical trials; employment; insurance and medical aid; media; and cultural and traditional practices.

4.3.4 Access to essential HIV/AIDS drugs

In 2002, the government embarked on a trial programme involving the distribution of free anti-retrovirals (ARVs) to women who attend two hospitals in Katutura (Windhoek) and Oshakati (northern Namibia). Women attending these clinics are counselled and offered a free HIV test together with their husbands or partners. Those who test positive and give written consent are enrolled in the programme.⁶⁴ To date, approximately 300 women have participated in this programme. Apart from these pilot sites, ARVs and medicine for opportunistic infections remain out of reach of the general population who cannot afford to pay for them. According to the Minister of Health and Social Services, health facilities intend to treat more HIV-positive patients with ARVs, and Namibia will begin importing generic AIDS drugs from Brazil as part of an aid agreement. However, this programme will reach only 100 additional people in need of ARVs.

On 10 June 2003, the Minister of Health announced that the Namibian government has teamed up with a local company to produce cheap AIDS drugs, and an industrial plant will be built to produce generic copies of drugs protected by intellectual property rights in developed countries.⁶⁵

63 The *Charter* was developed through a consultative process involving government ministries, representatives of commerce and industry, NGOs, ASOs, trade unions, churches, the medical and nursing profession, and PLWHAs.

64 Minister Libertina Albatilla in *New Era* 14 October 2002.

65 “Namibian firm will produce AIDS drugs, says Minister” in *The Namibian* 10 June 2003.

4.3.5 Medical trials on human subjects

The *Constitution* does not directly refer to bodily integrity. However, Article 8 declares that the dignity of all shall be inviolable, and dignity may be interpreted in this instance in a broader manner to include bodily integrity.

4.3.6 Condoms

Condoms are accessible in various places free of charge. The government distributes condoms through the National AIDS Co-ordination Programme (NACOP) to health services, government sectors, NGOs, private companies and institutions of higher learning. The National Social Marketing Programme (NASOMA) sells male and female condoms to pharmacies, petrol stations and traditional outlets such as bars and food shops at a reasonable price (N\$10.00 for a packet of 6 condoms).

One of the main strategies of the *MTP II* to prevent the spread of HIV/AIDS is increasing the use of condoms by strengthening the source of condom supply and distribution channels.⁶⁶ The public services sector is responsible for ensuring condom acquisition and distribution throughout public sectors.⁶⁷ The distribution of condoms forms part of each sector's responsibility in the fight against HIV/AIDS within the *MTP II*. In the *Second National Development Plan*, tabled in 2002, the government decided to pay particular attention to HIV/AIDS as a development issue to be addressed by all sectors. In keeping with this approach, the government aims over the next four years to reduce HIV/AIDS prevalence by 25% amongst the 15-25 year age group, increase access to affordable quality condoms by 100%, and to increase the distribution of affordable Femidom condoms from 3000 in 1999 to one million in 2006.

4.4 Equality and non-discrimination

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

Article 10 of the *Constitution*, known as the Equality Clause, guarantees both the right to equality and non-discrimination. Article 10 reads as follows:

- (1) "All persons shall be equal before the law; and
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

Although HIV status is not specifically listed as a grounds for non-discrimination, it appears that, based on existing jurisprudence, Namibian courts will take a purposive approach and read it in as a grounds for non-discrimination. This view is expressed in reference to a leading judgment of the Namibian Supreme Court that declared that in giving effect to the protection of fundamental rights and freedoms enshrined by Chapter 3 of the *Constitution*, a "right-giving" and "purposive" approach is to be followed and that the provisions of the Constitution are to be: "broadly, liberally and purposively interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the values bonding its people and in disciplining its government."⁶⁸

In addition, the *Labour Act* of 1992⁶⁹ provides for a finding of unfair discrimination in employment by the Labour Court on the following grounds:

"(a) that any person who has discriminated or is about to discriminate in an unfair manner, or is so discriminating against him or her on the grounds of his or her sex, race, colour, ethnic origin, religion, creed, social or economic status, political opinion or marital status or his or her sexual orientation, family responsibilities or disability in relation to his or her employment or occupation."

