



International  
Labour  
Office  
Geneva

# HIV and AIDS and Labour Rights: A Handbook for Judges and Legal Professionals

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**HIV and AIDS  
and labour rights:  
A handbook for judges  
and legal professionals**



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*HIV and AIDS and labour rights: A handbook for judges and legal professionals*

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# Preface

This Handbook aims to assist judges and legal professionals in handling HIV and AIDS-related matters with a focus on employment and occupation. It provides information on relevant national and international law and its application in domestic courts operating in diverse legal traditions and frameworks.

In the more than 30 years since the first case of AIDS was identified, the world has witnessed remarkable breakthroughs in the response to the global epidemic. The rate of new infections has declined in many countries and effective treatments have been developed, enabling those living with HIV to continue to lead healthier, more productive lives. Despite these achievements, significant social, economic and legal challenges remain.

HIV-related stigma and discrimination persist in many workplaces and violations of fundamental rights are widespread. In addition, key groups that are already disadvantaged or marginalized may experience increased levels of stigma and discrimination.

In many countries, the HIV epidemic is concentrated among members of specific key groups that are more difficult to reach precisely because they are stigmatized. Where individuals live on the outskirts of society due to stigma or fear discrimination because of an HIV-positive diagnosis and disclosure, they are less likely to access HIV-related prevention, treatment, care and support services, including voluntary HIV testing and treatment.

Efforts to prevent HIV and mitigate the impacts of the epidemic must therefore also ensure respect for the fundamental human rights of those living with or affected by HIV. Effective HIV responses in and through the world of work require the development and implementation of enabling legal and policy frameworks that safeguard dignity, job security and livelihoods for all men and women workers. International labour standards, notably the ILO HIV and AIDS Recommendation, 2010 (No. 200), provide a sound foundation for the development and implementation of such frameworks.

Judges and legal professionals play a critical role in ensuring respect for fundamental labour rights. Their advocacy and leadership in upholding labour rights in the context of the epidemic contributes to the global HIV response and supports the ILO's objective of achieving "Zero new HIV infections, Zero discrimination and Zero AIDS-related deaths" in and through the world of work. It is hoped that

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this Handbook and the accompanying training materials will assist judges, judicial training institutions and legal professionals in their task of ensuring effective and transparent access to social justice and observance of the fundamental labour rights of all those living with or affected by the epidemic.

Alice Ouedraogo

Chief

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# Useful references

## **UNAIDS: *Judging the epidemic: A judicial handbook on HIV, human rights and the law*, 2013**

On 10–12 December 2012, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the International Commission of Jurists (ICJ), the International Association of Women Judges (IAWJ) and the United Nations Development Programme (UNDP) organized a consultation of eminent African judges and jurists on HIV, the law and human rights in Johannesburg (South Africa). The consultation led to the adoption of a Statement of Principles on HIV, the Law and the Judiciary in Africa and called for supporting judicial education on HIV and the law through the development of a comprehensive handbook on HIV, the law and human rights for the judiciary.

*Judging the epidemic: A judicial handbook on HIV, human rights and the law* (2013) articulates critical legal and human rights considerations and best practices. It assists members of the judiciary to render judicial decisions that uphold human rights and support access to HIV services for all.

*Judging the epidemic* was developed primarily as a resource and reference for judges, magistrates, arbitrators and other judicial officers to help them adjudicate cases involving HIV-related issues. It may also be relevant to advocates, lawyers and other legal practitioners, civil society organizations (including people living with HIV) aiming to gain specific understanding of HIV-related legal issues and the potential role of the courts in advancing human rights in the context of the HIV.

*Judging the epidemic* consists of two main parts. Part 1 (“The science and medicine of HIV”) provides comprehensive background information on HIV transmission and treatment that is essential to understanding the HIV epidemic and the legal issues that it raises. Part 2 (“Legal decisions that promote human rights in the context of HIV”) contains seven chapters, each addressing a particular HIV-related legal issue, including HIV-related discrimination, women’s family and property rights, drug use, same-sex relations, sex work and criminalization of HIV non-disclosure, exposure and transmission. Each chapter provides an overview of applicable international, regional and national laws and human rights norms, suggests key considerations that are relevant to the adjudication of HIV-related cases, and summarizes pertinent court cases from different jurisdictions.

### **The Global Commission on HIV and the Law**

The law is a critical element of HIV and health responses and can help to bridge the gap between vulnerability and resilience. The 2011 Political Declaration on HIV and AIDS contains a commitment by UN Member States to halve the number of countries with punitive laws and practices around HIV transmission, sex work, drug use or homosexuality by 2015. To support that goal, UNDP convened the Global Commission on HIV and the Law, to examine the impact of the law on HIV responses. The Commission, consisting of 14 Commissioners and a Technical Advisory Group of 23 experts, reviewed and analysed 680 written submissions from 130 countries addressing how laws impact HIV responses. The Commission also convened seven regional dialogues with almost 700 participants from a diverse range of constituencies. Some of the key topics examined by the Global Commission on HIV and the Law include:

- criminalization of HIV transmission, exposure and non-disclosure;
- the impact of discrimination on people living with HIV;
- the criminalization of behaviours and practices such as drug use, sex work, same-sex sexual relations, issues of prisoners and migrants;
- the impact of discriminatory laws and practices related to women and girls as well as children and youth in the context of HIV; and
- intellectual property in the context of access to treatment.

The Commission's report, *HIV and the law: Risks, rights and health*, released in July 2012, analyses the critical role of laws and human rights-based legal environments in the well-being of people living with and vulnerable to HIV. Based on the evidence gathered, the report concludes that punitive laws and discriminatory practices create and punish vulnerability, hinder access to prevention and treatment and contribute to increasing stigma. By contrast, laws that place human rights at their centre can improve HIV prevention and treatment programmes, enhance social support for people affected by the epidemic, protect their rights and increase the cost-effectiveness of investments.

For more information on the report and follow-up, visit: [www.hivlawcommission.org](http://www.hivlawcommission.org).

# Introduction

**Country: South Africa**

**Constitutional Court of South Africa, *Jacques Charl Hoffmann v. South African Airways*, Case CCT 17/00, Judgement of 28 September 2000**

“... [People living with HIV] have been subjected to systemic disadvantage and discrimination. ... [T]hey have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. ... Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. ... The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living...” (paragraph 28).

Thirty years after the first case of HIV was detected, HIV-related stigma and discrimination remain widespread, with persons living with HIV (PLHIV) being subjected to stigma and discrimination in all aspects of their daily lives, including with respect to access to health services, housing, education and employment.<sup>1</sup> Protection of the fundamental human rights of those infected and affected by HIV and AIDS – including labour rights – is essential to ensure effective responses to the global epidemic.

The workplace has long been recognized as a key entry point to implementing successfully the response to HIV and AIDS and to addressing stigma and discriminatory attitudes. Most of those living with or affected by HIV and AIDS are linked to the world of work, either directly or indirectly, and the workplace can serve as an effective means to reach this significant segment of the population, as well as the wider community, to facilitate access to HIV-related information and services. In addition, the prevalence of HIV-related discrimination in both employment and occupation requires action in and through the workplace.

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<sup>1</sup> United Nations Human Rights Council, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, Report of the Secretary-General, United Nations General Assembly (20 December 2010), A/HRC/16/69.

The ILO is well placed to reach men and women at their workplace – as well as workers’ families and dependants – on account of its unique tripartite structure, which brings together governments, employers and workers, in partnership with UNAIDS<sup>2</sup> and a range of other international and national stakeholders, including organizations of, by and for persons living with HIV.<sup>3</sup> In this respect, the ILO plays an essential role, providing guidance aimed at promoting the development and implementation of effective rights-based workplace responses.

In 2010, the ILO adopted an international labour standard to guide legal and policy responses to HIV and AIDS in and through the world of work. The Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200), is an international human rights instrument that establishes key principles for the prevention and treatment of HIV and safeguards the labour rights of people living with or affected by HIV or AIDS. It is built around the four strategic objectives of the ILO’s Decent Work Agenda: fundamental principles and rights at work; opportunities for women and men to obtain decent work and income; access to social protection; tripartism and social dialogue.

In June 2011, the Political Declaration on HIV and AIDS confirmed the commitment of all United Nations Member States to include the world of work as an essential component of HIV responses, highlighting the guidance provided by ILO Recommendation No. 200 and other relevant ILO Conventions and Recommendations. It called upon UN Member States to protect human rights at work.

**United Nations General Assembly, *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, Resolution 65/277, adopted on 10 June 2011 (A/RES/65/277), paragraph 85:**

“Commit to mitigate the impact of the epidemic on workers, their families, their dependants, workplaces and economies, including by taking into account all relevant conventions of the International Labour Organization, as well as the guidance provided by the relevant International Labour Organization recommendations, including the Recommendation on HIV and AIDS and the World of Work, 2010 (No. 200), and call upon employers, trade and labour unions, employees and volunteers to eliminate stigma and discrimination, protect human rights and facilitate access to HIV prevention, treatment, care and support.”

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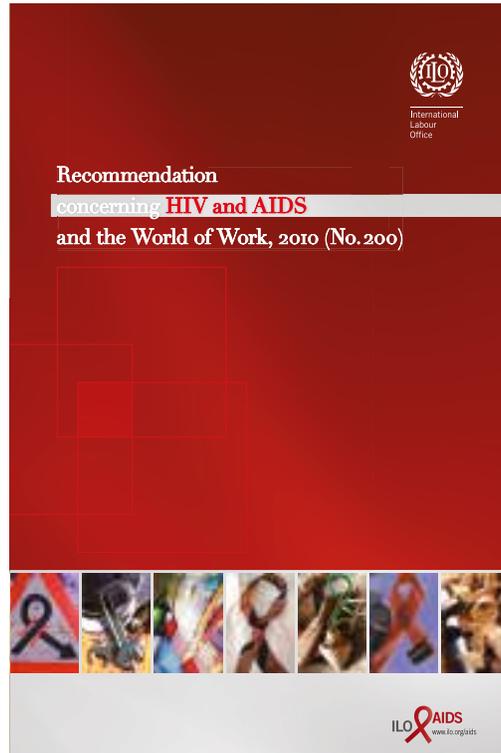
<sup>2</sup> The ILO has been a co-sponsor of UNAIDS since 2001 and works in collaboration with UNAIDS and the other co-sponsor agencies of the United Nations family.

<sup>3</sup> European Coalition of Positive People (ECPP), *Paris Declaration*, adopted at the Paris AIDS Summit on 1 December 1994. The Declaration establishes the “GIPA Principle”: Greater Involvement of People Living with or Affected by HIV/AIDS.

Recommendation No. 200 emphasizes the importance of strong, independent judicial institutions and labour administrations. It explicitly calls for national judicial authorities competent in labour matters to be involved in the development, adoption and effective implementation of national and workplace policies and programmes on HIV and AIDS—including in the development and application of national legislation—and calls for training to be provided to them for this purpose (Paragraphs 37(b) and 44 of the Recommendation, contained in Appendix 2).

To ensure the effective protection of labour rights for persons living with and affected by HIV and AIDS, existing rights-based national policies and legislation must be vigorously enforced in labour courts or other national dispute resolution mechanisms to facilitate reliable, accessible and adequate redress for alleged violations. Judges and legal professionals can also look to international (and regional) human rights instruments to assist them in addressing HIV-related cases that may come before them.

Since 1999, the ILO's International Training Centre in Turin, Italy (ITC-ILO) has been providing training to judges, lawyers and legal educators on international labour standards and on ways in which these standards can be – and have been – used in domestic courts.<sup>4</sup> It has also compiled a database of judicial decisions where domestic and international courts have relied on international labour standards and other international legal instruments to resolve the cases brought before them.<sup>5</sup> Moreover, the ILO has developed guidelines on how to respond to HIV and AIDS through the enactment and application of legislation that incorporates international labour standards, and has produced training and reference materials



<sup>4</sup> X. Beaudonnet (ed.), *International labour law and domestic law: A training manual for judges, lawyers and legal educators* (International Training Centre of the ILO, Turin, 2010).

<sup>5</sup> The database is available at: <http://compendium.itcilo.org/>.

for labour court judges and legal professionals on labour standards relevant to HIV and AIDS.<sup>6</sup>

Similarly, UNAIDS and other co-sponsors have recognized the importance of involving judicial authorities and members of the legal profession in national AIDS responses, developing reference materials for judges to familiarize them with a broad range of HIV-related issues, including relevant international instruments and jurisprudence.<sup>7</sup> In addition, regional materials have been developed and are available for judges and legal professionals, focusing on specific sub-regions.<sup>8</sup>

## **Objectives**

This Handbook is intended to enhance the capacity of national judicial authorities and legal professionals in addressing issues related to HIV and AIDS at the workplace – particularly workplace HIV-related stigma and discrimination – and in contributing more broadly to national HIV responses.

The Handbook's modules are designed to be used as a whole or separately, depending upon the objectives of the training in question and the time available. The modules may be used as a stand-alone training component on Recommendation No. 200, or as part of a broader course that covers other international labour standards and instruments. The Handbook's approach is aligned with the ITC-ILO training manual.

## **Structure**

This Handbook consists of 12 modules and provides a range of practical case law examples.

- Module 1 sets out basic facts on HIV and AIDS, including on the modes of HIV transmission.
- Module 2 provides an overview of when national courts can use international labour instruments in their decisions, and the manner in which they have used them in the past.

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<sup>6</sup> J. Hodges, *Guidelines on addressing HIV/AIDS in the workplace through employment and labour law*, InFocus Programme on Social Dialogue, Working Paper No. 3 (ILO, Geneva, 2004); see also: J. Hodges (ed.), *Digest of good legislative practices relating to HIV/AIDS in selected African countries/Recueil de bonnes pratiques législatives en matière de VIH/SIDA dans certains pays d'Afrique*, Dialogue, Working Paper No. 12 (ILO, Geneva, 2007).

<sup>7</sup> UNAIDS, *Judging the epidemic: A judicial handbook on HIV, human rights and the law* (Geneva, 2013); see also: Canadian HIV/AIDS Legal Network/UNAIDS, *Courting rights: Case studies in litigating the human rights of people living with HIV*, UNAIDS Best Practice Collection (Geneva, 2006).

<sup>8</sup> See, for example: Southern Africa Litigation Centre (SALC), *Equal rights for all: Litigating cases of HIV-related discrimination*, SALC Litigation Manual Series (Johannesburg, 2011); see also: SALC, *Protecting rights: Litigating cases of HIV testing and confidentiality of status*, SALC Litigation Manual Series (Johannesburg, 2012).

- Module 3 sets out the types and characteristics of international and regional instruments relevant to HIV and AIDS and the world of work.
- Module 4 provides an overview of the ILO structure, international labour standards and supervisory bodies, and presents examples of the guidance provided by the ILO supervisory bodies in relation to HIV and AIDS.
- Module 5 provides a summary of the key human rights principles of Recommendation No. 200.
- Module 6 addresses the most common forms of HIV-related employment discrimination.
- Module 7 examines issues of testing, privacy and confidentiality in the context of HIV and employment.
- Module 8 addresses the gender dimensions of the HIV epidemic.
- Module 9 discusses a number of key groups that are deemed to be more vulnerable to or at higher risk of HIV transmission in the context of national HIV epidemics.
- Module 10 examines the important role that judges and legal professionals can play in ensuring the effective protection of the labour rights of those living with or affected by HIV or AIDS.
- Module 11 addresses the access to justice of people living with or affected by HIV, including issues related to judicial mechanisms, procedures and remedies.
- Module 12 provides a sample three-day training course programme, activities and case studies to facilitate continuous learning.
- The accompanying CD-ROM contains a comprehensive set of reference and training materials, as well as the full text of the judgements cited in the main text.



# Module 1: HIV and AIDS and modes of transmission

The HIV epidemic is one of the greatest challenges facing the world in the twenty-first century. At the end of 2013, an estimated 35 million people were living with HIV worldwide.<sup>9</sup>

The vast majority of these people are adults aged 15–49 years – and it is precisely this age group that is the most productive, and either working or linked to the world of work. HIV and AIDS affect not only workers and their families but, through them, the local communities in which they live and work. HIV-related illness affects enterprises in terms of loss of skills, increased absenteeism and reduced productivity. For this reason, HIV is not only a health and human rights issue, it is also a workplace issue. Workplaces are, moreover, highly effective venues for reaching those most affected by the epidemic with HIV prevention, treatment, care and support.

## The evolving nature of the epidemic

Since the first cases of AIDS were identified in the early 1980s, the epidemic has resulted in the deaths of millions of people worldwide. HIV and AIDS have caused enormous human and economic losses, affecting workers and their families, enterprises, communities and national economies. Recognizing the devastating effects of the epidemic, especially in the most affected regions such as sub-Saharan Africa, the international community undertook to tackle HIV, TB, malaria and other diseases as part of the United Nations Millennium Development Goals (MDGs), adopted in 2000.<sup>10</sup>

Since the adoption of the MDGs, significant progress has been made in attaining the goal of universal access to HIV prevention, treatment, care and support services. There is now evidence that new HIV infections are on the decline in many countries.<sup>11</sup> Nonetheless, HIV prevention efforts continue to be of fundamental importance given that, despite a decline in new infections in a number of countries,

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<sup>9</sup> UNAIDS, *Gap report* (Geneva, 2014), p. 5.

<sup>10</sup> For more information on the Millennium Development Goals, see the United Nations website at: <http://www.un.org/millenniumgoals/>.

<sup>11</sup> UNAIDS, *Global report: UNAIDS report on the global AIDS epidemic 2012* (Geneva, 2012), p. 8.

new infections are on the rise in others.<sup>12</sup> To avoid losing ground to the epidemic, it is essential to intensify and target prevention measures to meet the needs and concerns of the key populations most affected, depending upon the characteristics of the epidemic in each country and region.

Although there is still no cure for HIV, scientific and medical advances have led to the development of effective antiretroviral treatments. As a result, HIV is no longer a death sentence. Worldwide, more people are now living with HIV than ever before; however, under half (46 per cent) of people living with HIV in low- and middle-income countries had access to the treatment they needed in 2011.<sup>13</sup> Ensuring timely access to treatment for all those living with HIV and sustainable treatment throughout their lives remains a challenge in many regions, and is essential to reduce new infections and the number of AIDS-related deaths worldwide.

To enable judges and legal professionals to handle cases involving HIV and AIDS-related issues with the necessary objectivity and impartiality, it is important for them to be familiar with the basic facts about HIV and AIDS and the modes of HIV transmission.

## Definitions<sup>14</sup>

- “*HIV*” refers to the human immunodeficiency virus, a virus that damages the human immune system. HIV infection can be prevented by appropriate measures;
- “*AIDS*” refers to the acquired immunodeficiency syndrome which results from advanced stages of HIV infection, and is characterized by opportunistic infections or HIV-related cancers, or both;
- “*Persons living with HIV*” means persons infected with HIV.

## Common myths and misconceptions

Many people have fears or misapprehensions about HIV and AIDS. Common misconceptions about the modes of HIV transmission give rise to fear, which in turn leads to stigma and intolerance, including in workplace settings.<sup>15</sup> To reduce HIV-related stigma, it is therefore essential to clarify the facts regarding HIV transmission.

HIV **cannot** be transmitted by casual physical contact of any kind, such as:

- ✓ Kissing, hugging, or shaking hands
- ✓ Mosquito or insect bites
- ✓ Coughing, sneezing or spitting

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<sup>12</sup> Ibid.

<sup>13</sup> UNAIDS, *World AIDS Day Report 2012* (Geneva, 2012), pp. 17, 39.

<sup>14</sup> Paragraph 1 of the HIV and AIDS Recommendation, 2010 (No. 200). See Module 3 for a more comprehensive list of definitions contained in the Recommendation.

<sup>15</sup> United Nations Human Rights Council, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)*, op. cit., para. 5.

- ✓ Sharing toilets or washing facilities
- ✓ Using utensils or consuming food and drink handled by someone who is infected with HIV.

## Modes of HIV transmission

HIV is transmitted through body fluids – blood, semen, vaginal secretions and breast milk.<sup>16</sup> Transmission can occur only through the following routes:

- Unprotected sexual intercourse,<sup>17</sup> either heterosexual or homosexual, with an infected partner (this is the most common mode of transmission). The risk of sexual HIV transmission is increased by the presence of other sexually transmitted infections, particularly ulcerative types such as herpes or syphilis;
- Mother-to-child transmission during pregnancy, labour and delivery where a prevention regimen is not followed, or through breastfeeding;<sup>18</sup> or
- Blood and blood products, for example:
  - Transfusion of infected blood or transplantation of infected organs or tissues;
  - Sharing of contaminated drug-injecting paraphernalia, such as needles or syringes, or of contaminated skin-piercing instruments;
  - Occupational injuries, including needle-stick injuries sustained by a health professional when caring for an HIV-infected patient. Other workers in the health sector, such as cleaners, may also be at risk of needle-stick injuries.

HIV is a fragile virus, which can only survive in a limited range of conditions. It can enter the body through mucous membranes, such as the mouth or vagina. HIV cannot enter the body if the skin is intact, but it can easily enter through an open wound. Prevention therefore involves ensuring that there is a barrier to the virus – condoms, for instance, or protective means such as gloves and masks, where appropriate – and that needles and other skin-piercing instruments are not contaminated.

In order to prevent accidental exposure to HIV, it is important to follow the standard precaution guidelines devised by the United States Centers for Disease Control and Prevention (CDC) in 1996. For additional information regarding standard precautions, please consult the CDC at <http://www.cdc.gov/>.

## The importance of individuals knowing their HIV status

A person may be infected with HIV for many years without developing symptoms. If individuals are not aware that they are HIV-positive, they may fail to take appropriate

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<sup>16</sup> People cannot be infected with AIDS, but rather with HIV. Reference should therefore be made only to “HIV transmission”, not to “HIV/AIDS transmission”.

<sup>17</sup> “Unprotected” sexual intercourse refers to sexual relations without a protective barrier. For example, male or female condoms are effective barriers when used correctly.

<sup>18</sup> Providing appropriate treatment protocols can reduce mother-to-child transmission but it cannot guarantee complete avoidance of transmission in every case.

precautions<sup>19</sup> and, as a result, may transmit the virus through sex, blood or other body fluids. For this reason, HIV prevention programmes encourage people to seek voluntary (and confidential) HIV counselling and testing as early as possible, so that they can be informed about their status; if they are in fact HIV-positive, they can then take appropriate measures to avoid transmitting the virus to another person. Provider-initiated testing is also encouraged, provided that such testing adheres to international guidelines on voluntary and confidential HIV testing accompanied by pre- and post- test counselling.<sup>20</sup>

Most HIV tests detect the presence of antibodies to HIV, not the virus itself. It can take some time for the immune system to produce enough antibodies for the test to detect HIV, the time period varying from person to person (between two weeks and six months). This time period is commonly referred to as the “window period”, during which people can be highly infectious and yet unaware of their condition. In order to encourage people to seek voluntary HIV testing, it is equally important to reduce HIV-related stigma and discrimination. Many of those who would benefit from voluntary HIV testing do not opt for this solution out of fear of being discriminated against or rejected by their families or co-workers.

## **Treatment as prevention**

Antiretroviral treatment contributes to preventing HIV transmission: it lowers the concentration of HIV (also known as the viral load) in the bloodstream and in genital secretions. Since viral load is the single greatest risk factor for all modes of HIV transmission, full antiretroviral treatment adherence, which keeps the viral load low, also decreases the risk of HIV transmission from one person to another.

## **Discussion points**

1. How has the HIV epidemic affected your country/region?
  - a. Do you know the rate of HIV infection in your country/region?
  - b. What are the main modes of HIV transmission in your country/region?
  - c. How is the epidemic evolving/changing in your country/region?
2. Is antiretroviral treatment widely available in your country/region? Is the cost of this treatment subsidized or otherwise supported?
3. What is the level of general awareness concerning HIV and AIDS among the general population, and among the legal community, including judges and legal professionals? Are educational and awareness programmes in place, and how effective are they?

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<sup>19</sup> For instance, by using a male or female condom.

<sup>20</sup> The “prevalence rate” refers to the proportion of individuals in a population who are living with HIV at a specific point in time. The “incidence rate” quantifies the rate of new HIV infections during a given period in a specified population.

## Module 2: Use of international law and international labour standards

The sources and content of international law have expanded since the creation of the ILO in 1919 and the United Nations in 1945. As a result, national courts have been referring more and more to international human rights law in their decisions. In addition, national legislation and policy have, with increasing frequency, incorporated references to international human rights law.<sup>21</sup>

Together with national law, international law can provide key resources to address and resolve HIV-related labour disputes. This Module will provide an overview of when and how international law can be and has been used in domestic settings. The Modules that follow (3, 4 and 5) will focus on the content of international law instruments relevant to HIV and AIDS and labour rights.

### National approaches to international law

The manner in which international law – including international labour standards – is incorporated into domestic law is generally contingent upon whether the country’s legal system takes a “monistic” or “dualistic” approach to international law.

Traditionally, under a “monist” system, international and domestic law are seen as belonging to a single legal order. Therefore, as a general rule, treaties will enter into force upon ratification or upon completion of the procedures required. Monist systems are generally referred to as providing for “automatic incorporation” of international law into domestic legislation.<sup>22</sup>

Under the “dualist” approach, national and international law are seen as belonging to two separate and distinct spheres of law. It is therefore necessary to provide for

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<sup>21</sup> For a detailed discussion of the use of international labour standards in domestic settings, see: X. Beaudonnet (ed.), *International labour law and domestic law*, op. cit., pp. 3–34.

<sup>22</sup> See C. Thomas, M. Oelz and X. Beaudonnet, “The use of international labour law in domestic courts: Theory, recent jurisprudence, and practical implications”, in *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos* (ILO, Geneva, 2004), pp. 249–285.

the statutory incorporation of a treaty by the national legislature before the instrument enters into force. Accordingly, domestic courts in countries with dualist legal systems cannot directly settle a dispute on the sole basis of a treaty unless it has been incorporated into the national law by statute, decree or other means.

Monist and dualist theories of law are helpful to identify issues related to the use of international law in domestic courts; nevertheless, many legal systems, irrespective of whether they are monist or dualist, share common approaches to international law. For example, the constitutions of many countries, both monist and dualist, provide that international law should be used as a guide to interpreting domestic law.

South Africa, a dualist country, provides in its Constitution that its courts are to consider international law:

**Article 39(1) of the Constitution of South Africa of 1996:**

“When interpreting the Bill of Rights, a court, tribunal or forum:

...

(b) must consider international law...”

Spain, a monist country, also requires national courts to take international law into account in interpreting national law:

**Article 10.2 of the Constitution of Spain of 27 December 1978:**

“Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.”

Dualist countries may also enact provisions that eliminate the need to incorporate ratified treaties into national law, thereby achieving a result similar to monism. For example, the South African Constitution provides that a self-executing provision of a treaty approved by Parliament forms part of the domestic legal system, unless it is inconsistent with the Constitution or an Act of Parliament.

**Article 231(4) of the Constitution of South Africa of 1996:**

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Regardless of the legal tradition in different countries, the national judicial authorities are applying international law with increasing frequency.

**International law has been and continues to be used by domestic courts in four basic ways:**

1. Directly, as the basis for a decision (generally to fill lacunae in domestic legislation or to pre-empt domestic legislation that provides a lesser standard of protection);
2. As a guide to assist in the interpretation of national legislation;
3. In establishing a judicial principle based on international law (particularly where domestic law is insufficient); or
4. In dictum, to strengthen a judge's decision based on domestic law and to support the rationale for the judgement.

***Direct application of international law***

In monist systems, domestic courts may use international law to resolve a case directly where there is a gap in existing national law or where a domestic provision sets a lesser standard of protection than the one contained in international law.

**Country: Argentina**

**Supreme Court of Argentina/Corte Suprema de Justicia de la República  
Argentina, *Aquino, Isacio v. Cargo Servicios Industriales S.A.*, Case No. A. 2652,  
XXXVIII, Judgement of 21 September 2004**

A worker suffered a serious accident at work after falling from a roof he was working on without safety equipment or a safety net. As a result of the accident, the worker was found to be 100 per cent incapacitated for work.

In Argentina, workplace accidents are regulated by the Risks in the Workplace Act (LRT) No. 24557, which establishes a compensation system for workplace injuries. Under the LRT, compensation is available only for material damages, covering only lost earnings. Employers covered under the LRT system are exempt from liability arising out of work-related accidents. The Court held that the LRT system was insufficient and did not provide full and comprehensive reparation as envisaged under Article 19 of the Argentinian Constitution, which prohibits infringement of third-party rights. The Court also determined that the system was incompatible with the principles of labour protection and the guarantee of decent and equitable working conditions provided for under Article 14bis of the Constitution, as well as with principles under other international instruments of constitutional status (such as the International Covenant on Economic, Social and Cultural Rights, cited in Article 75, section 22 of the Constitution).

The Court concluded that the LRT was not compatible with the principle of social justice, citing the Preamble to the ILO Constitution, the Charter of the Organization of American States and the American Convention on Human Rights.

### ***International law as a guide to interpreting national law***

When international law is used as a basis for interpreting a domestic law, the decision is not based solely on international law. This approach has been used in both monist and dualist systems. Moreover, the use of international law as a guide for interpretation is not limited to legally binding instruments. An example may be found in the following decision of the Botswana Industrial Court.

**Country: Botswana**

**Botswana Industrial Court, *Lemo v. Northern Air Maintenance (Pty) Ltd.*,  
Case No. 166 of 2004, Judgement of 22 November 2004**

In examining allegations of unfair dismissal on the basis of HIV status, the Court cited the ILO Declaration on Fundamental Principles and Rights at Work, noting that, as a court of equity, it “is entitled to have regard to international principles on rights at work”. In holding that a worker may not be dismissed solely because he or she is HIV-positive, the Court also noted that the “International Labour Organisation Code of Practice on HIV/AIDS... although not having a force of law, is persuasive insofar as it is consistent with Botswana’s international obligations” (citing also ILO Conventions Nos 111 and 158).

### ***Using international law to establish a judicial principle***

Courts in both monist and dualist systems have used international law to establish jurisprudential principles of law, particularly to fill a gap in domestic law. In this context, courts have used international law to develop jurisprudence on the basis of international law, using both ratified treaties and international guidelines, as illustrated in the case below.

**Country: Brazil**

**Federal Superior Labour Tribunal/Tribunal Superior do Trabalho (TST),  
*São Paulo Transporte S.A. v. Gilmar Ramos da Silva*, Case No. TST-RR- 439041-  
20.1998.5.02.5555, Judgement of 5 May 2003 (published 23 May 2003)**

The employer dismissed a worker for technical reasons, being aware that he was HIV-positive. The worker filed suit, seeking reinstatement and payment of damages. The court of first instance ruled in favour of the complainant. The employer appealed, arguing that the Brazilian law contained no provision recognizing the worker’s right to stability [in employment] and that the Federal Constitution’s provisions did not support the claim for reinstatement.

The Tribunal found that the employer had failed to prove the technical grounds for dismissal, concluding that the worker had been dismissed due to his HIV status, in



violation of the provisions of the 1988 Federal Constitution on the right to dignity. The Tribunal reasoned that the Brazilian legal framework contained protections against discriminatory conduct, citing the Federal Constitution and international labour standards, including the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the ILO Declaration on Fundamental Principles and Rights at Work, 1998. The Tribunal therefore found that the HIV-positive worker was entitled to protection from discrimination.

### ***Using international law to support a decision based on national law***

National courts in both monist and dualist legal systems may use international law to strengthen decisions taken on the basis of existing national law. Examples can be found in the following decisions.

#### **Country: Burkina Faso**

#### **Ouagadougou Labour Court/Tribunal du Travail de Ouagadougou, *Idrissa Zongo and 2 others v. the Petrol Station Bataille du Rail*, Case No. 090, Judgement of 17 June 2003**

To strengthen the principle of application of minimum wages as established by the Burkina Faso Labour Code, the Labour Court referred to the employer's obligation to respect fixed minimum wage rates as provided for under the ILO Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), and the ILO Minimum Wage Fixing Convention, 1970 (No. 131).

International labour standards have served as an inspiration for national courts and have been cited to support and supplement decisions based on domestic law.

#### **Country: South Africa**

#### **South African Labour Court, *Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd*, Case No. JS178/09, Judgement of 16 February 2011**

“South African anti-discrimination legislation derives its mandate from International Labour Organization Conventions, including the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which prohibits workplace discrimination on a number of specific grounds, but does not proscribe HIV discrimination. More recently, the ILO Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 has recognized the impact of discrimination based on real or perceived HIV status and its prevalence.”

The European Court of Human Rights takes into account international law, including international labour standards, when examining cases brought before it. The *Kiyutin v. Russia* case, which examined allegations of discrimination based on HIV status, referenced the HIV and AIDS Recommendation, 2010 (No. 200), among other instruments.

### **Council of Europe**

#### **European Convention on Human Rights (1950)**

**Country: Russian Federation**

#### **European Court of Human Rights, *Kiyutin v. Russia*, Application No. 2700/10, Judgement of 10 March 2011, paragraph 67:**

“The Court has consistently held that it takes into account relevant international instruments and reports in order to interpret the guarantees of the Convention and to establish whether there is a common standard in the field. It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them.”

The African Charter on Human and Peoples’ Rights provides that the Commission on Human and Peoples’ Rights established pursuant to Article 30 of the Charter should take into account international human rights law in examining matters brought before it.

### **African Union**

#### **African Charter on Human and Peoples’ Rights (1981)**

##### **Article 60**

“The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”

##### **Article 61**

“The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people’s rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.”

Similarly, the Inter-American Court of Human Rights has taken into account international law, including international labour standards, when examining cases brought before it. The *Yakye Axa Indigenous Community v. Paraguay* case, which dealt with, among other things, the right to health, is an example.

**Country: Paraguay**

**Inter-American Court of Human Rights, *Yakye Axa Indigenous Community v. Paraguay*, Complaint No. 12.313 of 10 January 2000, Judgement of 17 June 2005, at paragraph 127:**

In analysing the scope of Article 21 of the Convention, the Court considered it useful and appropriate to resort to other international treaties, aside from the American Convention, such as the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), to interpret its provisions in accordance with the evolution of the Inter-American system, taking into account related developments in international human rights law.

## International guidelines and other international instruments

National courts have also used international guidelines to resolve domestic cases. For example, in the following cases, the courts cited the ILO code of practice on HIV/AIDS and the world of work (2001) and the ILO Declaration on Fundamental Principles and Rights at Work (1998) in support of their decisions.

**Country: Botswana**

**Botswana Industrial Court, *Monare v. Botswana Ash (Pty) Ltd*, Case No. 112 of 1998, Judgement of 28 March 2004**

The Botswana Industrial Court referred to the ILO code of practice on HIV/AIDS and the world of work (2001). The Court noted that, while the code is not binding, it provides “useful guidelines, based on internationally accepted labour standards”.

**Country: Brazil**

**Regional Labour Tribunal /Tribunais Regionais do Trabalho (RODC),**

**Case No. TST-RODC-2025400-93.2006.5.02.000, Judgement of 18 October 2010**

**(published 28 October 2010)**

The Tribunal referred to both ILO Convention No. 111 and the ILO code of practice on HIV/AIDS and the world of work in examining a complaint involving allegations of unfair dismissal on the basis of HIV status. The Tribunal noted that, to give effect to Convention No. 111 and the ILO code of practice, it is necessary to guarantee a worker's right to be redeployed in a manner compatible with his or her state of health and pursuant to medical recommendations, when his or her working capacity is impaired [due to HIV-related illness].

**Federal Superior Labour Tribunal/Tribunal Superior do Trabalho (TST),**

***WMS Supermercados do Brasil LTDA v. Flávio Antônio dos Santos Mascarenhas,***

**Case No. TST-RR-105500-32.2008.5.04.0101, Judgement of 29 June 2011**

**(published 5 August 2011)**

In a case involving allegations of unfair dismissal due to a mental impairment, the Tribunal referred to ILO Convention No. 111, as well as to the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

## Discussion points

1. Is your country's legal system monist or dualist? Does it have "mixed" aspects?
2. Does your national Constitution or other law provide guidance on the position of international law in your national legal system?
3. Are you aware of jurisprudence in your country that has made use of international human rights instruments, including international labour standards? If so, how have these instruments been utilized in your jurisdiction?

## Module 3: International and regional human rights instruments relevant to HIV and AIDS

Human rights are rights inherent to all human beings, irrespective of their race, colour, sex, national origin, social status or any other factors. These rights are universal and inalienable and apply to all people equally, without discrimination. Human rights and fundamental freedoms are considered as being interrelated, interdependent and indivisible.<sup>23</sup> They are expressed in instruments, such as treaties and conventions, which can be ratified by countries.<sup>24</sup> Customary international law and general principles of law are also sources of international law.<sup>25</sup>

Where individuals and communities are able to realize their fundamental human rights – to education and information, health, free association, privacy and their right to be free of discrimination – they will also be able to enjoy improved access to HIV services. Open and supportive environments that respect the fundamental rights of those living with or affected by HIV or AIDS also support HIV prevention and education efforts.

### **United Nations General Assembly, *Declaration of Commitment on HIV/AIDS*, Resolution S-26/2, adopted on 27 June 2001 (A/RES/S-26/2)**

Paragraph 16:

“[T]he full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and [...] it reduces vulnerability to HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/AIDS.”

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<sup>23</sup> See the website of the Office of the High Commissioner for Human Rights at: [www.ohchr.org](http://www.ohchr.org).

<sup>24</sup> See Vienna Convention on the Law of Treaties, adopted on 23 May 1969.

<sup>25</sup> See Article 38 of the Statute of the International Court of Justice, set up in 1945 under the Charter of the United Nations.

This Module focuses on international and regional human rights instruments relevant to HIV and AIDS and the world of work.

## United Nations instruments

Human rights are confirmed in numerous United Nations instruments. A number of these instruments have been interpreted as applying to HIV and AIDS, despite the fact that the epidemic was unknown at the time that many of them were adopted.

United Nations instruments relevant to HIV and AIDS include:

- the Universal Declaration of Human Rights (1948);
- the International Covenant on Civil and Political Rights (1966) and its two Optional Protocols;
- the International Covenant on Economic, Social and Cultural Rights (1966);
- the Convention on the Elimination of All Forms of Discrimination against Women (1979);
- the Convention on the Rights of the Child (1989);
- the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); and
- the Convention on the Rights of Persons with Disabilities (2006).

The implementation of United Nations instruments is monitored by human rights treaty bodies created under the provisions of the specific treaty to which they refer. These bodies are composed of independent experts that provide States with guidance in implementing rights established under the treaty.<sup>26</sup>

The Universal Declaration of Human Rights expresses the principle of non-discrimination in its Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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* (emphasis added).

This principle is echoed in similar provisions in the International Covenant on Civil and Political Rights (Article 26) and the International Covenant on Economic, Social and Cultural Rights (Article 2(2)).

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<sup>26</sup> The Office of the High Commissioner for Human Rights (OHCHR) provides support to the different human rights monitoring mechanisms in the United Nations system. For further information, consult HIV and Human Rights at: <http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx>.