This provision was challenged in the Labour Court in relation to pre-employment HIV testing, in the case of *Haindongo Nghidiphamba Nanditume v Minister of Defence*.⁷⁰ This case considered whether the exclusion on the grounds of HIV status alone of a prospective applicant for enlistment to the Namibian Defence Force (NDF) constituted unfair discrimination as contemplated in Section 107 of the *Labour Act*. The Court ruled that: "the exclusion of the applicant from the military solely because he was found to be HIV positive, constituted unfair discrimination, in

⁶⁶ See page 10 of *MTP II*.

⁶⁷ Appendix D, page 2 of the *MTP II*.

⁶⁸ *Government of the Republic of Namibia and another v Cultura 2000 and another* 1994 (1) SA 407 (NmSC) at 418 F-J as quoted in M Figueira

A Human Rights-Based Response to HIV/AIDS in Namibia: Successes and Failures since Independence, at page 3.

⁶⁹ (No.6 of 1992), Section 107 (1).

⁷⁰ No. LC 24/98, judgment delivered on 10 May 2000.

breach of section 107 of the *Labour Act*.⁷¹ In coming to this decision, the Court took into account the following factors:⁷²

1. The applicant was recommended for the position by the Secretary General of SWAPO in light of his previous involvement in the liberation struggle and that together with his positive medical report (apart from his HIV status) he would be fit for duty anywhere in Namibia.
2. There are already HIV-positive persons in the ranks of the NDF, and as and when the disease had progressed, they have been 'deployed to other positions where they run less risk of the process accelerating.'
3. No extra cost factor arises as the respondent testified that the medical machinery for the NDF was already in place.

The Court made the following order:⁷³

1. The respondent shall enlist the applicant in the NDF should the applicant re-apply for enlistment, provided the applicant's CD4 count is not below 200 and his viral load is not above 100 000.⁷⁴
2. The medical examination⁷⁵ shall include an HIV test together with a CD4 count test and a viral load test, and no person may be excluded from enlistment into the NDF solely on the basis of such person's HIV status where such person is otherwise fit and healthy, unless such person's CD4 count is below 200 and his viral load is above 100 000.

Shortly after the judgment, the National Assembly and the National Council approved a new *Defence Amendment Bill*, which states that the NDF "shall not appoint any person who suffers from a disease or ailment which is likely to deteriorate to the extent that it will impair his or her ability to undergo any form of training required to be undertaken or to perform his or

71 Page 7 of the judgment.

72 Page 7 of the judgement.

73 Page 8 of the judgment.

74 The Court declared that the applicant was not reliable about when he contracted HIV, and therefore to avoid saddling the respondent with a recruit who could not do the basic training or any of the duties in the military, he had to avail himself for a CD4 test and a viral load test. See page 8 of the judgment.

75 Section 65(2) of the *Defence Act No 44 of 1957* requires recruits to undergo a medical examination. See page 5 of the Judgment.

her duties as a member of the Defence Force.'⁷⁶ Although no specific reference is made to HIV/AIDS, it has been interpreted to relate directly to HIV/AIDS.⁷⁷

4.4.2 Specialised legislation on equality and non-discrimination

The National AIDS Control Programme issued a policy document entitled the *National HIV/AIDS Policies and Guidelines - Positive Responses and Choices* in June 1992. Section 4.5 of this document deals specifically with discrimination. It contains the following guidelines on discrimination:⁷⁸

- Information and education programmes aimed at removing unfounded fears and myths about HIV/AIDS should be strengthened.
- Measures should be taken to promote respect for the dignity and rights of HIV/AIDS-infected individuals and of those assumed to be infected.
- No measures should be entertained which discriminate against individuals or groups on the basis of real or assumed HIV status, with respect to access to the workplace, to education or training institutions, to accommodation, to public places, transport and to travel in general.
- An individual's HIV/AIDS status should not be taken into account when recruiting new employees.
- There should be no discrimination in respect of access to health services.

4.5 Labour rights

4.5.1 HIV/AIDS in the workplace

The Ministry of Labour is to provide protection to PLWHAs against discrimination in the workplace whilst also ensuring the effective implementation and monitoring of the *National Code on HIV/AIDS in Employment*.⁷⁹ It is further responsible for developing educational materials on HIV/AIDS for the workplace and for the distribution of condoms within the workplace.⁸⁰

76 Section 10 (1) (d) of the Bill. The *Bill* was tabled in 2001.

77 M Figueira, at page 22. Figueira also mentions that a *Police Amendment Bill* containing identical provisions to the *Defence Amendment Bill* was approved by both Houses of Parliament at the same time.