**Article 26 of the International Covenant on Civil and Political Rights (1966):**

“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*” (emphasis added).

**Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (1966):**

“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*” (emphasis added).

The United Nations Commission on Human Rights (now replaced by the Human Rights Council) has confirmed on numerous occasions that the prohibition against discrimination on the grounds of “other status” found in international human rights instruments should be interpreted as encompassing health status, including HIV and AIDS.<sup>27</sup>

**United Nations Commission on Human Rights, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, Resolution No. 1995/44 (adopted 3 March 1995) E/CN.4/RES/1995/44:**

“1. *Confirms* that discrimination on the basis of AIDS or HIV status, actual or presumed, is prohibited by existing international human rights standards, and that the term ‘or other status’ in non-discrimination provisions in international human rights texts can be interpreted to cover health status, including HIV/AIDS;

2. *Calls* upon all States to ensure, where necessary, that their laws, policies and practices, including those introduced in the context of HIV/AIDS, respect human rights standards, including the right to privacy and integrity of people living with HIV/AIDS, prohibit HIV/AIDS-related discrimination and do not have the effect of inhibiting programmes for the prevention of HIV/AIDS and for the care of persons infected with HIV/AIDS;”

The reference to “other status” in international human rights instruments may enable national courts to address HIV-related discrimination even when HIV

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<sup>27</sup> See United Nations Commission on Human Rights, Resolution 1995/44 of 3 March 1995, paragraph 1; See also Resolutions 1996/43 of 19 April 1996; 1999/49 of 27 April 1999; 2001/51 of 24 April 2001; 2003/47 of 23 April 2003; 2005/84 of 21 April 2005.

and AIDS are not explicitly covered under national legislation. The decision of the Constitutional Court of Romania is a case in point.

**Country: Romania**

**Constitutional Court of Romania/Curtea Constituțională a României,  
Decision No. 6, Judgement of 25 February 1993:**

“The non-discrimination criteria ... as set forth in Article 4(2) of the Constitution include: race, nationality, ethnic origin, language, religion, sex, opinions, political affiliation, property and social origin. It must be stressed in this context, however, that the provisions of the Constitution must be complemented with international human rights instruments, since this is the only way that the principle of equal rights can have an authentic legal dimension. This results explicitly from the first paragraph of Article 20 of the Constitution, which provides that “Constitutional provisions concerning citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with the covenants and other treaties to which Romania is a party.” Consequently, the provisions of Article 26 of the International Covenant on Civil and Political Rights, which entered into effect on 23 March 1976, shall be applicable in this instance. That Article stipulates as follows: “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”” (paragraph 3).

The Committee monitoring the application of the International Covenant on Economic, Social and Cultural Rights has interpreted the reference to “other status” to include HIV as a prohibited ground of discrimination, in addition to other relevant grounds, such as health status, disability and sexual orientation.<sup>28</sup> The Human Rights Committee has also interpreted the reference to “other status” in Article 2(1) of the International Covenant on Civil and Political Rights to protect persons from discrimination on the basis of HIV status.<sup>29</sup> The United Nations Convention on the Rights of the Child also contains a reference to the prohib-

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<sup>28</sup> See United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, forty-second session (Geneva, May 2009), E/C.12/GC/20, paras 27–28 and 32–33.

<sup>29</sup> United Nations Human Rights Committee, *Consideration of reports submitted by States parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee. Republic of Moldova*, ninety-seventh session (Geneva, 4 November 2009), CCPR/C/MDA/CO/2, para. 12.

ition of discrimination on the basis of “other status”, which has been interpreted to encompass HIV status.<sup>30</sup>

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is relevant to cases of discrimination against women living with or affected by HIV in all settings, including employment. Its Article 2 calls on States to pursue a policy of eliminating discrimination against women. The important role of the courts is highlighted in Article 2, subsection (c), which calls on States:

... 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”.

In particular, Article 12(1) of CEDAW urges States to take measures to eliminate discrimination against women in the field of health-care services and to ensure their access to adequate health service facilities, including information on family planning. The CEDAW Committee has issued a specific recommendation on women and AIDS, calling for programmes on HIV and AIDS “to give special attention to the rights and needs of women and children, and to the factors relating to the reproductive role of women and their subordinate position in some societies which make them especially vulnerable to HIV infection”.<sup>31</sup>

The Committee on Economic, Social and Cultural Rights has issued comments calling on States to take measures to ensure that women enjoy equal access to health services, education and information, including in relation to sexual and reproductive health. The Committee recommended that States “undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights”.<sup>32</sup>

## United Nations General Assembly Resolutions

In June 2001, the United Nations General Assembly held its first Special Session on HIV/AIDS (UNGASS) and adopted the *Declaration of Commitment on HIV/AIDS* (Resolution S-26/2 of 27 June 2001). The Declaration calls for

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<sup>30</sup> United Nations Committee on the Rights of the Child, *Adolescent health and development in the context of the Convention on the Rights of the Child*, General Comment No. 4 (2003), thirty-third session (Geneva, 19 May – 6 June 2003), CRC/GC/2003/93, para. 6.

<sup>31</sup> United Nations Committee on the Elimination of Discrimination against Women, *Recommendation No. 15: Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS)*, ninth session (Geneva, 1990).

<sup>32</sup> See Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, twenty-second session (Geneva, 2000), para. 21.

measures to be taken to establish supportive workplace environments for people living with HIV and AIDS (paragraph 49) and to develop a national legal and policy framework to protect workplace rights of people infected or affected by HIV and AIDS (paragraph 69).

In adopting the 2001 Declaration, all United Nations Member States undertook to report to the General Assembly every two years on progress made in responding to the epidemic. (These reports are commonly referred to as “UNGASS reports”.)

**United Nations General Assembly, *Declaration of Commitment on HIV/AIDS*, Resolution S-26/2, adopted on 27 June 2001 (A/RES/S-26/2)**

**Paragraph 49:**

“... strengthen the response to HIV/AIDS in the world of work by establishing and implementing prevention and care programmes in public, private and informal work sectors, and take measures to provide a supportive workplace environment for people living with HIV/AIDS”.

**Paragraph 69:**

“... develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at the greatest risk of HIV/AIDS, in consultation with representatives of employers and workers, taking account of established international guidelines on HIV/AIDS in the workplace.”

This commitment was reaffirmed in 2006 in a second instrument, the Political Declaration on HIV/AIDS, Resolution 60/262 (adopted on 2 June 2006).

In 2011, the United Nations General Assembly adopted the Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS (Resolution 65/277 of 10 June 2011). Its paragraph 85 reaffirms the commitment to eliminate HIV-related stigma and discrimination in and through the world of work.

## **International guidelines**

The joint UNAIDS/OHCHR *International guidelines on HIV/AIDS and human rights* (2006) call on governments to provide legislative protections against HIV-related discrimination in employment:

**Office of the United Nations High Commissioner for Human Rights (OHCHR)/  
UNAIDS, *International guidelines on HIV/AIDS and human rights, Consolidated  
version, Geneva, 2006***

Guideline 5 provides that anti-discrimination legislation should cover a range of areas, including employment. It calls for protective measures to be taken to guarantee a range of workplace rights, including freedom from HIV testing or screening for employment, promotion, training or benefits; confidentiality of HIV-related information at the workplace; and employment security for workers living with HIV until they are no longer able to work. Legislation should cover both direct and indirect discrimination and provide for independent, speedy and effective legal and/or administrative procedures for seeking redress.

The ILO code of practice on HIV/AIDS and the world of work (2001) provides guidance on the development and implementation of rights-based workplace responses to HIV and AIDS. The code was developed by a tripartite group of experts representing governments, employers' and workers' organizations. (See Module 4.)

## **Regional instruments relevant to HIV and AIDS**

### ***Council of Europe***

The European Convention on Human Rights (1950) is a relevant source of law in European countries, particularly for those that are members of the Council of Europe. The European Court of Human Rights has held that discrimination on the basis of health status, including HIV status, is covered under the reference in Article 14 of the Convention to "other status", either as a form of disability or together with a disability.

**Country: Russian Federation**

**European Court of Human Rights, *Kiyutin v. Russia*, Application No. 2700/10,  
Judgement of 10 March 2011, paragraph 57:**

"... the Court considers that a distinction made on account of one's health status, including such conditions as HIV infection, should be covered – either as a form of disability or alongside it – by the term 'other status' in the text of Article 14 of the Convention".

### **European Convention on Human Rights (1950)**

Article 14 of the Convention provides that:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*” (emphasis added).

### **African Union**

The African Charter on Human and Peoples’ Rights (1981) calls upon African Union member States to undertake to eliminate all forms of discrimination.

#### **African Union**

##### **African Charter on Human and Peoples’ Rights (1981)**

Article 2 of the African Charter prohibits discrimination of any kind, providing that:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized 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*” (emphasis added).

In the *Banda v. Lekha* case, the Malawi Industrial Relations Court cited both the African Charter and ILO Convention No. 111, maintaining that protection from discrimination in employment on the basis of HIV was implicit in Article 20 of the Malawi Constitution, which prohibits unfair discrimination.

#### **Country: Malawi**

##### **Malawi Industrial Relations Court, *Banda v. Lekha*, Case No. IRC 277 of 2004, Judgement of 1 June 2005**

The Malawi Industrial Relations Court relied on both ILO Convention No. 111 and the African Charter (ratified by Malawi on 22 March 1965 and 21 October 1986, respectively). The Court noted that Article 20 of the Malawi Constitution prohibited unfair discrimination, without specifically referring to discrimination on the basis of HIV status. In holding that protection from discrimination on the basis of HIV status was to be implied under Article 20, the Court cited the obligations arising under the African Charter and ILO Convention No. 111 to enact protective legislation and formulate national policy to give effect to fundamental rights enshrined in the Charter and Convention. In its ruling, the Court also cited Malawi’s national AIDS policy, which “is aimed at ensuring that all people affected or infected with HIV are equally protected under the law”.

## **Organization of American States**

The Inter-American Commission on Human Rights has interpreted the American Convention on Human Rights (1969) as prohibiting HIV-related discrimination.

### **Country: El Salvador**

#### **Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez and Others v. El Salvador*, Case No. 12.249, Report No. 27/09 of 20 March 2009**

The Commission cited Article 24 of the Convention, which provides that “all persons are equal before the law” and that “consequently, they are entitled, without discrimination, to equal protection of the law”. The Commission noted that Article 1(1) of the Convention further establishes the obligation to respect the rights of all persons and to ensure their free and full exercise “without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. On this basis, the Commission held that the Convention’s anti-discrimination provisions encompassed protection from discrimination on the basis of HIV status.

In 2013, the Organization of American States adopted the Inter-American Convention against All Forms of Discrimination and Intolerance. The new Convention explicitly prohibits discrimination on the basis of a number of grounds relevant to HIV, including sexual orientation, gender identity or expression, infectious or contagious disease status, or on the basis of any other condition.<sup>33</sup>

### **Organization of American States**

#### **Inter-American Convention against All Forms of Discrimination and Intolerance (2013), Article 1(1), second paragraph:**

“Discrimination may be based on nationality; age; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition, including infectious-contagious condition and debilitating psychological condition; or any other condition.”

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<sup>33</sup> The Organization of American States also adopted in 2013 the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance.

## Subregional guidelines

National courts have also turned to subregional guidelines to address cases alleging HIV-related discrimination at the workplace.<sup>34</sup> For example, the Southern Africa Development Community (SADC) Code of Conduct on HIV/AIDS and Employment explicitly prohibits discrimination in employment on the basis of HIV status.<sup>35</sup>

**Southern African Development Community (SADC), *Code of Conduct on HIV/AIDS and Employment* (1997), section 4:**

“HIV status should not be a factor in job status, promotion or transfer. Any changes in job status should be based on existing criteria of equality of opportunity, merit and capacity to perform the work to a satisfactory standard.”

### Discussion points

1. What are the elements in the international human rights treaties that you would consider relevant in resolving a case of HIV-related discrimination in the workplace?
2. Are there regional instruments applicable in your jurisdiction relevant to HIV and AIDS?
3. Could you refer to – or have you already made use of – international or regional instruments in national cases involving HIV-related discrimination?

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<sup>34</sup> South Africa Labour Court, see *Gary Shane Allpass v. Mooikloof Estates*, at para. 42.

<sup>35</sup> At the time of writing, SADC's Code is under revision.

# Module 4: An overview of the ILO, international labour standards and supervisory mechanisms

## The ILO: Its role and structure

The International Labour Organization (ILO) was created in 1919, in the aftermath of the First World War, as part of the Treaty of Versailles. It became a specialized agency of the United Nations system in 1946 and currently has 186 member States. It is the United Nations agency responsible for the world of work and its primary objective is to promote decent work for all, based on principles of social justice and equality.

The ILO has a unique “tripartite” structure, which brings together representatives of governments, employers, and workers to address issues related to labour and social policy. It is the only international organization in the United Nations system in which civil society employers’ and workers’ organizations participate together with governments in decision-making, including in developing and adopting international labour standards.<sup>36</sup>

International labour standards provide minimum protection in a range of areas related to the workplace and to social protection.<sup>37</sup> ILO standards have been incorporated in whole or in part into labour and human rights legislation all over the world.

## What form do international labour standards take?

International labour standards take the form of either:

- **Conventions**, which are international treaties that may be ratified by ILO member States and thus become legally binding; or

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<sup>36</sup> The ILO’s Governing Body and International Labour Conference are both tripartite. Work is carried out through a process of social dialogue involving representatives of governments, employers’ and workers’ organizations. All of the tripartite partners enjoy the constitutional right to vote, including voting on the adoption of international labour standards.

<sup>37</sup> For a more complete background concerning the history and work of the ILO, see: G. Rodgers, E. Lee, L. Swepston and J. Van Daele, *The International Labour Organization and the quest for social justice 1919–2009* (ILO, Geneva, 2009).

- **Recommendations**, which serve as non-binding standards that are not open for ratification. In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplements the Convention by providing more detailed guidelines on how it might be applied.<sup>38</sup> Recommendations can also be autonomous, i.e., not linked to any Convention, as is the case for the HIV and AIDS Recommendation, 2010 (No. 200), and the Social Protection Floors Recommendation, 2012 (No. 202).

Conventions and Recommendations are an important source of inspiration and interpretation for both the domestic legislator and the judiciary.

## Obligations of member States in relation to international labour standards

Under article 19 of the ILO Constitution, once an international labour standard is adopted, member States are obliged to submit the standard to their competent national authority (normally the parliament) for consideration. In the case of Conventions, submission implies that the competent authority will review the instrument with a view to its ratification, as well as consider whether and to what extent the Convention should be incorporated into national law and practice even in the absence of ratification.

In ratifying a Convention, member States commit themselves to applying its provisions in both national law and practice and to reporting on its application at regular intervals. When an ILO Convention is ratified, it becomes the responsibility of the State as a whole, including the judiciary, to comply with its obligations. Special representation and complaint procedures can be initiated against countries for violations of a Convention they have ratified. In the case of Recommendations, the parliament may decide to adopt some or all of the measures in the instrument as national policy or legislation. If requested, the ILO may provide technical assistance to assist member States in this process.

## Fundamental ILO Conventions

The ILO has identified eight Conventions as “fundamental”, covering four areas that comprise fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

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<sup>38</sup> One example of a Convention accompanied by a related Recommendation is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which is supplemented by the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).

These principles are contained in the *ILO Declaration on Fundamental Principles and Rights at Work* (1998). Pursuant to the Declaration, all ILO member States have an obligation to work towards realizing these fundamental principles, arising from the very fact of their membership in the ILO, even if they have not ratified the Conventions concerned.

**The eight fundamental ILO Conventions are:**

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

## Governance Conventions

The ILO has also designated another four Conventions as governance instruments, thereby encouraging member States to ratify and apply them because of their importance to the functioning of the international labour standards system. The *ILO Declaration on Social Justice for a Fair Globalization* (2008) identified these standards as being the most significant from the viewpoint of governance.

**The four ILO governance Conventions are:**

- Labour Inspection Convention, 1947 (No. 81)
- Labour Inspection (Agriculture) Convention, 1969 (No. 129)
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)
- Employment Policy Convention, 1964 (No. 122)

## Technical Conventions

Since its founding in 1919, the ILO has adopted close to 200 Conventions and Recommendations on all aspects of the world of work. In addition to the fundamental and governance Conventions referred to above, there are numerous so-called “technical” Conventions dealing with, inter alia, employment promotion, vocational guidance and training, wages, working time, occupational safety and health, social security, maternity protection, social policy, migrant workers, seafarers, fishers, dock workers, and indigenous and tribal peoples.

## International labour standards relevant to HIV and AIDS

The sole international labour standard that focuses on HIV and AIDS is the HIV and AIDS Recommendation, 2010 (No. 200). The key principles of the Recommendation are addressed in Module 5.

The Recommendation's principles are rooted in a range of international labour standards and other international instruments, some of which are referred to directly in the Recommendation. (A list of relevant ILO standards is provided in Appendix 2.)

Many of these international labour standards have been widely ratified and have been integrated wholly or partially into the domestic law of ILO member States. These standards cover various aspects of the HIV response in and through the workplace, and where appropriate will be discussed in more detail under the relevant headings. For example, the discussions on HIV-related discrimination will refer explicitly to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

## Other ILO instruments

### *Declarations*

Although not expressly referred to in the ILO Constitution, a number of Declarations have been adopted by both the International Labour Conference and the ILO Governing Body. As a general rule, Declarations are adopted with the aim of highlighting or reiterating one or more of the ILO's core principles.

#### **ILO Declaration on Fundamental Principles and Rights at Work, 1998**

Referring to the ILO Constitution, the Declaration on Fundamental Principles and Rights at Work identifies four categories of principles and rights recognized as fundamental, set out in eight core ILO Conventions. Based on their acceptance of the content of the Constitution arising out of membership of the Organization, all member States undertake to respect, to promote and to realize the fundamental principles and rights at work, irrespective of whether they have ratified the Conventions concerned or not.

### *Resolutions*

Resolutions are non-binding instruments adopted by the Conference, expressing its views on a particular subject. When they concern a theme covered by a Convention, resolutions may provide guidance on the interpretation of the meaning of a provision in a relevant Convention. For example, the ILO supervisory bodies

use the resolutions on equality of opportunity and treatment in employment and occupation to help them monitor member States' compliance with their obligations under the relevant Conventions.<sup>39</sup> Resolutions have also been adopted jointly with international labour standards to provide guidance for member States and to promote their application.<sup>40</sup>

**International Labour Conference, *Resolution concerning the promotion and the implementation of the Recommendation on HIV and AIDS and the world of work, 2010, Resolution II, 99th Session, 16 June 2010***

A Resolution concerning the promotion and the implementation of the Recommendation on HIV and AIDS and the world of work, 2010 was adopted by the International Labour Conference on 16 June 2010, to support the effective implementation of the HIV and AIDS Recommendation, which was adopted on 17 June 2010 by a 96.6 per cent majority vote of the Conference delegates.

### ***Codes of practice***

The ILO has developed and endorsed a number of codes of practice. These are technical instruments drawn up during meetings of experts representing employers, workers and governments, and are subsequently endorsed by the ILO Governing Body. ILO codes of practice have been developed on a number of subjects, primarily on different aspects of occupational safety and health.

The three ILO codes of practice most relevant to HIV and AIDS at work are:

- An ILO code of practice on HIV/AIDS and the world of work, 2001
- ILO code of practice on managing disability in the workplace, 2002
- ILO code of practice on the protection of workers' personal data, 1997

While codes of practice are not legally binding, national courts have accorded them significant weight, citing their provisions as useful references.