78 Page 9.

79 Appendix D page 18 of *MTP II*.

80 Ibid.

In 1998, the Minister of Labour promulgated guidelines in terms of Section 112 of the *Labour Act* for the implementation of the *National Code on HIV/AIDS in Employment* and for the application of the relevant provisions of the *Labour Act* in respect of HIV/AIDS and employment.⁸¹ Importantly, these guidelines:

1. outlaw discrimination on the basis of HIV status in the context of employment;
2. identify the need for education and prevention programmes for both employers and employees;
3. make it clear that, with regard to pre-employment HIV testing: “there should be neither direct nor indirect pre-employment testing for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV.” Where a test is undertaken voluntarily, informed consent and pre- and post-test counselling should accompany it;
4. make it clear that an employee’s HIV status should be kept confidential in the workplace and should only be disclosed if accompanied with informed consent;
5. stipulate that no one should be dismissed merely on the basis of HIV status and that employees should be allowed to continue work whilst they are medically fit to do so. Where they become too ill, standard procedures for termination of service for comparable life-threatening conditions should apply without discrimination;⁸² and
6. provide specifically that standard grievance handling procedures that exist in labour and civil law should apply to all workers with HIV-related grievances.⁸³

Section 6.9 of the guidelines addresses the issue of protecting people infected or believed to be infected with HIV/AIDS from discrimination and stigmatisation. This Section states that “where employers and employees agree that there has been adequate information and education provisions for safe work, then disciplinary procedures should apply to persons who refuse to work with an employee with HIV/AIDS.”

The *Labour Amendment Bill of 2000*⁸⁴ exempts the NDF and the Namibian Police Services from the provisions of Section 107 of the *Labour Act*, which precludes discrimination in an unfair

manner, related to standards of physical or mental fitness required for selection of persons for appointment to the NDF and the police.

4.5.2 HIV/AIDS and medical schemes

The *Medical Aid Funds Act*⁸⁵ was promulgated to provide for the control and promotion of medical aid funds; to establish the Namibian Association of Medical Aid Funds; and, to provide for matters incidental thereto. There is no specific section that deals with HIV/AIDS. A number of medical aid companies in Namibia offer reasonable access to anti-retroviral medication to members, up to the allocated amount for medication. Typically, people on anti-retroviral medication need to supplement the costs of their medication once the medical aid funds are depleted.

The 2000 Namibia National Teachers’ Union (NANTU) *Policy on HIV/AIDS* declares that health insurance coverage should be available for all “educational based employees” regardless of HIV status and therefore no pre- or post-employment testing should take place. It also states that health insurance premiums for educational employees should not be affected by HIV status.⁸⁶

In October 2002, the Namibia Health Plan launched a treatment programme called the “Aid for AIDS” benefit scheme. This Plan registers and monitors AIDS and under the scheme, benefits are provided to cover the costs of anti-retroviral drugs with the aim of keeping clients out of hospital.⁸⁷

4.5.3 Insurance and HIV/AIDS

Most insurance companies have a policy of compulsory HIV testing for applicants. The applicant is assured that the information will be kept confidential and can decide whether to allow for the disclosure of the results to the family doctor. People living with HIV/AIDS are expected to pay higher premiums (this depends on the type of health insurance plan they choose; the insurance cover is also reduced by 50% if a person is HIV positive).

81 Government Notice 78 of 1998 published in Government Gazette No 1835 of 3 April 1998.

82 Section 6.6.

83 Section 6.10.

84 This *Bill* negates the decision of the Court in *M Houndongo v Minister of Defence*.

85 Act No 23 of 1995.

86 Section 5.2.3.4, page 13 of the NANTU *Policy on HIV/AIDS*.

87 Maletsky, C. ‘Medical aid fund provides new option for HIV positive’ in *The Namibian* 2 December 2002, page 19.

Since 1996, Metropolitan Namibia offers life cover to people with HIV called Inclusive Life, which treats AIDS as a “dreaded disease”. Inclusive Life offers a range of policies including life cover, unit trusts and pure endowment investment plans. The policy can be ceded as collateral on loans, and this makes purchasing of houses and cars more accessible to HIV-positive people.⁸⁸