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<sup>39</sup> Resolution on equal opportunities and equal treatment for men and women in employment, 1985.

<sup>40</sup> For example, see resolutions adopted jointly with the 2006 Consolidated Maritime Labour Convention (MLC, 2006) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

## South Africa

**South African Labour Court, *PFG Building Glass (Pty) Ltd. v. Chemical Engineering Pulp Paper Wood & Allied Workers Union & Others*, Case No. J90/03, Judgement of 28 March 2003 (Published in *Industrial Law Journal*, Volume 24, May 2003, pp. 974–999), paragraphs 77 and 78:**

“Although the ILO code of practice on HIV/AIDS and the world of work is not binding on the Labour Court, it is fortifying to note that, as an international instrument, it echoes some of the important provisions of our law. Its key principles include an acknowledgement that HIV/AIDS is a workplace issue, promotion of non-discrimination against workers on the basis of real or perceived HIV status, prohibition of HIV testing at the time of recruitment or as a condition of continued employment, prohibition of mandatory HIV testing, recommendations about conditions for voluntary testing at the instance of employees and adherence to strict confidentiality and disclosure requirements.

...

The code of practice on the protection of workers’ personal data (the Data Code) also has important recommendations for HIV testing. It advocates as a general principle that personal data should, *inter alia*, be processed lawfully and fairly, and only for reasons directly relevant to the employment of the worker and be used only for the purposes for which they were originally collected. Employers should regularly assess their data processing practices to improve ways of protecting the privacy of workers...”.

## The ILO supervisory system

The ILO monitors the application of international labour standards through its regular and special supervisory mechanisms. The regular supervisory mechanism consists of the following two supervisory bodies:

- The Committee of Experts on the Application of Conventions and Recommendations (CEACR) examines the periodic reports submitted on ratified Conventions by ILO member States.
- The Conference Committee on the Application of Standards (the Conference Committee) examines and discusses CEACR reports, focusing on specific cases (see below).

The ILO Constitution also provides for two special procedures that can be invoked in the event of non-observance of a *ratified Convention* by an ILO member State: the representation procedure (under article 24 of the Constitution) and the complaints procedure (under article 26 of the Constitution). There is also a special mechanism, the Committee on Freedom of Association (CFA), which examines complaints concerning violations of freedom of association, whether or not the country concerned has ratified the relevant Conventions.

This Handbook focuses on the regular supervisory system, given that this is the most relevant source of information for judges and legal professionals handling HIV and AIDS-related matters.

### ***The Committee of Experts on the Application of Conventions and Recommendations (CEACR)***

The regular supervisory system is based on a constitutionally established reporting mechanism that provides for a systematic and periodic exchange of information and continued dialogue between the supervisory bodies and the ILO constituents in relation to the application of standards.<sup>41</sup>

The CEACR consists of 20 independent experts who meet once a year to examine and comment on information provided to the ILO under the reporting system. The reporting mechanism is based on articles 22 and 23 of the ILO Constitution. Once a member State has ratified an ILO Convention, it is obliged under article 22 to report regularly on measures it has taken to implement it. States are required to communicate copies of their reports to the national employers' and workers' organizations, so that they might also make comments on the report or directly to the CEACR.

Article 19 of the ILO Constitution also provides that member States may be requested to report periodically on the application in their law and practice of the principles established in a Convention or Recommendation (regardless of whether or not the Convention has been ratified by the particular member State).<sup>42</sup>

The CEACR report is published annually and is submitted to the ILO Conference Committee, which meets in June each year. The report is available online at [www.ilo.org](http://www.ilo.org) and can provide guidance to national judicial authorities and legal professionals on HIV and AIDS issues.

In examining the application of international labour standards, the CEACR makes two kinds of comments: ***observations*** and ***direct requests***. Observations contain comments on fundamental technical issues that have arisen in the framework of the application of a particular Convention by a State. Observations are published in the annual CEACR report. Direct requests relate to minor technical questions or requests for further information. They are not published in the annual report, but are communicated directly to the governments concerned and are available on the ILO website ([www.ilo.org](http://www.ilo.org)).

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<sup>41</sup> For an in-depth explanation of the ILO supervisory procedures and mechanisms, see: ILO, *Rules of the game: A brief introduction to international labour standards*, Revised edition (Geneva, 2009). See also ILO, *Handbook of procedures relating to international labour Conventions and Recommendations*, International Labour Standards Department (Geneva, 2012).

<sup>42</sup> See also A. Trebilcock, *The implementation of international labour law*, United Nations Audiovisual Library of International Law, Lecture Series, video available online at: [http://legal.un.org/avl/l/Trebilcock\\_ILL.html](http://legal.un.org/avl/l/Trebilcock_ILL.html).

## ***The Conference Committee on the Application of Standards***

The CEACR report is submitted to the International Labour Conference each June, where it is examined by the Conference Committee on the Application of Standards. The tripartite Conference Committee is composed of Government, Employers' and Workers' delegates.

When the Conference Committee examines the CEACR report, it selects a number of observations (also referred to as "cases") for discussion. The governments concerned are invited to appear before the Conference Committee and to engage in a dialogue in which they may be commended for certain measures they have taken, or requested to provide additional information and to take additional specific action. In many cases the Conference Committee draws up conclusions recommending that governments take specific steps to remedy a problem. The discussions and conclusions in relation to the cases examined by the Conference Committee are published in its report. Situations of special concern are also highlighted in special paragraphs of the Committee's General Report.

## **References to HIV and AIDS by the ILO supervisory bodies**

The ILO supervisory bodies have been referring to the impact of the HIV epidemic on the world of work since 1990. In its 2012 General Survey, the CEACR noted the increasing number of countries that have included HIV status in their legislation and policies as a prohibited ground of discrimination. Citing Recommendation No. 200, the CEACR noted that national laws and policies should provide for protection from discrimination and stigma on the basis of both real and perceived HIV status, in order to cover those discriminated against on the basis of stereotyping.<sup>43</sup>

Comments from the CEACR and the Conference Committee offer useful guidance in interpreting HIV-related rights under relevant Conventions. Under the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the CEACR has commented positively on the adoption of national laws and policies providing for HIV status as a prohibited grounds of discrimination, as well as on the creation of national AIDS authorities or the adoption of national policies or strategies on HIV and AIDS. In its continuing dialogue with ILO member States, the CEACR has asked a number of governments to provide statistical information

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<sup>43</sup> ILO, *Giving globalization a human face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, Report III (Part 1B), International Labour Conference, 101st Session (Geneva, 2012), paras 810–812.

with regard to the number of HIV-related discrimination complaints lodged, and to provide information on other measures taken or envisaged to reduce HIV-related discrimination and inequalities in employment. The CEACR has also examined the issue of HIV-related discrimination in the context of the Migration for Employment Convention (Revised) 1949, (No. 97), concluding that the refusal of entry or repatriation of a migrant worker on the grounds that the worker was HIV-positive would “constitute an unacceptable form of discrimination and is contrary to the Convention”.

Under the Worst Forms of Child Labour Convention, 1999 (No. 182), the CEACR has noted measures taken by governments to ensure school attendance of AIDS orphans, as well as actions that focus on child orphans/victims in countries where HIV infection rates are high. Under the Forced Labour Convention, 1930 (No. 29), the CEACR has noted the extremely serious problem of the sexual exploitation of children, pointing out that human trafficking increases the vulnerability to HIV infection.

The Conference Committee has also discussed cases relating to HIV and AIDS. At the International Labour Conference in June 2008, for example, the Committee examined a case concerning the Dominican Republic, which involved the alleged practice by employers of imposing mandatory HIV testing as a requirement for access to employment.

### Discussion points

1. What ILO Conventions have been ratified by your country? Has your country ratified any of the ILO’s fundamental or governance Conventions? If so, which ones has it ratified that may be relevant to the issue of HIV and AIDS?
2. Have courts in your country made use of international labour standards in domestic decisions?
3. Do you consider that your country’s legislation fully implements the principles of the ILO fundamental Conventions? Why or why not?

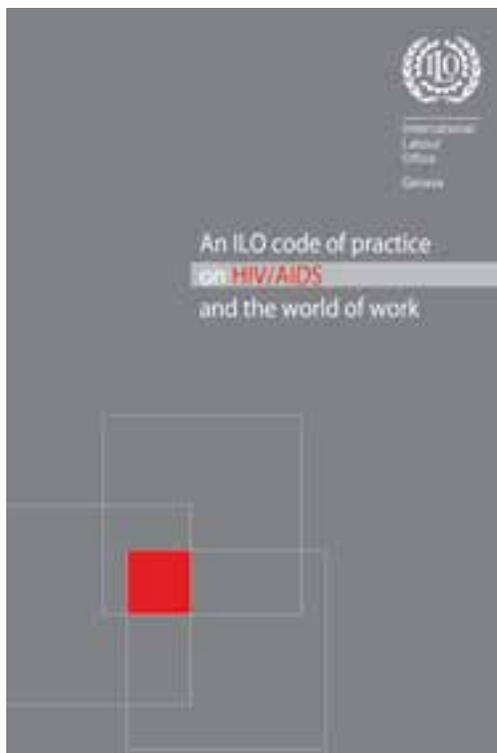


## Module 5: HIV and AIDS Recommendation, 2010 (No. 200)

Recommendation No. 200 builds on the successful development and implementation of the ILO code of practice on HIV/AIDS in the world of work (2001). The code of practice is a set of guidelines developed by a tripartite group of HIV and AIDS experts and adopted by the ILO Governing Body in June 2001.<sup>44</sup>

The code of practice has been widely disseminated and has been cited by domestic courts in a number of cases of HIV-related employment discrimination.<sup>45</sup> It remains a valuable source of guidance for the development and implementation of policies and programmes on HIV and AIDS in the world of work.

Building on the successful implementation of the code, the ILO Governing Body decided, at its 298th Session in March 2007, that it was necessary to adopt an international labour standard on



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<sup>44</sup> The tripartite group was convened pursuant to the resolution concerning HIV/AIDS and the world of work, adopted on 13 June 2000 at the 88th Session of the International Labour Conference in Geneva.

<sup>45</sup> See, for example, South African Labour Court, *Joy Mining Machinery (Harnischfeger) (SA) (Pty) Ltd v. National Union of Metalworkers of SA & Others*, Case No. J 158/02, Judgement of 31 January 2002.

HIV and AIDS and the world of work. This decision was taken to increase the attention devoted to this issue at the national and international levels, to promote united action among the key national and international actors on HIV and AIDS, and to increase the impact of the ILO code of practice, taking into consideration scientific developments in the field of HIV and AIDS over the decade following its adoption.<sup>46</sup> The three-year standard-setting process<sup>47</sup> established under article 19 of the ILO Constitution culminated in the adoption of the first international labour standard focused on the protection of fundamental human rights at work in relation to HIV and AIDS.<sup>48</sup>

The key human rights principles contained in the Recommendation are derived from a number of existing ILO Conventions and Recommendations, as well as from other international instruments, some of which are referred to directly in the instrument. This Module will provide an overview of these key principles.

## **Recommendation No. 200 and its contribution to the HIV response**

Recommendation No. 200 was developed and adopted at the 99th Session of the International Labour Conference (2010), with the active participation of governments, representatives of employers' and workers' organizations from around the world, and representatives of organizations of persons living with HIV. The discussions also involved other United Nations agencies, notably the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the World Health Organization (WHO).

The Recommendation is the first international labour standard to provide explicitly for the protection of human rights at work in the context of HIV and AIDS. The principles of non-discrimination in employment and occupation, and gender equality, are cornerstones of the Recommendation.

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<sup>46</sup> For example, when the ILO code of practice was endorsed by the ILO Governing Body in 2001, treatment options were much more limited than they are today.

<sup>47</sup> For the preparatory work, see: ILO, *HIV/AIDS and the world of work*, Report IV(1), International Labour Conference, 98th Session, 2009 (Geneva, 2008); ILO, *HIV/AIDS and the world of work*, Report IV(2), International Labour Conference, 98th Session, 2009 (Geneva, 2009); ILO, *HIV/AIDS and the world of work*, Report V(1), International Labour Conference, 99th Session, 2010 (Geneva, 2009); ILO, *HIV/AIDS and the world of work*, Report V(2A), International Labour Conference, 99th Session, 2010 (Geneva, 2010); and ILO, *HIV/AIDS and the world of work*, Report V(2B), International Labour Conference, 99th Session, 2010 (Geneva, 2010).

<sup>48</sup> See A. Trebilcock, *The development of international labour law*, United Nations Audiovisual Library of International Law, Lecture Series, video available online at: [http://legal.un.org/avl/lst/Trebilcock\\_ILL.html](http://legal.un.org/avl/lst/Trebilcock_ILL.html).

The Preamble to the Recommendation recognizes that HIV and AIDS have a serious impact on society and all sectors of the economy and undermine the attainment of decent work and sustainable development. It highlights that poverty, social and economic inequalities and unemployment increase the risk of HIV transmission by impeding access to prevention, treatment, care and support services. The Preamble further notes that stigma and discrimination against persons infected with or affected by HIV or AIDS, and the threat of job loss, are barriers to knowing one's HIV status.

The Recommendation establishes key principles for the prevention of HIV transmission and the mitigation of its impact at the workplace. It calls on governments, in consultation with organizations of employers and workers, organizations of persons living with HIV and other concerned actors, such as the health sector, to take measures to: prevent HIV-related stigma and discrimination; prevent new infections; provide for access to treatment, care and support; and ensure a safe and healthy workplace for all workers, as well as equal access to employment-related benefits, such as insurance and social security schemes. Noting that HIV and AIDS have a more severe impact on vulnerable and at-risk groups, the Recommendation places special emphasis on the need to reach persons belonging to these groups with HIV-related services.

## Scope of the Recommendation

The Recommendation is intended to have the widest scope possible, encompassing all workplaces and all workers at all stages of the employment relationship. It covers all types of work wherever it is performed, in both formal and informal settings, defining “workers” as “persons working under any forms or arrangement”.

The Recommendation applies to selection and recruitment prior to employment, and to all aspects of the employment relationship.

**Recommendation No. 200, Paragraph 2:**

“The Recommendation covers:

- (a) All workers working under all forms or arrangements, and at all workplaces, including:
  - (i) persons in any employment or occupation;
  - (ii) those in training, including interns and apprentices;
  - (iii) volunteers;
  - (iv) jobseekers and job applicants;
  - (v) laid-off and suspended workers;
- (b) all sectors of economic activity, including the private and public sectors and the formal and informal economies; and
- (c) armed forces and uniformed services.”

## National workplace policies and programmes

The Recommendation calls for the development, adoption and effective implementation and monitoring of national tripartite workplace policies and programmes. These should integrate its key human rights principles and provide for access to HIV prevention, treatment, care and support services in and through the world of work (see Paragraphs 4–7 of the Recommendation).

National judicial authorities have recommended the development of HIV and AIDS workplace policies as part of the remedy granted in respect of violations of workplace rights.

**Country: Canada**

**Canadian Human Rights Tribunal/Tribunal canadien des droits de la personne,  
*Fontaine v. Canadian Pacific Ltd.*, Case No. TD 14/89, Judgement  
of 27 October 1989**

Fontaine was hired as a cook for a railroad crew. His supervisor and co-workers reacted negatively to the disclosure that he was HIV-positive. The court found that the disclosure resulted in discrimination that led to his constructive dismissal. The court noted that the co-workers had little awareness about HIV and modes of transmission. The court also noted that the employer’s “failure to have in place an express and clear policy about AIDS in the workplace has meant that employees [...] have been left to deal with these situations based on their own personal misconceptions”. The court recommended that to prevent additional incidents the employer should “develop and disseminate among its employees a written policy against discrimination of those with AIDS or the HIV infection to educate its personnel and prevent irrational fears that could otherwise arise in these circumstances”.

## Key principles

Paragraph 3 of the Recommendation establishes the following general principles:

- The response to HIV and AIDS should be recognized as contributing to the realization of human rights and fundamental freedoms and gender equality for everyone.
- HIV and AIDS should be recognized and treated as a workplace issue, which should be included among the essential elements of the national, regional and international response to the pandemic with full participation of organizations of employers and workers.
- There should be no stigma or discrimination against workers – including those seeking work – on the basis of real or perceived HIV status. In addition, there should be no indirect discrimination based on stereotypes regarding persons from regions of the world perceived to be at higher risk of HIV or persons from groups perceived to be at higher HIV risk.
- Prevention of new HIV infections should be a fundamental priority in all workplace responses.
- Workers, their families and their dependants should have access to and benefit from prevention, treatment, care and support in relation to HIV and AIDS, and the workplace should play a role in facilitating access to these services.
- Workers' participation and engagement in the design, implementation and evaluation of national and workplace programmes should be recognized and reinforced.
- Workers should benefit from programmes to prevent specific risks of occupational transmission of HIV and related transmissible diseases, such as tuberculosis.
- Workers, their families and their dependants should enjoy protection of their privacy, including confidentiality regarding HIV and AIDS, particularly with regard to their own HIV status.
- No workers should be required to undergo an HIV test or disclose their HIV status (or that of any other person).
- Measures to address HIV and AIDS in the world of work should be part of national development policies and programmes, including those related to labour, education, social protection and health.
- Measures should be taken to protect workers in occupations that are particularly exposed to the risk of HIV transmission.

This Module elaborates on certain key principles that may be of particular relevance to judges and legal professionals.

## **Non-discrimination**

The principle of non-discrimination is a cornerstone of the HIV response and includes both HIV-related stigma and discrimination. Discrimination in law and practice, whether direct or indirect, is covered by the Recommendation (see Paragraphs 1(e), 3(a) and (c), 9–14.) The instrument calls for measures to protect against all forms of employment-related discrimination on the basis of real or perceived HIV status. These include denial of access to employment or to a specific occupation; forced disclosure or violations of confidentiality of HIV status; mandatory HIV testing or screening; exclusion from employment-related benefits, such as denial of access to health and occupational insurance schemes; and unfair dismissal.

### **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**

Article 1 defines discrimination as:

“ ... (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.”

### **Direct and indirect discrimination**

Source: ILO, *Giving globalization a human face*, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, Report III (Part 1B), International Labour Conference, 101st Session (Geneva, 2012), paragraphs 744 and 745.

“Direct discrimination occurs when less favourable treatment is explicitly or implicitly based on one or more prohibited grounds. It includes sexual harassment and other forms of harassment. (...)

Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job. In referring to the “effect” of a distinction, exclusion or preference, it is clear that intention to discriminate is not an element of the definition in the Convention, which covers all discrimination irrespective of the intention of the author of a discriminatory act. The Convention also covers situations in which inequality is observed in the absence of a clearly identifiable author, as in some cases of indirect discrimination or occupational segregation based on sex. Challenges related to structural discrimination therefore need to be addressed under the Convention.”

Recommendation No. 200 explicitly includes perceived HIV status as a protected ground, in order to protect workers from HIV-related discrimination that may be based on stereotyping.<sup>49</sup> For example, a worker may be discriminated against because he is perceived as being homosexual and therefore at higher risk of HIV infection, but in fact he may be heterosexual and HIV-negative.

The Recommendation calls for measures to protect specific groups from discrimination, providing that “there should be no discrimination or stigmatization of workers... on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection”. This provision provides for protection against discrimination based on stereotyping, and includes key groups such as men who have sex with men, sex workers, or injecting drug users.<sup>50</sup>

Paragraph 10 of the Recommendation stipulates that real or perceived status should not be a ground of discrimination preventing the recruitment or continued employment, or the pursuit of equal opportunities consistent with the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). It invites States to consider affording protection equal to that available under Convention No. 111. Paragraph 12 calls on States to provide for effective protection against HIV-related discrimination in the workplace and to provide for the effective and transparent implementation of such measures of protection.

The Recommendation provides explicitly that real or perceived HIV status should not be a cause for termination of employment (Paragraph 11). In addition, it provides that there should be no discrimination in relation to terms and conditions of employment, including employment-related benefits. Paragraph 20 of the Recommendation stipulates that there should be no discrimination against workers or their dependants based on real or perceived HIV status in access to social security systems and occupational insurance schemes, or in relation to benefits under such schemes, including for health care and disability, and death and survivors' benefits.

### ***Gender equality***

The Recommendation recognizes that women and girls are at greater risk and more vulnerable to HIV infection and are disproportionately affected by HIV and AIDS compared to men and boys as a result of gender inequality (Preamble). Paragraph 14 addresses the gender dimensions of the epidemic, calling for measures to be taken in or through the workplace to reduce HIV transmission and mitigate its impact by ensuring gender equality and women's empowerment, preventing and prohibiting harassment and violence at work and promoting the active involvement of both

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<sup>49</sup> ILO, *Giving globalization a human face*, op. cit., para. 811.

<sup>50</sup> Ibid.

women and men in the HIV response. (The issue of gender equality is explored in greater detail in Module 8.)

### ***Testing, privacy and confidentiality***

A key principle, interlinked with the principle of non-discrimination, is that of confidentiality of HIV-related personal data, including medical data regarding HIV status. The right to confidentiality extends to workers, their families and dependants (Paragraphs 3(h) and (i), 25–27).

The Recommendation provides that no worker should be asked to disclose her/his or another person's HIV status (Paragraph 3 (i)). In particular, migrant workers should not be required by countries of origin, transit or destination to disclose HIV-related information about themselves or others (Paragraph 27).

All access to HIV-related information should be governed by rules of confidentiality consistent with the ILO code of practice on the protection of workers' personal data (1997), and other relevant international data protection standards (Paragraph 27).

#### **An ILO code of practice: *Protection of workers' personal data* (1997)**

##### **“Section 5.11**

Employers, workers and their representatives should cooperate in protecting personal data and in developing policies on workers' privacy consistent with the principles in this code.

##### **Section 5.12**

All persons, including employers, workers' representatives, employment agencies and workers, who have access to personal data, should be bound to a rule of confidentiality consistent with the performance of their duties and the principles in this code.

##### **Section 5.13**

Workers may not waive their privacy rights.”

Workers – including job applicants – should not be required to undergo mandatory HIV testing or other forms of screening for HIV. They should not be denied access to jobs or be subjected to negative consequences when they refuse to undergo testing.<sup>51</sup>

The Recommendation encourages voluntary and confidential HIV counselling and testing as a component of prevention programmes to enable workers to know their own HIV status. However, HIV testing should be genuinely voluntary and free of coercion, and it should be accompanied by pre- and post-test counselling. Moreover, the Recommendation emphasizes that the results of HIV testing

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<sup>51</sup> In adopting the Recommendation, the delegates to the International Labour Conference agreed that there should be no exception to the general principle that no worker should be required to undergo HIV testing for employment purposes.

should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement. Workers should not be asked to disclose their own HIV status or that of any other person.

### ***The right to continue in employment***

Persons with HIV-related illness should not be denied the possibility of continuing in employment, with reasonable accommodation if necessary, for as long as they are medically fit to carry out the tasks inherent to the job. Paragraph 13 also encourages measures to redeploy such persons to work adapted to their abilities, to find other work through training or to facilitate their return to work.

#### **Paragraph 1(g) of Recommendation No. 200 states that:**

“**reasonable accommodation** means any modification or adjustment to a job or to the workplace that is reasonably practicable and enables a person living with HIV or AIDS to have access to, or participate or advance in, employment”.

“Reasonable accommodation” implies that employers should seek to make adjustments to the place of work or the tasks attributed to the job. This can take different forms, such as time off for medical visits, extended sick leave, shorter working time, or reorganization of work. Reasonable accommodation may take many different forms, based on the individual’s needs. However, the notion of “reasonable accommodation” means that such measures should be adjusted to the size and capacities of the employers as well as to the workers involved. Whether an accommodation requested is “reasonable” is a question that must be determined on a case-by-case basis.

Employers should also take account of the fact that although HIV-positive workers may be symptom-free much of the time, they may experience episodes of illness that require periods of absence, just as with any other chronic illness. The Recommendation provides that any absence from work due to HIV should be treated in the same way as absences for other health reasons, in accordance with the Termination of Employment Convention, 1982 (No. 158).

#### **Termination of Employment Convention, 1982 (No. 158)**

##### **Article 4**

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

##### **Article 6(1)**

“Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.”

### *The right to a safe and healthy workplace*

The Recommendation affirms the principle established in the Occupational Safety and Health Convention, 1981 (No. 155), that the work environment should be safe and healthy for all workers (Paragraph 30). It notes that certain occupations may expose workers to greater risks of HIV transmission or exposure to related transmissible diseases, such as tuberculosis, and calls for special training to be provided to these workers. Paragraph 23 also provides that AIDS and infection by HIV should be recognized as an occupational disease or accident where a direct link can be established between an occupation and the risk of HIV infection.<sup>52</sup>

The Recommendation builds on the ILO's Occupational Safety and Health Convention, 1981 (No. 155), the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 161), and other relevant international instruments, including joint International Labour Office and World Health Organization guidance documents. It also seeks to reduce HIV-related stigma and discrimination by emphasizing that all awareness-raising measures in the workplace should clarify that HIV is not transmitted by casual physical contact, and that the presence of a person living with HIV should not be considered a workplace hazard (Paragraph 33).

### *Social dialogue*

Social dialogue is the cornerstone of successful workplace policies and programmes on HIV and AIDS, and this key principle is reflected throughout the Recommendation (Paragraphs 3(f), 6, 8–9, 17, 37–39, 41, 43 and 52). In particular, the Recommendation provides that policies and programmes on HIV and AIDS and the world of work should be developed, adopted, effectively implemented, evaluated and monitored through a participatory dialogue process that involves employers and workers and their representatives, as well as organizations of persons living with HIV (an example of “tripartite-plus” dialogue). In addition, the Recommendation calls for organizations of employers and workers to promote awareness of HIV and AIDS, including prevention and non-discrimination, by providing education and information to their members.

Recommendation No. 200 provides that national policies and programmes on HIV and AIDS should promote social dialogue consistent with the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). Recognizing the need for a multi-sectoral response to HIV and AIDS in and through the workplace, the Recommendation takes a broad approach that extends beyond the traditional tripartite structure. It stipulates that a range of government authorities should be engaged in the national responses to HIV and AIDS (for example,

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<sup>52</sup> The Annex to the ILO List of Occupational Diseases Recommendation, 2002 (No. 194), was revised in 2010 to include both HIV and tuberculosis (TB).

government authorities should include representatives of ministries of labour, health, youth, women, education and others), and that employers' and workers' organizations from all sectors should be engaged in this process. In addition, dialogue should also include all relevant stakeholders, for example, national AIDS authorities, civil society, international organizations and all relevant sectors, including the health sector.

### ***Treatment and care***

The Recommendation provides that the workplace should play a role in facilitating access to HIV-related services for workers living with HIV, their families and dependants. They should also benefit from full access to health care, whether this is provided under public health, social security systems or private insurance or other schemes (Paragraph 18). There are instances in which different kinds of insurance schemes simply exclude or block coverage of HIV-positive people, or those thought to be particularly vulnerable to HIV infection, from the health-care financing that could enable them to live longer and to provide for the welfare of themselves and their families.

### ***Support***

The principle of continuation in employment with reasonable accommodation if necessary is also reflected in Paragraph 21 of the Recommendation, which provides as follows:

#### **Paragraph 21 of Recommendation No. 200:**

“Programmes of care and support should include measures of reasonable accommodation in the workplace for persons living with HIV or HIV-related illnesses, with due regard to national conditions. Work should be organized in such a way as to accommodate the episodic nature of HIV and AIDS, as well as possible side effects of treatment.”

The Recommendation calls on governments to promote the retention in work and recruitment of persons living with HIV (Paragraph 22). It also urges them to consider extending support through periods of unemployment, including where necessary income-generating opportunities for persons living with HIV or affected by HIV or AIDS.

### **Implementation**

The Recommendation can be implemented by one or a combination of means, including national laws and regulations, collective agreements, national tripartite

policies and programmes on HIV and AIDS, and sectoral strategies. It calls for labour judges and labour administration authorities to be involved in the planning and implementation of these policies and programmes (Paragraphs 37 and 44).

## **Education, training, information and consultation**

All HIV prevention information should be provided in a clear and accessible form for all workers (Paragraphs 8, 16, 32, 40–43). This section of the Recommendation emphasizes that prevention and education should be provided to all workers, including management and supervisory employees, and that training should take into account the particular characteristics of the workforce. For example, training for the transportation sector might take into consideration the particular needs of long-distance truck drivers, given their particular working conditions and factors that could contribute to their HIV risk.

## **Public services**

The Recommendation calls for the role and function of labour judges and labour administration authorities to be reviewed and strengthened where necessary (Paragraph 44). In addition, it stipulates that public health systems should be strengthened to ensure access to HIV-related services (Paragraph 45).

## **International cooperation**

The Recommendation calls for continuing and increased international cooperation, particularly in the context of the UNAIDS Programme, to give effect to its provisions (Paragraphs 46–50).

Governments are called upon to cooperate through bilateral or multilateral agreements, through their participation in the multilateral system or through other effective means, to give effect to the Recommendation, particularly in relation to migrant workers, to ensure their access to HIV services.

International cooperation should be encouraged among governments, their national structures on HIV and AIDS and relevant international organizations and should include the systematic exchange of information on all measures taken to respond to HIV.

## **Follow-up**

At the national level, the Recommendation calls for governments to establish an appropriate mechanism or make use of an existing one for monitoring the national policy on HIV and AIDS and the world of work and its implementation

(Paragraphs 51–54). The most representative organizations of employers and workers should participate, on an equal footing, in this mechanism for monitoring developments. The views of organizations representing persons living with HIV, as well as expert reports or technical studies, should also be taken into account.

### **Discussion points**

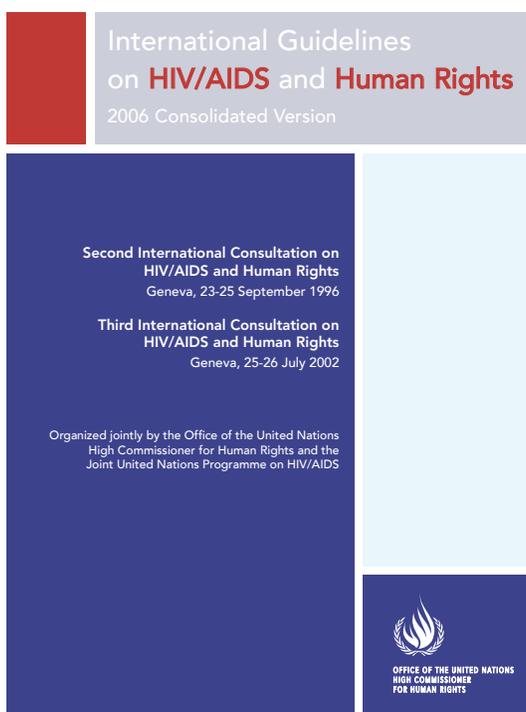
1. How is discrimination in employment on the basis of real or perceived HIV status addressed under your national legislation?
2. What steps, if any, would need to be taken to provide for the protections against stigma and discrimination envisaged in Recommendation No. 200?
3. Are you familiar with any national policies in your country that address HIV and AIDS?



## Module 6: HIV-related discrimination

Governments and international bodies have long recognized the human rights dimension of the HIV epidemic. The OHCHR-UNAIDS *International guidelines on HIV/AIDS and human rights* (2006) called on governments to “enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality ... and effective administrative and civil remedies”.<sup>53</sup> In referring to the principle of non-discrimination, the Guidelines noted the particular relevance of ILO Conventions and Recommendations, “such as ILO instruments concerning discrimination in employment and occupation, termination of employment, protection of workers’ privacy, and health and safety at work”.<sup>54</sup>

Where stigma and discrimination are prevalent at the workplace, fear of job loss or other negative consequences hinder HIV prevention efforts by reducing the uptake



<sup>53</sup> OHCHR/UNAIDS, *International guidelines on HIV/AIDS and human rights*, op. cit., Guideline 5, pp. 17–18; see also pp. 31–37.

<sup>54</sup> *Ibid.*, p. 80.

of services and adherence to needed treatment.<sup>55</sup> As a result, HIV-related stigma and discrimination undermine all international and national efforts to stop new HIV infections and to provide for access to prevention, treatment, care and support measures for people infected with or affected by HIV.

HIV-related discrimination is grounded in stigma, which is fuelled by fear and misinformation about the virus and the manner in which it can be transmitted. Stigma also has its roots in the association of HIV with behaviours that are considered “bad” or “immoral” according to the cultural or societal values in many countries.<sup>56</sup>

Those living with or affected by HIV should be protected from *both* stigma and discrimination, phenomena that are linked but nevertheless separate. While stigma is linked with discrimination, its reach and effects are perhaps even more insidious.

**Paragraph 1(d) of Recommendation No. 200 defines the concept of stigma as:**

“[T]he social mark that, when associated with a person, usually causes marginalization or presents an obstacle to the full enjoyment of social life by the person infected or affected by HIV.”

Stigma can take many forms. People infected with or affected by HIV may be excluded from work-related social events, or may be made the subject of malicious gossip or harassment on the part of other co-workers. Managers or co-workers may isolate a colleague out of fear that shaking hands, sharing a drink or otherwise having social contact with the colleague could expose them to the virus. Stigma can have devastating effects on affected workers, influencing their morale, motivation, productivity, their mental and physical health and their livelihoods. It can also affect the organizational climate and ultimately socialization in the workplace, as it can foster a culture of non-inclusion and lack of respect for human rights.

According to a 2010 report of the United Nations High Commissioner on Human Rights to the United Nations General Assembly, HIV is still perceived as a condition that makes people dangerously contagious or otherwise unfit for work, giving rise to intolerance, discrimination and fear in the workplace.<sup>57</sup> A 2010 survey commissioned by UNAIDS measured, among other items, the level of HIV-related

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<sup>55</sup> UNAIDS, *Non-discrimination in HIV responses*, 26th Meeting of the UNAIDS Programme Coordinating Board (Geneva, 22–24 June 2010) UNAIDS/PCB (26)/10.3, para. 10.

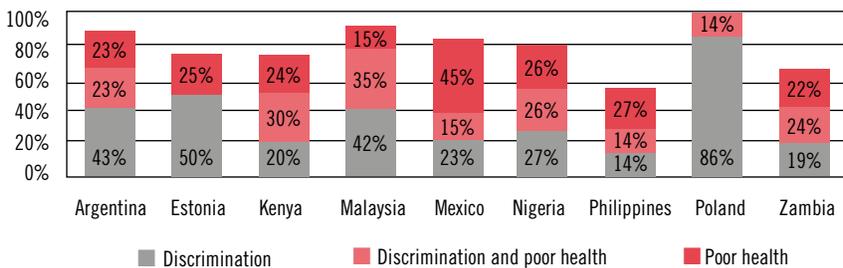
<sup>56</sup> See United Nations Human Rights Council, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, op. cit., paras 5 and 11.

<sup>57</sup> Ibid.

discrimination in the workplace in different countries. A sample from the survey showed that between 13 per cent and 29 per cent of workers would not be willing to work with an HIV-positive colleague.<sup>58</sup>

The 2012 PLHIV Stigma Index, a survey of the experiences of persons living with HIV (PLHIV) in nine countries,<sup>59</sup> reveals persistently high levels of employment-related stigma and discrimination. For example, figure 6.1 shows that a high percentage of workers surveyed attributed the loss of their job or other source of income to HIV-related discrimination.

**Figure 6.1 Reason lost employment or income source: previous 12 months**  
(or those who lost their job as result of HIV)



Source: Global Network of People Living with HIV (GNP+), ILO and The PLHIV Stigma Index, *Evidence brief: Stigma and discrimination at work. Findings from the PLHIV Stigma Index* (Amsterdam, 2012), p. 12.

The following case provides an example of HIV-related stigma on the part of co-workers that led to discrimination by prompting the employer’s decision to dismiss an HIV-positive worker.

**Country: Greece**

**European Court of Human Rights, *I.B. v. Greece*, Application No. 552/10, Judgement of 3 October 2013**

The complainant was dismissed from his position in a jewellery business after testing positive for HIV. While the complainant was absent on sick leave, several of his co-workers, suspecting that he might have HIV, underwent HIV testing. The results were negative. Soon afterward, the complainant’s co-workers learned that the complainant had tested HIV-positive. A group of co-workers immediately demanded that

<sup>58</sup> See UNAIDS/Zogby International, “The Benchmark Survey”, in *UNAIDS Outlook Report* (Geneva, 2010), pp. 34–45.

<sup>59</sup> Global Network of People Living with HIV (GNP+), ILO and The PLHIV Stigma Index, *Evidence brief: Stigma and discrimination at work. Findings from the PLHIV Stigma Index* (Amsterdam, 2012). The nine countries surveyed are listed in figure 6.1.

management remove him from the workplace. Approximately half the work force signed a petition urging that the complainant be removed. The employer ceded to the pressure placed upon her by her employees and dismissed the complainant. The Greek Supreme Court held that this action did not constitute discrimination, but was instead justified in the circumstances, given the pressure the employer was under and the danger posed to the smooth operation of the enterprise by the complainant's continued presence.

The European Court of Human Rights reversed the Greek Supreme Court's decision on the basis of the European Convention on Human Rights. The Court took up ILO Recommendation No. 200, referring extensively to the Recommendation's provisions on non-discrimination. The Court held that, by terminating the applicant's employment, the employer had further stigmatized a person who, even though he was HIV-positive, had shown no signs of illness. The Court also found that the co-workers' threats were irrational as they were based on no valid scientific theory. The Court held that if the applicant's HIV status was not disrupting the smooth operation of the enterprise (such as by preventing the employee from carrying out the duties of his job), his HIV status alone could not be a valid basis for terminating his employment.

In contrast to stigma, discrimination generally takes the form of an act or omission. It can be a deliberate action, such as an employer's decision to refuse to hire or to terminate a worker on the basis of real or perceived HIV status. It may also be an exclusion of a certain group from a work-related benefit, such as a training opportunity or access to occupational insurance schemes.

**Recommendation No. 200, Paragraph 1(e), defines discrimination with reference to ILO Convention No. 111 as:**

"[A]ny distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, as referred to in the Discrimination (Employment and Occupation) Convention, 1958."

Discrimination can be direct or indirect. There is direct discrimination where, in a comparable situation, a person is treated less favourably on the basis of real or perceived HIV status. For example, an HIV-positive job applicant may be denied employment following an employment interview, where he or she may be asked about medication being taken, marital status, or other elements aimed at determining HIV status. There may also be indirect discrimination where an apparently neutral provision or practice puts someone at a particular disadvantage compared to others, without a reasonable ground for the difference in treatment: for example, an internal regulation that provides for a bonus depending on the availability of workers to work overtime without taking into account the situation of those

who cannot make themselves available due to sickness, parental obligations or other reasons could constitute indirect discrimination.

Discrimination need not be intentional. It is sufficient for the discriminatory act or exclusion to have the effect of impairing equality of opportunity and treatment.