4.6 Gender rights

4.6.1 Legal status of women and the role of cultural practices

The Constitution states the following regarding equality between men and women in Articles 10 (1) and (2): “All persons shall be equal before the law ... No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.” Despite formal equality, certain cultural practices such as the following put women in a vulnerable position in society:

- forced sex with young girls;⁸⁹
- polygyny (especially practised in the Caprivi);⁹⁰
- boys initiating younger girls into the sexual world by having sex with them (practised amongst the Hereros).

Churches have started playing a role in discouraging these practices. None of the practices have been challenged in formal court structures to date.⁹¹

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

Article 2(3) of the *Combating of Rape Act*, No 8 of 2000, criminalises marital rape: “No marriage or other relationship shall constitute a defence to a charge of rape under this Act.” Further Article 3(1)(a)(iii)(dd) stipulates that a penalty of imprisonment for a period of not less than

15 years will apply to a first-time offender where “the convicted person is infected with any serious sexually transmitted disease and at the time of the commission of the rape knows that he or she is so infected.” Article 3(b)(iii) stipulates that “where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in subparagraph (iii)” the convicted rapist is to be sentenced to imprisonment for a period of not less than 40 years.

The *Combating of Rape Act* therefore provides for harsher sentencing where an HIV-positive offender is aware of his/her HIV status whilst committing the crime of rape, irrespective of whether or not he/she transmitted the disease. On 17 March 2003, the first case under the *Combating of Rape Act* was heard in the High Court of Namibia. The perpetrator was allegedly infected with HIV whilst committing the alleged rape.⁹²

On 27 March 2003, the Namibian National Assembly approved the *Combating of Domestic Violence Bill* despite great opposition from various (male) MPs. The *Bill* is now at the House of Review in the National Council.⁹³

4.6.3 Administering ARVs to rape survivors

The Ministry of Health and Social Service has drafted a policy to regulate the administering of ARVs to rape victims but this has not yet been made public. Post-exposure prophylaxis (PEP) is available only to medical doctors and nurses. Rape survivors are not provided with anti-retrovirals. The government previously announced that it would provide a combination of three anti-AIDS drugs (AZT, 3TC and Crixivan) to rape survivors but it appears that distribution is being hindered by a lack of guidelines on their use.⁹⁴

4.6.4 Commercial sex workers

Prostitution is illegal in Namibia under the *Combating of Immoral Practices Act* No. 21 of 1980. Sex work itself is not illegal, but all the secondary activities such as living off the proceeds of

88 ‘Inclusive Life Gives Hope’, published in supplement to *The Namibian* 29 November 2002.

89 Phillipe Talavera states that amongst the Ovahimba and Ovaherero women and girls can be forced to have sex. There is no concept of rape, and sex between the boy child and girl child is seen as a playful game.

90 The civil law in Namibia prohibits polygyny.

91 Cases may have been brought at customary courts, but since these proceedings are not documented it is difficult to obtain reliable

information or make generalisations.

92 See Menges, W. ‘Court hears first HIV-rape case’ in *The Namibian* 18 March 2003, page 1.

93 See ‘National Assembly passes anti-violence Bill’ at <http://allafrica.com/stories/200303280350.html>.

94 Maletsky, C. ‘Criminal delays on AIDS drugs berated’ in *The Namibian* 27 August 2002 page 1

sex work, running a brothel, soliciting or loitering are illegal. The *Children's Act* No. 33 of 1960 makes it an offence for parents or guardians to coerce a child into sex work. The *Combating of Rape Act* states that it is an offence to coerce someone to have sexual intercourse with a third person. The Legal Assistance Centre has proposed that sex work be decriminalised and discouraged. There is an obvious need to have legislation regulating the commercial sex work industry.⁹⁵ The Minister of Health and Social Services and other parliamentary members have since echoed similar sentiments.⁹⁶

4.6.5 Homosexuality and HIV/AIDS

Male homosexuality is illegal, based on the common law offence of committing “an unnatural sex crime”. The last case was tried in the late 1980s. Lesbianism is not formally criminalised but would most probably fall under the common law, although there are no documented court cases dealing with lesbianism. Article 107 of the *Labour Act* of 1992 protects gay and lesbian rights by listing sexual orientation as a ground for non-discrimination in the workplace. Nevertheless, it appears that homophobic sentiments abound and government has no policies related to HIV/AIDS for the gay/lesbian population in place.