As the ILO Committee of Experts noted in its General Observation on the 50th anniversary of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), HIV-related discrimination is often linked with discrimination on other grounds:

**Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 98th Session, 2009, Report III (Part 1A) at para. 108:**

“... Article 1(1)(b) [of the Convention] acknowledges that new manifestations of discrimination will arise or be recognized, and envisages ratifying States determining additional grounds to be addressed under the Convention. Countries are increasingly making use of the possibility to determine additional grounds, and are taking measures, including legislative protection, to address discrimination based on additional grounds, such as age, health, disability, HIV/AIDS status, nationality, family status or responsibilities and sexual orientation. The Committee observes that in many cases discrimination in employment and occupation is not limited to discrimination on solely one ground. For example, sex-based discrimination frequently interacts with other forms of discrimination or inequality based on race, national extraction or religion or even age, migrant status, disability or health. In this regard, the Committee wishes to draw attention to the particular situation of migrant workers, including female domestic workers, indigenous women, and persons suffering from HIV/AIDS.”

## Forms of HIV-related discrimination

HIV-related discrimination in employment occurs in three main settings:

- pre-employment;
- during employment (terms and conditions); and
- unfair dismissal from employment.

Discrimination may occur prior to employment. An HIV-positive job applicant who has disclosed his or her status to a prospective employer may be denied employment. Similarly, a job applicant may be required to undergo an HIV test as a condition of employment. Some employers may subject applicants to indirect testing (referred to as “screening”), by asking them for information designed to determine whether the applicant is or may be living with HIV.

HIV-related discrimination may occur in the context of an individual action taken by an employer against a job applicant or worker, or in the context of a

regulation or policy excluding persons from employment on the basis of HIV status. For example, there may be a practice or policy prohibiting a person living with HIV from engaging in a specific occupation, without regard to the worker's competencies or individual capacities.

Discrimination in terms and conditions of employment may occur when a worker is rejected or marginalized by his or her employer and colleagues. The worker may be denied training or other job-related opportunities or be denied access to employment-related benefits.

A worker may be dismissed on account of HIV status alone, or as a result of a perception that he or she cannot perform the tasks required by the job, regardless of his or her actual capacity.

## Discrimination based on real or perceived HIV status

When examining a complaint of unfair discrimination on the basis of real or perceived HIV status, one of the first issues to be considered is whether and to what extent victims of HIV-related discrimination enjoy protection of their rights under national legislation. Real or perceived HIV status has been included as a protected ground of discrimination in the national legislation of an increasing number of countries.<sup>60</sup> Nevertheless, according to the UNAIDS *Global Report 2012*, as of the end of 2012, only 61 per cent of United Nations member States reported the existence of national legislation protecting PLHIV.<sup>61</sup>

In countries where protections exist, the nature and type of coverage varies widely. A number of countries provide broad protections against discrimination in their constitutional laws. Courts have interpreted these constitutional provisions to prohibit discrimination on the basis of HIV status.

### Country: South Africa

#### **Constitutional Court of South Africa, *Jacques Charl Hoffmann v. South African Airways*, Case CCT 17/00, Judgement of 28 September 2000**

The South African Constitutional Court held that the plaintiff was protected from employment discrimination on the basis of HIV status under the South African Constitution.

In two decisions handed down in 2011 by the Brazilian Federal Superior Labour Tribunal, citing both ILO Convention No. 111 and Recommendation

<sup>60</sup> ILO, *Giving globalization a human face*, op. cit., para. 810.

<sup>61</sup> UNAIDS, *Global Report 2012*, op. cit., p. 80.

No. 200, the Tribunal relied on general provisions in constitutional law. (These two decisions are discussed in more detail in Module 10.)

Numerous countries cover HIV-related discrimination under other prohibited discrimination grounds, such as “disability”,<sup>62</sup> “health” or “other status”, while others have included HIV status as a specific protected ground under general discrimination or equal opportunities legislation. Some countries have adopted general HIV or AIDS legislation,<sup>63</sup> or provide for protection from employment discrimination on the grounds of real or perceived HIV status in their labour codes or other labour legislation.<sup>64</sup> Some countries have issued HIV policies or codes of practice, while others have included anti-discrimination clauses in collective bargaining agreements.<sup>65</sup>

In 2012, the ILO Committee of Experts urged countries to consider adopting legislation protecting persons from discrimination on the basis of both real and perceived HIV status.<sup>66</sup>

**ILO, *Giving globalization a human face* (General Survey, 2012), para. 811:**

“Legislation and policies sometimes limit protection from employment-related discrimination and stigma to persons living with HIV, that is, to persons who are in fact HIV-positive. National laws and policies should provide for protection from discrimination and stigma on the basis of “real or perceived HIV status”, as contemplated in the HIV and AIDS Recommendation, 2012 (No. 200), in order to cover those discriminated against on the basis of stereotyping. Protection should cover those affected by HIV, such as family members and children who are orphaned or vulnerable due to HIV or AIDS, and migrant workers.”

In respect of HIV-related discrimination based on stereotyping, the Committee of Experts noted:

“Stereotyping arises, for example, because the persons concerned belong to regions of the world or segments of the population perceived to be at greater risk or vulnerable to HIV infection, including men who have sex with men, injecting drug users and sex workers.”

Besides providing that there should be no discrimination in employment and occupation on the basis of real or perceived HIV status, Paragraph 3(c)

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<sup>62</sup> For example, the United States, which covers HIV as a disability under the Americans with Disabilities Act, 1990. The United Kingdom’s Equality Act of 8 April 2010 also covers HIV as a disability rather than as a separate prohibited discrimination ground.

<sup>63</sup> For example, Costa Rica has adopted a General AIDS Law (Law No. 7771 of 29 April 1998). Mozambique has a General AIDS Act (Act No. 5 of 5 February 2002).

<sup>64</sup> For example, section 5(2)(f) of Namibia’s Labour Act No. 11 of 21 December 2007, or section 6 of the Bahamas Employment Act No. 73 of 2001.

<sup>65</sup> ILO, *Giving globalization a human face*, op. cit., para. 810.

<sup>66</sup> *Ibid.*, para. 811 and footnote 2048 (at p. 339).

of Recommendation No. 200 explicitly provides that there should be no discrimination against people belonging to regions of the world or groups perceived to be at higher risk of HIV.

Discrimination based on stereotyping can arise in various ways. For example, an individual may be discriminated against on account of sexual orientation and HIV status, purely on the basis of a preconceived notion that persons of different sexual orientation are more likely to be HIV-positive. The individual may in fact be neither homosexual nor HIV-positive. A person may also be discriminated against because of an association with an HIV-positive spouse or family member.

The decision of the Human Rights Tribunal of Ontario illustrates the approach taken by a national court with respect to the issue of discrimination on the basis of perceived HIV status.

**Country: Canada**

**Human Rights Tribunal of Ontario/Tribunal des droits de la personne d'Ontario, *Giguere v. Popeye Restaurant*, Case No. 2008 HRT02, Judgement of 17 January 2008**

The Ontario Human Rights Tribunal examined allegations of discrimination against an HIV-negative individual. The complainant alleged that her employment as a waitress had been terminated by her employer because her common-law spouse was HIV-positive. The employer claimed that the HIV status of the spouse was known at the time the complainant was hired and that the decision to terminate the complainant had not been taken because of customer complaints related to the common-law spouse's HIV status. The complainant alleged discrimination on the basis of disability (including perceived disability), association and marital status. The respondent employer and manager denied the allegations, claiming that the termination was the result of a business slowdown and financial difficulties. They claimed that customer complaints and the fact that the complainant's spouse was HIV-positive had played no part in the decision. The Tribunal noted that the case raised "the interesting legal issues of perceived disability, discrimination by reason of association and what is sometimes called 'customer preference cases'".

The Tribunal noted that the employer had provided the complainant with a written letter of termination, which stated:

*"It is with regret that I must terminate your job due to complaints from customers of your possible contraction of the AIDS virus. The complaints were filed with me and some of your co-workers.*

*Some customers flat out told me that they would stop coming to the restaurant if you continued working for me.*

*Upon hiring you, you yourself told me that your boyfriend soon to be husband was infected with the AIDS virus, and that you had been tested negative. Your honesty was greatly appreciated.*



*At the time I did not see this as a problem, unfortunately contrary to my beliefs, if this is going to affect business in this way, I have no other choice than to terminate your job."*

The Tribunal noted that it was undisputed that the restaurant was indeed in financial difficulty. There was, however, no evidence that anyone but the complainant was terminated during the same period, nor was there any evidence that the restaurant had lost customers. The Tribunal concluded that the decision to terminate the complainant was primarily motivated by discrimination on the basis of her association with an HIV-positive person, and that it therefore violated the Ontario Human Rights Code.

## Courts' approaches to HIV-related discrimination in employment and occupation

This section provides examples of jurisprudence illustrating the way in which courts in different countries have approached the issue of HIV-related discrimination in employment and occupation.

### *Discrimination in recruitment and selection: failure to hire*

A number of national courts have held that job applicants should not be denied access to employment on the basis of real or perceived HIV status alone.

#### **Country: South Africa**

#### **Constitutional Court, *Jacques Charl Hoffmann v. South African Airways*, Case No. CCT 17/00, Judgement of 28 September 2000**

A job applicant was denied employment as a flight attendant due to his HIV-positive status. Before his HIV status was disclosed to the employer, he had been deemed qualified and fit for the position. The Constitutional Court noted that persons living with HIV constituted a minority that was subjected to intense discrimination in South African society. The Court noted the need to protect this group of people from discrimination and interpreted Article 9(3) of the Equality clause of the Constitution, to provide protection against discrimination in employment on the basis of HIV status.

The Court held that HIV status alone did not render the complainant unfit for the position of cabin attendant. Relying on the Constitution and on the ILO Discrimination (Employment and Occupation) Convention, 1958 (No.111), the Court concluded that, in order to effectively eliminate discrimination, the appropriate relief in the circumstances of this case was to direct South African Airways to employ the appellant as a cabin attendant.

### *HIV-positive status and the right to work*

The High Court of Bombay has held that denial of employment to an HIV-positive job applicant constitutes unlawful discrimination as well as a violation of the right to work, life and livelihood.

**Country: India**

**Bombay High Court, *MX of Bombay Indian Inhabitant v. M/s ZY Courts and another*, Case No. BOM 406, Judgement of 3 April 1997**

The petitioner's name was deleted from the employer's pool of casual labourers because he tested positive for HIV. According to the evidence before the Court, the petitioner was considered fit to work.

The judgement examined the economic consequences of the exclusion of HIV-positive workers from the labour market. The Court reasoned that denial of employment on the basis of HIV status violated the right to work, to life and to livelihood, concluding that such discrimination would effectively condemn the HIV-positive worker to virtual economic death:

*"Therefore, the right of such a person to livelihood and employment, the interests of the employer, co-workers at the workplace and the public which may come into contact with such a person at the workplace have to be balanced. In our opinion, the State and public Corporations ... cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. ... [T]he most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution."*

In a subsequent decision, the High Court of Bombay also addressed the issue of HIV-related discrimination in the context of compassionate employment, a benefit denied to the HIV-positive widow of a deceased worker.

**Country: India**

**Bombay High Court, *S. Indian Inhabitant of Mumbai v. Director General of Police, CISF and others (unreported)*, Case No. 202 of 1999, Judgement of 27 February 2004**

The petitioner was an HIV-positive widow whose husband had worked in the public sector. She was denied employment on compassionate grounds (in lieu of her deceased husband) because of her HIV-positive status, despite being certified medically fit for the job. On 14 November 1999, the Court issued an interim order directing the company to employ her on a temporary basis for a period of 90 days. On 16 January 2004, in its final order, the Court directed the company to give the petitioner a permanent post.

## Denial of access to a specific occupation

While HIV-related discrimination can result in denial of access to a job, it can also result in exclusion from a specific occupation. For example, in the case of Hoffmann, referred to above, the employer argued that the complainant could not be employed as a cabin attendant because his HIV-positive status would prevent him from being vaccinated against yellow fever, a requirement for him to travel overseas. The South African Constitutional Court rejected this argument. Relying on the expert medical evidence presented, the Court held as follows:

Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgements. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive (para. 35).

Where an HIV positive individual is asymptomatic and immunocompetent, he or she will in the absence of any other impediment be able both: to meet the performance requirements of the job and to receive appropriate vaccination as required for the job (para. 14).

The Court further stated: “On medical grounds alone, exclusion of an HIV positive individual from employment solely on the basis of HIV positivity cannot be justified”, and noted that, with effective treatment, “individuals are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified”(para. 14).

A number of courts have struck down blanket policies denying employment to HIV-positive persons who were employed or seeking employment in the armed forces and uniformed services.

### **Country: Namibia**

#### **Labour Court, *Haindongo Nghidipohamba Nanditume v. Minister of Defence*, Case No. LC 24/98, Judgement of 10 May 2000**

The Labour Court cited provisions against unfair discrimination contained in the Namibian Labour Act in striking down the Namibian Defence Force’s policy excluding persons living with HIV from employment.

**Country: South Africa**

**High Court, *South African Security Forces Union (SASFU) v. Surgeon General*,  
Case No. 18683/07, Judgement of 16 May 2008**

The SASFU challenged the policy of the South Africa Defence Force of excluding HIV-positive persons from recruitment and excluding those already in the armed forces from deployment and promotion opportunities if they became HIV-positive. The employer justified its policy on the grounds that it was necessary to ensure the good health of its employees. In the light of scientific evidence challenging this justification, the parties agreed to a settlement that was adopted by the High Court, which also ordered the employer to develop a new health classification policy in line with its decision.

**Country: United States**

**United States District Court, District of Columbia, *Doe v. District Court of  
Columbia*, Case No. 91-1642, Judgement of 1 July 1992 (796 F. Supp. 559 (1992))**

The District Court examined the issue of whether a firefighter's HIV-positive status would make him incapable of performing his work. The Court relied on expert medical and scientific testimony in finding that there was no measurable risk of the applicant transmitting HIV to other firefighters or to the public during the course of his duties. The Court observed that, "in reaching this conclusion, the Court joins other courts that have refused to regard the theoretical or remote possibility of transmission of HIV as a basis for excluding HIV-infected persons from employment or educational opportunities."

**Country: India**

**High Court of Andhra Pradesh, *X v. State Level Police Recruitment Board*,  
Case No. 15981 of 2005, Judgement of 22 December 2005**

The High Court of the State of Andhra Pradesh held that HIV-positive status alone was not a basis for denial of employment and that a person who was otherwise fit, qualified and posed no substantial risk to others could not be denied employment in the police service. The High Court emphasized that HIV status alone did not make a person unfit for work. Citing *Hoffmann*, the Court stressed that unfair discrimination can condemn an HIV-positive person to "economic death": "The fact that some people found to be HIV-positive may, under certain circumstances, be unsuitable for employment in the police force does not justify the exclusion from employment of all people who are living with HIV. Were this to be the case, people who are HIV-positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment in the police force. On the contrary, they would be vulnerable to discrimination on the basis of prejudice



and unfounded assumptions. This is manifestly unfair. The constitutional right of the petitioner not to be unfairly discriminated against cannot be determined by ill-informed public perception regarding persons with HIV. Prejudice can never justify unfair discrimination. People who are living with HIV must be treated with compassion and understanding. They must not be condemned to “economic death” by the denial of equal opportunity in employment. ... Not all people who are living with HIV are unsuitable for employment. It is only those whose CD4+ count has dropped below a certain level who may become unsuitable for employment. Having regard to all these considerations, denial of employment to the petitioner, who had fulfilled the prescribed physical and other standards, only because he was tested HIV-positive, impaired his dignity and constituted unfair discrimination. ... [N]o person can be denied employment solely on the ground that he has tested HIV-positive.”

### ***Access to social protection: HIV-related discrimination in relation to health care, social security and insurance***

Persons living with HIV may be excluded from coverage under employment-related health care plans and insurance plans (health, disability and life insurance). Recommendation No. 200 provides in Paragraph 18 that “Members should ensure that workers living with HIV and their dependants benefit from full access to health care, whether this is provided under public health, social security systems or private insurance or other schemes”.

#### **1. The right to treatment**

The right of equal access to health services, including treatment for HIV-related illness, is also covered by Paragraph 19 of Recommendation No. 200. Courts have held that denial of access to health services on the basis of HIV status is a violation of the rights of the person living with HIV or AIDS.

#### **Country: South Africa**

#### ***Constitutional Court of South Africa, Ministry of Health and Others v. Treatment Action Campaign and others, Case No. CCT 9/02, Judgement of 4 April 2002***

An NGO called for nevirapine (an ARV medication) to be distributed freely to women infected with HIV, as it can reduce by half HIV transmission from mothers to babies. The Constitutional Court held that the Government’s policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with Article 27(1) and 27(2) of the South African Constitution and ordered the State to provide the required medication and to remedy its programme.

**Country: United States**

**U.S. Supreme Court, *Bragdon v. Abbot*, Case No. 97-156, Judgement of 25 June 1998 (524 U.S. 624)**

A dentist had refused to treat a patient due to his HIV-positive status. Maintaining that this refusal constituted unlawful discrimination, the Supreme Court held that:

“The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the *risk assessment must be based on medical or other objective evidence...* As a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability.”

## 2. Equal access to insurance

National courts have held that persons living with HIV have the right to procure life insurance.

**Country: Colombia**

**Constitutional Court of Colombia/Corte Constitucional de Colombia, *xxxx and xxxx v. Aseguradora Solidaria de Colombia*, Case No. T-1165/01, Judgement of 6 November 2001**

The Constitutional Court of Colombia examined the case of an insurance company's refusal to provide life insurance coverage to HIV-positive persons. The Court found that the company's policy was discriminatory and violated the complainant's right to dignity.

## 3. Equal access to social security benefits

Access to social security is considered to be a fundamental human right under international law, as well as under many national constitutions.

**Country: Peru**

**Constitutional Court of Peru /Tribunal Constitucional del Perú, *Jacinto Francisco Villacorta Guevara v. Government*, Case No. 04749-2009-PA/TC, Judgement of 9 August 2011**

The Constitutional Court upheld the right of an HIV-positive plaintiff to receive a disability pension. The Court concluded that the denial constituted a violation of a fundamental right. The decision noted that HIV-positive persons were vulnerable physically and emotionally as a consequence of their HIV status and stated that for this reason, they deserved special protection under the law. The decision referred to Peru's national legal and policy framework, which provides for the right to social protection and prohibits all forms of discrimination on the basis of HIV status. Article 7.2 of Peruvian Law No. 28243 also provides for the right of HIV-positive people to have access to care and



treatment, including social security benefits in the event that they become incapacitated and unable to work. The Court explicitly stated that the decision was based on the fundamental right to life and the national HIV and AIDS legislation.

Discriminatory dismissal on the basis of HIV status not only results in job loss for the worker, but also impairs the worker's access to coverage under social security and occupational health schemes. National courts have examined cases of unfair dismissal in which the relief ordered included restitution of the complainant's right to social security benefits.

**Country: Colombia**

**Constitutional Court of Colombia/Corte Constitucional de Colombia, *XX v. Gun Club Corporation et al.*, Case No. SU-256/96, Judgement of 30 May 1996**

The complainant alleged that his employment had been terminated when his employer learned that he was HIV-positive.

The complainant was employed by the Gun Club Corporation in 1992. His employment benefits included receiving medical services from the employer's physician on the Club's premises. In 1994, the physician ordered the complainant to undergo an HIV test. The complainant alleged that, when he tested positive for HIV, the physician ordered him to leave the Club. The employer then prepared a letter suspending the complainant with pay for 30 days. Subsequently, the employer imposed a second period of suspension with pay, followed by a letter terminating his employment.

The complainant requested compensation for lost earnings as well as an order retaining his social security entitlements. The Court recognized the complainant's rights under the Colombian Constitution to equality, dignity, work, health and social security. On the evidence presented, the Court found that the complainant had been discriminated against and unfairly dismissed due to his HIV-positive status.

The Constitutional Court ordered the employer to compensate the complainant for all damages (including lost earnings) incurred as a result of the dismissal. It further ordered that the national Social Security Institute provide coverage to the complainant to the same extent as if he had not been terminated. The Court also ordered that the Institute provide the complainant with a disability pension from the date on which he developed AIDS-related symptoms. Taking the conduct of the employer's physician into consideration, it also instructed that copies of the judgement be sent to the Medical Ethics Tribunal.

***Unfair dismissal***

One of the more common forms of HIV-related discrimination in employment is unfair dismissal, which results in loss of income and livelihood for the worker concerned. It may also result in loss of access to employment-related health benefits for the worker, his or her family and dependants.

**Country: Poland**

**Polish Constitutional Tribunal/Trybunał Konstytucyjny,  
Case No. 150/10/A/2009, Judgement of 23 November 2009 and Gdansk Regional  
Administrative Court, Case No. III SA/Gd 6/10, Judgement of 10 March 2010**

A policeman living with HIV was dismissed from the police force on the basis of his HIV status. The employer based the dismissal on administrative regulations listing certain health conditions precluding employment in the police force. The request for a ruling on the constitutionality of the regulations was referred to the Constitutional Tribunal by the Gdansk Regional Administrative Court, which was hearing the policeman's appeal of the decision to dismiss him. The Constitutional Tribunal ruled that the administrative regulations providing for automatic dismissal on account of HIV status violated the constitutional right to non-discrimination in employment in the public sector. It also made a number of references to the ILO code of practice on HIV/AIDS. Based on this judgement, the Gdansk Regional Administrative Court vacated the dismissal.

In a 2011 case, the South African Labour Court cited ILO Convention No. 111 and Recommendation No. 200, in addition to constitutional and statutory law, holding in favour of a worker dismissed on the basis of HIV status.

**Country: South Africa**

**South African Labour Court, *Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd*,  
Case No. JS178/09, Judgement of 16 February 2011**

Allpass was employed by Mooikloof Estates as a horse riding instructor and stable manager on 1 November 2008. At the time of his recruitment, he had been living with HIV for almost 20 years. Prior to being hired, Allpass underwent an interview, during which he informed the employer that he was “in good health”. Shortly after being hired, Allpass – along with two other employees – was asked to complete a form requiring him to disclose whether he was taking any “chronic medication”. Allpass complied and disclosed that he was taking, among other things, daily medication to manage his HIV condition. Upon learning of his HIV-positive status, the manager immediately fired Allpass on the grounds that he had fraudulently misrepresented his condition and that he was in fact “severely ill”. In addition to the allegations of discrimination and wrongful dismissal, Allpass, who resided on the employer's estate as part of the terms and conditions of his employment contract, alleged that he had been insulted, manhandled and physically evicted from the estate.

The South African Labour Court found that Allpass had been discriminated against and unfairly dismissed due to his HIV status and awarded him 12 months' pay in compensatory damages and costs. The Court considered that the dismissal violated the equality rights set out in Article 9 of the Constitution of South Africa of 1996. The Court also considered that the dismissal violated sections 187(1)(f)



and 188 of the Labour Relations Act, No. 66 of 1995 and section 6(1) of the Employment Equity Act, No. 55 of 1998. (The allegations of harassment and forced eviction were dismissed by the Court due to the lack of evidence establishing a direct link between the eviction, which was carried out by a third party, and the employer.)

In reaching its decision, the Court made reference to the South African Code of Good Practice on Key Aspects of HIV and AIDS in Employment (1998). It also invoked the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200).

In 2011, the Brazilian Federal Superior Labour Tribunal also cited Convention No. 111 and Recommendation No. 200 in two cases of unfair dismissal on the basis of HIV status.

**Country: Brazil**

**Federal Superior Labour Tribunal/Tribunal Superior do Trabalho (TST), *Adriana Ricardo da Rosa v. Sociedade de Ônibus Porto Alegre LTDA – SOPAL*, Case No TST-RR-104900-64.2002.5.04.0022, Judgement of 3 August 2011 (published 2 September 2011)**

**Federal Superior Labour Tribunal/Tribunal Superior do Trabalho (TST), *Edson Osório Leites v. Sociedade de Ônibus Gaucha LTDA (SOGAL)*, Case No. TST-RR-61600-92.2005.5.04.0201, Judgement of 22 June 2011 (published 1 July 2011)**

The complainants in both cases argued that they had been dismissed because of their HIV-positive status, and that the employers' actions were discriminatory and violated their fundamental rights under the Brazilian Constitution. Both complainants sought reinstatement and payment of retroactive salaries and all corresponding benefits lost as a result of the dismissals. The Tribunal found in favour of the workers in both cases, ruling that they had been discriminated against and unfairly dismissed on the basis of their HIV status. In the decisions, the Tribunal referred to Convention No. 111 and Recommendation No. 200. It noted in both cases that Recommendation No. 200 prohibits discrimination against HIV-positive workers and provides that member States should ensure that workers not be discriminated against or stigmatized because of either real or perceived HIV status.

The Tribunal's decisions referred to Paragraphs 10 and 11 of Recommendation No. 200, which stipulate that real or perceived HIV status should not be a ground of discrimination preventing recruitment or continued employment, nor a cause for termination of employment. They also emphasized that Recommendation No. 200 calls for ILO member States to promote the retention in work and recruitment of persons living with HIV. Examining the issue of burden of proof in the two cases, based on comments provided by CEACR under the Discrimination (Employment



and Occupation) Convention, 1958 (No. 111), the Tribunal determined that the respondent employers – not the complainants – had the duty of proving that the dismissal was not due to the complainants' HIV status. Both workers were reinstated.

### ***Employers' obligations in the event of HIV-related illness***

As noted in the previous section, real or perceived HIV status alone is not a valid reason for termination of employment. In addition, pursuant to Paragraph 13 of Recommendation No. 200, workers with HIV-related illness should not be denied the possibility of continuing to carry out their work, with reasonable accommodation if necessary, for as long as they are medically fit to do so.

Employers may, however, justify a decision to dismiss an employee on the grounds that the worker can no longer perform his or her duties. Courts may be called upon to determine whether a dismissal is in fact unfair and discriminatory or whether it is justified due to the incapacity of the worker.

The following cases provide examples of how courts have approached this issue.

#### **Country: Botswana**

#### **Botswana Industrial Court, *Lemo v. Northern Air Maintenance (Pty) Ltd*, Case No. 166 of 2004, Judgement of 22 November 2004**

The Industrial Court examined allegations of unfair dismissal of a worker with HIV-related illness. There was a factual dispute before the court as to whether Lemo had been terminated due to his HIV status or because, as alleged by the employer, he had declined to submit to medical examination.

Lemo, an employee of Northern Air Maintenance, was dismissed the day after he disclosed his HIV status to his employer. During the final four years of his employment, Lemo's health had deteriorated. He had taken all of his annual leave and sick leave, and his employer had on several occasions granted him periods of unpaid leave. On 28 January 2004, management met with Lemo and, referring to his frequent absences, suggested that he undergo a medical examination with a private doctor. Lemo declined, indicating that he was being treated at the local hospital and that the medical personnel there were familiar with his situation. The next day, 29 January 2004, Lemo disclosed his HIV status to the employer. The employer prepared a letter of termination on 30 January 2004.

The Court found that Northern Air Maintenance's decision to dismiss Lemo was discriminatory. Rejecting the employer's argument that the dismissal was due to Lemo's refusal of a medical examination, the Court found, on the basis of all the evidence presented, that Lemo had been dismissed solely due to his HIV status. In reaching its decision, the Court pointed to the fact that the Northern Air Maintenance had authorized Lemo's frequent absences from work for three years until they had discovered his HIV status, whereupon he had been immediately dismissed. The Court



also noted that there was no evidence that Lemo was in fact incapacitated. In the circumstances, the Court concluded that Lemo was dismissed solely on account of his HIV-positive status and that the decision was therefore substantively unfair.

The Court also held that Lemo's dismissal was procedurally unfair, as it was not preceded by the appropriate consultation and discussion procedures. In this regard, the Court noted that:

..."[E]ven in the case of progressive incapacitation, the employee cannot be dismissed without first being given a fair enquiry, at which the nature of the incapacity, the cause of the incapacity, the likelihood of recovery, improvement or recurrence, the period of absence, its effect on the employer's operations and the employee's length of service, to mention only some of the critical factors, are considered.

Where an employee is HIV-positive, employers should refrain from any discriminatory practices towards an HIV/AIDS-positive employee, and should view the employee in the same way as it would any other employee suffering from a life threatening illness. This is so because as a general rule an HIV-positive employee may for years, even decades, experience no interference with his or her capacity for service in fulfilment of the demands of his job. ...To exclude an HIV/AIDS positive employee from employment through dismissal solely because he is HIV-positive and without having established that he is incapacitated... lacks a rational foundation and is unfair."

In the *Lemo* case, the Court nonetheless observed that an employer is not expected to be "saddled with an employee who is not productive either on account of HIV/AIDS or some other ailment and is entitled to dismiss an employee who, on account of illness, is absent for an unreasonably long time in the circumstances". However, it noted that the issue of whether a period of absenteeism was deemed "unreasonably long" should be determined according to the circumstances of each case. Moreover, the Court cautioned that when employees "become too ill to perform their current work, an employer is obliged to follow fair procedure". A fair and objective medical assessment of the worker's capacity to perform the tasks of his or her job is a necessary part of such procedures.

The 1998 decision of the Botswana Industrial Court in a case of HIV-related illness (cited in the *Lemo* case) provides guidance on the nature and extent of the employer's procedural obligations in dealing with issues of progressive or permanent incapacity of an HIV-positive employee.

**Country: Botswana**

**Botswana Industrial Court, *Monare v. Botswana Ash Pty (Ltd)*, Case No. 112 of 1998, Judgement of 28 March 2004**

The Industrial Court found that an employer could be justified in dismissing an employee who is no longer able to perform the functions of his work, if the correct procedures are followed. The complainant was the only worker performing a particular job. He was absent from work due to HIV-related illness and the employer provided him with assistance during his illness, including accommodation, medical care and transportation to hospital. During the last few months of his employment, the complainant was only able to work half days but was paid as if he had continued to work full time. In the circumstances, the court concluded that the employer could dismiss the employee due to ill health, given that there was no chance of recovery and on account of its operational requirements.

**Discussion points**

1. How does discrimination on the basis of real or perceived HIV status manifest itself in the workplace?
2. What elements are necessary to establish a prima facie case of discrimination?
3. Are you aware of any instances where HIV-related discrimination has been under consideration by a labour court in your country? If so, what was the outcome?

## Module 7: Testing, privacy and confidentiality

Recommendation No. 200 calls for comprehensive protections to safeguard the privacy of workers – including job applicants – and their families in the context of HIV and AIDS. The Recommendation provides that there should be no mandatory HIV testing for employment purposes, and that results of (voluntary) testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement. It further stipulates that employers have an obligation to respect workers' privacy and maintain the confidentiality of personal information, including medical data, relating to the HIV status of workers, their families and dependants. In addition, workers should not be required to disclose information regarding their own HIV status or that of anyone else.

### **HIV and AIDS Recommendation, 2010 (No. 200)**

#### **Paragraph 3(h) and (i)**

“(h) Workers, their families and their dependants should enjoy protection of their privacy, including confidentiality related to HIV and AIDS, in particular with regard to their own HIV status;

(i) no workers should be required to undertake an HIV test or disclose their HIV status.”

#### **Paragraph 14**

“Measures should be taken in or through the workplace to reduce the transmission of HIV and alleviate its impact by:

...

(g) ensuring the effective confidentiality of personal data, including medical data.”

This Module will examine the approach taken by national courts to the issues of confidentiality and compulsory HIV testing.

### **Privacy and confidentiality**

In 1988, the United Nations Human Rights Committee affirmed the right to privacy laid down in Article 17 of the International Covenant on Civil and Political

Rights. The Committee clarified that the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law and that such information must never be used for purposes incompatible with the Covenant. This would preclude use of such information for purposes of employment discrimination, which is prohibited under Article 26 of the Covenant.<sup>67</sup>

Where privacy rights are not respected, HIV-positive workers may be subjected to stigma and discrimination, creating a hostile environment that may ultimately force them into resigning from their employment. National courts have held that where a hostile environment has been shown to exist, a worker's resignation may be deemed to constitute constructive dismissal. The following case illustrates this approach and provides an example of the harm that can be done by disclosure of a worker's status, particularly in a working environment where HIV-related stigma is prevalent.

**Country: Canada**

**Canadian Human Rights Tribunal/Tribunal canadien des droits de la personne, *Fontaine v. Canadian Pacific Ltd.*, Case No. TD 14/89, Judgement of 26 September 1989**

Gilles Fontaine, an HIV-positive man, was hired by the Canadian Pacific Railroad to work as a cook for a railroad crew of close to 20 men in a camp in Saskatchewan, Canada. When he disclosed his HIV-positive status to a member of the crew, the news spread rapidly.

The crew supervisor's reaction to the disclosure contributed to a hostile working environment. He refused to eat breakfast that morning, communicating in this manner to the rest of the crew that they could be at risk of HIV transmission if they ate the meal Fontaine had prepared for them. The supervisor also expressed concern for Fontaine's safety, intimating to Fontaine that the crew could have a violent reaction to the news that he was HIV-positive.

These actions created such a hostile atmosphere that Fontaine quickly decided that he could no longer remain in the camp. The Canadian Human Rights Tribunal found that, although Fontaine had not been officially terminated, the hostile atmosphere had had the same effect, leading to Fontaine's constructive dismissal due to HIV-related discrimination.

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<sup>67</sup> United Nations Human Rights Committee, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, General Comment No. 16 (United Nations, Geneva, 29 March 1996), HRI/GEN/1/Rev.2.

## Employers' obligations in relation to confidentiality of personal data

The ILO has developed guidelines for the protection of workers' personal data, including personal medical information. In 1997, a tripartite meeting of experts was convened to examine the issue of workers' privacy, in response to growing concerns about the growing practice of gathering, storing and disseminating data on workers, including personal medical data. This meeting resulted in the development of the ILO code of practice on the protection of workers' personal data, 1997 ("the 1997 Code").

The 1997 Code addresses the use of workers' personal data and aims to safeguard the dignity of workers and protect their fundamental privacy rights.

Section 6.7 of the Code calls for the strict protection of workers' personal medical information:

Medical personal data should not be collected except in conformity with national legislation, medical confidentiality and the general principles of occupational health and safety, and only as needed:

- (a) to determine whether the worker is fit for a particular employment;
- (b) to fulfil the requirements of occupational health and safety; and
- (c) to determine entitlement to, and to grant, social benefits.

Recommendation No. 200 integrates the principles of the 1997 Code:

### **Paragraph 27 of Recommendation No. 200:**

"Workers, including migrant workers, jobseekers and job applicants, should not be required ... to disclose HIV-related information about themselves or others. Access to such information should be governed by rules of confidentiality consistent with the ILO code of practice on the protection of workers' personal data, 1997 and other relevant international data protection standards."

## Mandatory HIV testing

Job applicants may be required to undergo an HIV test prior to employment or in order to be able to enter a particular occupation. Workers already employed may be required to undergo an HIV test as a condition of continued employment. Job applicants or workers may also be subjected to "screening" practices aimed at determining their HIV status through invasive interview questions or a request for information regarding medications.

An argument commonly advanced to justify mandatory HIV testing is that it would protect public health interests. In fact, mandatory testing protects neither co-workers nor the general public.

First, HIV can only be transmitted through the specific modes outlined in Module 1 (sexual transmission, contact with blood or blood products and mother-to-child transmission). Thus, the presence of an individual with HIV does not threaten the safety of others. For this reason, in the context of occupational safety and health measures, the Recommendation provides as follows:

**Paragraph 33 of Recommendation No. 200:**

“Awareness-raising measures should emphasize that HIV is not transmitted by casual physical contact and that the presence of a person living with HIV should not be considered a workplace hazard.”

Second, mandatory HIV testing is not justified on the grounds that it would be in the interest of public health, given the limitations inherent in the test itself:

- An HIV test may not detect the virus if the infection is recent. As noted in Module 1, most HIV tests detect the presence of antibodies to HIV, not the virus itself. It can take some time for the immune system to produce enough antibodies for the test to detect HIV, the time period varying from person to person (from two weeks to six months). This time period is commonly referred to as the “window period”, during which people can be highly infectious and yet unaware of their condition. An HIV test carried out during this window period will reflect a false HIV-negative result.
- The test will determine HIV status only as of the time the test is administered. A worker that tests negative one day may test positive the next.

For this reason, a more effective approach to HIV prevention at work is to promote the use of standard precautions (as described in Module 1), which act as a barrier to prevent the occupational transmission of HIV. This approach is complemented by the establishment of a non-discriminatory working environment that respects the workplace rights of persons living with or affected by HIV or AIDS. In such an environment, workers can, as part of an effective workplace HIV prevention strategy, be encouraged to learn their HIV status by seeking voluntary and confidential HIV counselling and testing. This approach not only protects the health of the worker, who can then take appropriate measures and seek treatment in the event that he or she tests positive, but also contributes to preventing the spread of the virus. Once a person knows his or her status, he or she can take precautions to prevent sexual transmission. Moreover, once the worker starts taking an effective antiretroviral treatment to reduce the viral load, the risk of transmission to another person is reduced accordingly.

Recommendation No. 200 establishes unequivocally that HIV testing or other forms of screening should not be required (Paragraphs 3(i), 24 and 25). This principle builds on the key principles already set out in the 2001 ILO code of practice and the joint UNAIDS/OHCHR *International guidelines on HIV/AIDS and human rights*.<sup>68</sup>

Mandatory testing or screening is discriminatory if used to identify HIV-positive persons for employment purposes. Furthermore, even when workers have agreed to undergo testing, there may not have been informed consent, or consent may not have been freely given, particularly in view of the unequal power relations between employer and employee. In some cases, workers may undergo HIV testing as part of a workplace medical examination, but may not know that they have been tested for HIV. Employers may then use positive test results in a discriminatory manner and the job applicant or worker may be denied a job or fired without ever being told the true reason why. In order to avoid discrimination and in accordance with Article 1(2) of the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), medical examinations for employment purposes should only assess fitness to carry out the tasks inherent to a particular job.

**ILO, *Equality in employment and occupation*, Special survey on equality in employment and occupation in respect of Convention No. 111, International Labour Conference, Report III (4B), 83rd Session, Geneva, 1996, paragraph 255:**

“A worker’s state of health should only be taken into consideration by employers with regard to the specific requirements of a particular job, and not be considered automatically as affecting the right to access to employment, or conditions of work within the employment relationship...”

Paragraph 26 of Recommendation No. 200 stipulates that the results of HIV testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement. In addition, failure to respect confidentiality of test results will also make workers reluctant to avail themselves of voluntary testing services, fearing that a positive test may result in dismissal from their jobs or otherwise lead to negative consequences.

Numerous courts have held that subjecting workers to mandatory HIV testing constitutes a violation of their fundamental rights.

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<sup>68</sup> See OHCHR/UNAIDS, *International guidelines on HIV/AIDS and human rights*, op. cit., para. 20(b).

**Country: Zambia**

**Livingstone High Court, *Kingaipe et al. v. Zambia Air Force*, Case No. 2009/HL/86, Judgement of 27 May 2010**

Stanley Kingaipe and Charles Chookole joined the Zambian Air Force (ZAF) in June and July 1989, respectively. Between 2001 and 2002, both underwent compulsory medical examinations without being informed that they were being tested for HIV. The men tested positive for HIV and were prescribed antiretroviral drugs (ARVs). However, according to their testimony, they were neither informed of their HIV-positive status, nor advised on the nature of the drugs prescribed to them. They were both discharged in October 2002.