4.7 Children's rights

4.7.1 Health care, orphans and HIV/AIDS

The Ministry of Health and Social Services has a pilot mother-to-child transmission (MTCT) project in Oshakati and Katutura. Expectant mothers are encouraged to be tested, and if they test HIV positive, they are put on treatment to reduce the risk of MTCT.

The Directorate of Development and Social Welfare Services convened a National Conference on Orphans and Other Vulnerable Children in May 2001. The aims of the conference were to establish a national policy on orphans and vulnerable children (OVC), to find ways of supporting families and communities to cope in caring for their orphaned children, and to ensure access to basic services for OVC.

The Ministry of Women and Child Welfare has set up a division for OVC. The Committee is finalising its organisational structure. The Ministry of Women and Child Welfare has also recently distributed food and blankets to orphans. The maintenance grant programme was initially managed by the Ministry of Health and Social Services, and is now managed by the Ministry of Gender and Child Welfare. The Ministry of Health and Social Services makes provision for children (including orphans), to access state grants, which take the form of a monthly allowance. There are shelters run by NGOs, and the Ministry of Women and Child Welfare provides shelters for orphans. The Ministry of Women and Child Welfare provides assistance to foster parents who are taking care of orphans. The grant is allocated when one or both of the parents die, because of HIV/AIDS, upon production of a death certificate and the birth certificate of the children. Normally, the first child will receive N\$200.00 and the remaining children will each receive N\$100.00. The OVC policy is still in draft and remains to be approved by Parliament.

The Namibian government adopted legislation to ensure that children orphaned by HIV/AIDS continue to have access to schooling. This effort will be enhanced by the adoption of a national policy on HIV/AIDS in the education sector. A more detailed discussion on children and education follows in the next section.

4.7.2 HIV/AIDS and the educational system

Article 20 of the *Constitution* of Namibia declares that: “All persons have the right to education.” The Article states further that primary education should be provided free of charge and that children shall not be allowed to leave school until they have either completed primary education or have attained the age of 16, whichever occurs first. The Ministry of Basic Education and Culture and the Ministry of Higher Education, Vocational Training, Science and Technology are responsible for the co-ordinated integration of relevant HIV/AIDS-related activities and information into all curricula, including the acquisition and distribution of condoms at secondary and tertiary educational institutions.⁹⁷ In terms of the MTP II, the government will strive to introduce formal education on reproductive health, sexuality and HIV/AIDS in all educational institutions.

⁹⁵ Interview held with Eva Zimba, Legal Adviser, Legal Assistance Centre in Windhoek, Namibia.

⁹⁶ Maletsky, C. 'Namibia considers legalising sex work' in *The Namibian* 12 October 1999.

⁹⁷ Appendix D, page 6 of the *MTP II*.

The Namibian National Teachers' Union (NANTU) issued their *Policy on HIV/AIDS* on 1 December 2000. The *Policy* is "based on the fundamental principles of human rights and patient rights, Ministry of Health and Social Services, World Health Organization and International Labour Organization standards and guidelines ..."98 The following areas are addressed by the NANTU *Policy on HIV/AIDS*:

- information, education, other preventive health measures and counselling;
- voluntary testing, counselling and confidentiality;
- terms of appointment and service: (a) pre-recruitment and employment prospects; (b) continuity of employment; (c) health insurance benefits; (d) protection against victimisation; and
- grievance handling and research.

In terms of victimisation, Section 5.2.3.5 states that: "Persons infected and affected with or by HIV/AIDS or believed to be infected and affected with or by HIV/AIDS should be protected from stigmatisation and discrimination by colleagues, teachers and learners. Information and education are essential to maintain the climate of mutual understanding necessary to ensure this protection."

The October 2002 *National Policy on HIV/AIDS for the Education Sector* (4th Draft) was prepared by the AIDS Law Unit - Legal Assistance Centre. The following sections of this policy are rights-based:

- *Section 2(5)*: Compulsory disclosure of a lecturer, student or education sector employee's HIV status is not advocated. Voluntarily disclosure of HIV status is encouraged;
- *Section 2(6)*: Learners and students living with HIV or AIDS should not be denied the opportunity to receive an education to the maximum of their ability;
- *Section 4*: Non-discrimination and equality should be enforced with regard to learners and students living with HIV/AIDS;
- *Section 4(1)*: No learner or student living with HIV or AIDS may be unfairly discriminated against directly or indirectly solely on the basis of their HIV status;
- *Section 4(3)*: No learner or student may be excluded from attendance at an educational

institution or participation in sports or play activities solely on the basis of his/her HIV status;

- *Section 4(4)*: Learners and students living with HIV/AIDS should be treated in a just, humane and life-affirming way and supported;
- *Section 5*: HIV testing, admission and continued attendance at schools and institutions by learners or students living with or affected by HIV/AIDS is covered here;
- *Section 5(1)*: Testing for HIV for learners or students as a pre-requisite for admission to or continued attendance at an educational institution is prohibited;
- *Section 5(2)*: No learner or student should be denied admission or continued attendance at an educational institution on account of his or her HIV/AIDS status;
- *Section 5(3)*: Learners or students living with HIV and AIDS have the same right as other learners to attend any school or institution;
- *Section 6*: Disclosure of HIV/AIDS-related information and confidentiality is covered here;
- *Section 6(2)*: No learner or student shall be compelled to disclose his/her HIV status to the educational institution attended by him/her;
- *Section 6(4)*: Any person to whom information on HIV status has been divulged must keep this information confidential and may only disclose this information to his or her guardian, parent or caregiver with written permission of the learner or student.

On 21 October 1999, the Minister of Information and Broadcasting launched the first Namibian HIV/AIDS Media Campaign. The Namibia HIV/AIDS Media Campaign Task Force was formed, creating a multi-sectoral partnership. The campaign aims to produce and disseminate information throughout Namibia. The campaign promotes HIV/AIDS awareness, prevention and behaviour change and engages television, radio and print media to disseminate its messages. Messages are also put on billboards, buses, taxis and telephone cards. The campaign aims to empower those at risk with skills to negotiate safer sexual behaviour. The campaign also aims to spread a message of hope to those living with HIV/AIDS and to destigmatise the disease in order to create acceptance of all affected Namibians.

98 Section 5.2.3 of the NANTU *Policy on HIV/AIDS*.

4.8 Criminal law and HIV/AIDS

On harsher sentencing for HIV positive rapists, see Section 4.6.2.

4.9 HIV/AIDS and prisons

Currently, there is no policy of HIV/AIDS testing in prisons. There are AIDS counsellors in prisons to assist inmates who are HIV positive and the AIDS campaign trains inmates to counsel fellow prisoners. HIV testing is voluntary and status is kept confidential. Inmates who are HIV positive receive a special diet and they are not separated from other prisoners.

The Ministry of Prisons and Correctional Services is responsible for the development of specific education programmes on HIV/AIDS for prison inmates and prison communities. It is also in charge of the procurement and distribution of condoms to all offices, prisons, cells and duty stations.⁹⁹ Despite these recommendations, it appears that the Ministry of Prisons and Correctional Services refuses to distribute condoms on the grounds that sodomy is illegal in Namibia.¹⁰⁰

⁹⁹ Appendix D, page 14 of *MTP II*.

¹⁰⁰ Figueira, at page 23.

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</i> 202 of 1998 prohibits discrimination on the basis of HIV status in the workplace.

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

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

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

	Botswana	Malawi	Mozambique	Namibia	South Africa	Swaziland	Zambia	Zimbabwe
HIV/AIDS and the workplace: discrimination and pre-employment testing	Labour legislation does not address discrimination on the ground of HIV status and there are no legislative provisions on pre-employment HIV testing.	Labour legislation does not address discrimination on the ground of HIV status and there are no legislative provisions on pre-employment HIV testing.	Law no 5/2002 outlaws discrimination on the ground of HIV status in employment and prohibits pre-employment HIV testing.	Guidelines were promulgated in terms of section 112 of the Labour Act for the implementation of the <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.

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



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

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