Both Kingaipe and Chookole sued the ZAF, alleging that their constitutional rights to be free from cruel, inhuman and degrading treatment, and their rights to liberty, privacy, life and non-discrimination were violated when they were subjected to mandatory HIV testing, placed on treatment without their knowledge, and dismissed solely due to their HIV status.

The Court found that both of the petitioners were subjected to HIV testing without their informed consent, which violated their rights to privacy and to be free from inhuman and degrading treatment, and that they were entitled to damages. Upon review of the medical history of both petitioners and the effect of their health on their ability to work, the Court concluded that the ZAF's discharge was based on the medical condition of the petitioners and not on their HIV status.

**Country: Nigeria**

**High Court of Lagos State, *Georgina Ahamefule, v. Imperial Medical Centre and Dr. Alex K. Molokwu*, Case No. ID/1627/2000, Judgement of 27 September 2012**

The complainant had been employed by the defendant medical centre (D1) as an auxiliary nurse since its founding by the second defendant in 1989. In 1995, while pregnant, she developed boils and sought treatment from the defendant physician (D2). He carried out diagnostic tests, but did not disclose the nature or results of the tests to the complainant. Instead, he placed her on two weeks' medical leave. D2 referred the complainant to a second hospital for further tests, where she and her husband were asked to provide blood samples. They were not told the reason for the request. Subsequently, the second hospital informed the complainant that she had tested positive for HIV. The defendants then terminated her employment. After suffering a miscarriage, she was denied medical care by the defendants due to her HIV status.

The complainant sought a declaration that her dismissal due to her HIV status was discriminatory and unlawful. She also alleged that she had been subjected to unlawful battery, as the defendants had subjected her to HIV testing without her knowledge or informed consent. She claimed that the defendants' denial of medical care due to her HIV status constituted a violation of her fundamental right to health.



It was not disputed that the complainant had been terminated due to her HIV-positive status; however, the defendants argued that the termination was justified because the complainant's status posed a risk to the staff and patients of the hospital. The Court rejected this argument, finding that, as an auxiliary nurse, the complainant did not pose a risk to either hospital staff or patients. The Court concluded that the termination was "based on malice and extreme bad faith". Moreover, the Court found that the defendants had committed unlawful battery in subjecting the complainant to HIV testing without her informed consent. The Court also held that "denying the Plaintiff medical care on grounds of her HIV-positive status constitute[d] a flagrant violation of the right to health guaranteed under ... the African Charter on Human and Peoples' Rights ... laws of the Federation of Nigeria and ... the International Covenant on Economic, Social and Cultural Rights".

National courts have also, as part of the relief granted in cases of HIV-related discrimination, instructed employers to cease the practice of requiring HIV testing.

**Country: Japan**

**Tokyo District Court, *Tokyo (Police Academy/Police Hospital HIV Test) Case*, Case Nos 12133 (Wa) of 2001 and 20076 (Wa) of 2001, Judgement of 28 May 2003**

The Tokyo District Court issued a decision in favour of a plaintiff who had been required to undergo an HIV test and was expelled from the Tokyo police force when the test revealed his HIV-positive status. As part of the relief granted, the Court instructed that the employer cease the practice of requiring HIV testing.

***Refusal to undergo HIV testing***

Courts have upheld the principle that a worker cannot be dismissed for refusing to consent to HIV testing.

**Country: Botswana**

**Botswana Industrial Court, *Diau v. Botswana Building Society*, Case IC No. 50/2003, Judgement of 19 December 2003**

The complainant, an employee of the Botswana Building Society, was terminated after refusing to undergo an HIV test. She sought reinstatement and compensation for unfair dismissal and humiliation. The Court concluded that the complainant had been dismissed because she had refused to undergo a compulsory HIV test. It held that the complainant was entitled to disobey the instruction to undertake the test, as it was "irrational and unreasonable to the extent that such a test could not be said to be related to the inherent requirements of the job".



While it was not proven that the complainant had been dismissed on account of her perceived or actual HIV status, the court found that the complainant's right to be free of inhuman and degrading treatment had been infringed. The Court held that "to punish an individual for refusing to agree to a violation of her privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human". The Court observed that this conclusion was especially justified in the context of HIV and AIDS, "where even the remotest suspicion of being HIV/AIDS [sic] can breed intense prejudice, ostracization and stigmatization". The Court ordered the employer to reinstate the complainant and awarded compensation amounting to four months' salary.

**Country: Costa Rica**

**Supreme Court of Costa Rica/La Corte Suprema de Justicia de Costa Rica, *XX v. Centro Nacional de Rehabilitación (CENARE)*, Case No. 09-007890-0007-CO, Judgement of 29 January 2010**

The complainant was hired to work as a physician's assistant in the neurology department of the National Rehabilitation Center (CENARE), a medical institution forming part of the Costa Rica Social Security Fund (CCSS). Shortly after his recruitment, the complainant underwent a medical examination with a doctor employed by CENARE. The physician instructed the complainant to undergo a series of tests, including an HIV test. When he declined to undergo the test, noting that compulsory HIV testing was prohibited under Costa Rican legislation, the physician allegedly replied that she required the test nevertheless. She allegedly observed that, as a physician's assistant, he was required to be in good health, as he would be dealing with sick patients. The physician allegedly stated that an HIV-positive person was not in good health and could therefore not work with CENARE patients. The complainant refused to undergo the test, disclosing that he was HIV-positive. Following this exchange, the complainant left his employment and brought an *amparo* suit alleging unlawful discrimination.

The Supreme Court of Costa Rica found in favour of the complainant, holding that CENARE had violated national legislation in requiring the complainant to submit to HIV testing for employment. The Court awarded the complainant compensatory damages, including lost wages, and instructed CENARE to refrain from conducting compulsory HIV testing in violation of national legislation.

## Voluntary and confidential HIV testing

The adoption and implementation of protections against forced testing and screening for employment purposes does not negate the need to encourage persons to seek voluntary and confidential HIV testing, accompanied by pre- and post-testing counselling, as part of general HIV prevention efforts. The ILO code of practice stipulates that testing for HIV should not be carried out at the workplace except as specified in three specific situations:

- *voluntary* testing at the worker's own initiative, provided that it is carried out by suitably qualified personnel in conditions of strict confidentiality, preceded by written informed consent and accompanied by pre- and post-test counselling;
- epidemiological surveillance, provided that it is *anonymous* and undertaken in accordance with the ethical principles of scientific research and protection of individual rights and confidentiality; and
- following a risk of *occupational exposure* to potentially infected material.

Recommendation No. 200 includes voluntary and confidential HIV counselling and testing as an essential part of effective HIV workplace prevention programmes.

**Paragraph 16 (d) of Recommendation No. 200 provides that:**

“Prevention programmes should ensure:

...

(d) measures to encourage workers to know their own HIV status through voluntary counselling and testing”.

Most general AIDS laws and some labour laws that address HIV and AIDS at the workplace have specific sections dealing with mandatory and voluntary testing. The majority simply prohibit forced testing. Others lay down a general ban, but then carve out exceptions under specific circumstances. For example, exceptions under national legislation typically provide for HIV testing in criminal proceedings, such as in rape cases, or in the context of blood or organ donations.<sup>69</sup>

For example, section 14 of Costa Rica's General Law on HIV/AIDS, No. 7771 of 29 April 1998, provides for exceptions to the prohibition on mandatory HIV testing where: (1) there are medical criteria justifying the testing solely to attend to the health of the patient; (2) in criminal or divorce cases, pursuant to a court order; or (3) in the case of donation of blood and blood products, breast milk, semen, organs and tissue. Section 14 also provides that where HIV testing is authorized under any of the exceptions stipulated, the results of the testing are to be used in a confidential manner.

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<sup>69</sup> For additional examples, see J. Hodges, *Guidelines on addressing HIV/AIDS in the workplace through employment and labour law*, op. cit., pp. 29–33.

Some national courts have also examined the circumstances under which HIV testing at the workplace is justifiable under national labour legislation. South Africa provides an illustration of how courts have approached this issue.

**Country: South Africa**

**South African Labour Court, *Irvin & Johnson Ltd v. Trawler & Line Fishing Union and Others*, Case No. C1126/2002, Judgement of 17 December 2002**

A South African employer filed a petition with the South African Labour Court requesting authorization to carry out voluntary and anonymous testing of its workers in order to assess the potential impact of HIV and AIDS on its workforce and to design appropriate and targeted workplace responses to facilitate the effective prevention of new HIV infections. The trade unions representing the workforce filed petitions confirming that they did not oppose the petition in the circumstances. The court granted the petition and authorized the testing. In doing so, the court examined the criteria set out in national legislation providing for HIV testing, and concluded that where an employer intended to carry out testing that was both voluntary and anonymous for purposes of taking effective action to address the epidemic in the workplace, such testing could be justifiable.

See also South African Labour Court, *Joy Mining Machinery (Harnischfeger) (SA) (Pty) Ltd v. National Union of Metalworkers of SA & Others*, Case No. J 158/02, Judgement of 31 January 2002.

**Discussion points**

1. Are there legislative protections in place in your country that safeguard the privacy rights of job applicants and workers?
2. Is mandatory HIV testing for employment purposes prohibited in your jurisdiction? If so, do these protections meet the criteria established by Recommendation No. 200?
3. Has your country adopted legislative protections to safeguard workers and job applicants from discriminatory screening practices in relation to employment?

## Module 8: Gender equality and the HIV epidemic

It is estimated that half of all adults living with HIV worldwide are women. HIV epidemics evolve differently in diverse regions of the world, and the role of gender and sexuality varies among epidemics. Nevertheless, gender inequalities in all regions increase the vulnerability of women and girls to HIV infection. At the same time, stereotyped gender roles also increase the risk of HIV infection for men and boys.

**UNAIDS: *Global Report: UNAIDS Report on the Global AIDS Epidemic 2012*, page 70:**

“The lower socioeconomic and political status women are assigned, including unequal access to education and employment, and fear or experience of violence compound women’s greater physiological vulnerability to HIV. Because of social and economic power imbalances between men and women and the associated limitations in access to services, many women and girls have little capacity to negotiate safe sex, insist on condom use or otherwise take steps to protect themselves from HIV.

Gender norms also increase men’s vulnerability to HIV, encouraging high-risk behaviour and deterring them from seeking sexual health services or acknowledging their lack of knowledge about HIV. In addition, stigma and discrimination against transgender people render them highly vulnerable to HIV and impede their access to HIV services and secure livelihoods.”

This Module focuses on the issue of equality between women and men workers. Nevertheless, the gender dimensions of the epidemic extend beyond male-female issues. Key vulnerable and at-risk groups in national epidemics include men who have sex with men, transgender and transsexual persons. Discrimination on the basis of sexual orientation and gender identity is prevalent in many countries and is often linked to HIV-related discrimination. (These issues will be addressed in Module 9.) Before turning to the issue of inequalities between men and women, however, it may be useful to distinguish between the concepts of “sex” and “gender”.

### The distinction between sex and gender

- The term “sex” refers to the biological and universal physical attributes of males and females.

- “Gender” refers to the socially constructed roles, responsibilities and power relations between women and men and girls and boys, which are based on their sex. Gender-based roles and responsibilities are changeable over time and can vary due to other key factors such as ethnicity, economic class, religion and age. The concept of gender also captures norms, beliefs and practices concerning what is considered “male” and “female” behaviour.<sup>70</sup>
- Gender-based attitudes and behaviours also increase the vulnerability of men and boys, primarily by encouraging behaviours that expose them to the risk of HIV infection. For example, men and boys may be expected to be strong and display dominant behaviour, and may be discouraged from showing their emotions. Perceptions regarding “masculine” behaviours often encourage men and boys to demonstrate their virility through risk-taking behaviours, which may include unprotected sex with multiple sexual partners. These behaviours increase their risk of HIV infection.<sup>71</sup> Gender-based expectations also make it more difficult for men and boys to seek information about HIV and AIDS, limiting their access to prevention information, including information on the use of condoms for HIV prevention.
- The concept of gender also includes transgender persons. This group includes men and women who may identify with a gender that does not correspond to their sex. Their gender identity may therefore place them in conflict with the accepted gender norms in the society and culture in which they live. Discrimination on the basis of sexual orientation or gender identity is frequent, and transgender persons often face harassment and violence, including in the workplace.<sup>72</sup>

## **The gender dimensions of HIV and AIDS**

### ***Increased vulnerability of women and girls***

In sub-Saharan Africa, the region most affected by the HIV epidemic, more women than men are living with HIV. According to the *UNAIDS Global Report 2012*, approximately 58 per cent of those living with HIV in this sub-region are women.<sup>73</sup> In a number of countries in this region, young women (15–24 years) are up to eight times more likely to be infected with HIV than young men. In the Caribbean, young women are over twice as likely to be infected with HIV than their male counterparts.<sup>74</sup>

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<sup>70</sup> ILO, *Guide to mainstreaming gender in workplace responses to HIV and AIDS* (Geneva, 2011), p. 5.

<sup>71</sup> A. Cruz and S. Klinger, *Gender-based violence in the world of work: Overview and selected annotated bibliography*, Bureau for Gender Equality, Working Paper 2011/3 (Geneva, 2011), p. 21.

<sup>72</sup> United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, op. cit., para. 32.

<sup>73</sup> UNAIDS, *Global Report 2012*, op. cit., p. 70.

<sup>74</sup> UNAIDS, *Global Report: UNAIDS report on the global AIDS epidemic 2010* (Geneva, 2010), p. 130.

Gender inequalities also impede access to HIV-related services. While women and girls face barriers to access due to inequality, gender norms also deter men from accessing needed health services, including HIV testing and treatment.

**UNAIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2012*, page 71:**

“UNAIDS-led participatory assessments of gender-related barriers to services to prevent infants from becoming newly infected with HIV underscore the negative effects of gender inequality. Female study participants cited their lack of decision-making power, lack of access to resources, fear of violence and abandonment and cultural attitudes towards sex, pregnancy and HIV as significant barriers to [access] services.

...

Similarly, gender norms of masculinity discourage men from seeking help and admitting ill health. Men have consistently lower rates of HIV testing than do women... [Their] disproportionately poorer access to antiretroviral therapy has been documented across southern Africa and in numerous other countries, including Kenya, Malawi, South Africa and Zambia.”

### ***Biological risk factors***

Women are also more vulnerable to HIV infection from a biological perspective. The increased biological risk of HIV infection faced by women and girls is compounded by gender inequalities, which in many countries place them in subordinate roles in society as a whole and in individual relationships. These inequalities often mean that women and girls shoulder a heavier burden in coping with the epidemic.

### ***Social, economic and legal inequities make women and girls more vulnerable to HIV***

- Societal gender norms related to “feminine” and “masculine” behaviour affect whether and to what extent women and men access HIV information and services, their sexual behaviours and the way in which they cope with HIV infection. Subordination in marriages or relationships reduces the ability of women and girls to protect themselves from HIV infection by negotiating condom use or refusing sex, especially unprotected sex. They face increased violence at the hands of their partners for requesting condom use, accessing voluntary HIV testing and counselling, or refusing sex within or outside marriage.<sup>75</sup>
- Conformity to traditional gender roles that make women dependent on men, both socially and economically, deter women from accessing HIV-related

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<sup>75</sup> UNAIDS, *Reducing HIV stigma and discrimination: A critical part of national AIDS programmes – A resource for national stakeholders in the HIV response* (Geneva, 2007), p. 10.

health services. Studies among women in sub-Saharan Africa showed that fear of a partner's negative reaction, including abandonment, violence, rejection, loss of economic support and accusations of infidelity, were the most commonly reported barriers to HIV testing and disclosure of HIV status.<sup>76</sup>

- Gender inequality in employment contributes to women's economic disadvantage. For example, women are more likely to be unemployed, predominate in part-time and informal employment, spend more time in unpaid care work, and earn less than men for work of equal value.<sup>77</sup> Women may be discriminated against due to pregnancy or as a result of their family responsibilities, resulting in diminished access to jobs or in job loss. Accepted gender roles in some societies also effectively exclude women and girls from access to certain occupations.
- Discriminatory laws and practices with regard to land ownership, inheritance, marriage and divorce, increase the economic marginalization of women and can deter them from leaving abusive relationships. Where women have limited options to support themselves, they are more likely to remain in relationships where they have little or no ability to negotiate safer sex, particularly condom use. Research on impoverished communities in different regions around the world suggests that women take high sexual risks in favour of a livelihood for themselves and their families.<sup>78</sup> Some may be compelled to engage in unprotected transactional sex in exchange for money, food or shelter.<sup>79</sup>
- Harmful traditional practices in certain countries, such as the dowry system, intergenerational marriage, dry sex, wife inheritance and widow cleansing, also facilitate the spread of HIV.<sup>80</sup> Domestic violence, rape and sexual assault, as well as other forms of gender-based violence, also increase women's risk of exposure to HIV.

### ***HIV and AIDS have a disproportionate impact on women and girls***

Not only are women and girls more vulnerable to HIV infection, they are also often disproportionately affected by HIV and AIDS in comparison to men. For example, women and girls are more likely to shoulder the task of caring for family members suffering from HIV-related illness, and may be forced to leave work or school

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<sup>76</sup> UNAIDS, *HIV in Asia and the Pacific: Getting to zero* (Geneva, 2011).

<sup>77</sup> UN Women/ILO, *Decent work and women's economic empowerment: Good policy and practice*, Policy Brief (New York, 2012).

<sup>78</sup> M. Gysels, R. Pool and B. Nnalusiba, "Women who sell sex in a Ugandan trading town: Life histories, survival strategies and risk", in *Social Science and Medicine*, 2002, Vol. 54, Issue 2, pp. 179–192.

<sup>79</sup> International Association of Women Judges (IAWJ), *The gender and legal dimensions of HIV/AIDS: Women's access to justice and the role of the judiciary* (Washington, DC, 2005).

<sup>80</sup> United Nations Human Rights Council, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, op. cit., paras 30–34.

due to these responsibilities. This in turn reduces their education and employment opportunities.

### ***Gender-based violence***

Gender inequality and violence against women are closely linked. Inequality may facilitate gender-based violence, while violence in turn reinforces existing inequalities. Violence against women is both a risk factor for HIV and a consequence of being identified as having HIV. Domestic violence, rape and sexual assault and other forms of gender-based violence also increase women's risk of exposure to HIV.

**WHO/UNAIDS, *Addressing violence against women and HIV/AIDS: What works?* (Geneva, 2010), page 9**

Studies in Africa and Asia have shown that women who experience violence are more likely to be HIV-positive. For example, a study in Rwanda showed that women who had been sexually coerced by their male partners were 89 per cent more likely to test HIV-positive. In the United Republic of Tanzania, women under 30 who had experienced partner violence were ten times more likely to be HIV-positive; and in a study of over 28,000 married women in India, it was determined that women who had experienced violence were three times more likely to test HIV-positive than those who had experienced no violence. Young girls are particularly at risk. According to the *UNAIDS World AIDS Day Report* (2011), the prevalence of forced first sex among adolescent girls under 15 ranges from 11 to 48 per cent globally.

Women who disclose their HIV-positive status also face an increased risk of violence from their spouses or partners. A survey among women in Europe and Central Asia revealed that one-third of women who disclosed their HIV-positive status to their partners experienced domestic violence.<sup>81</sup> Violence against girls greatly increases their risk of HIV infection.

### ***Barriers to accessing health care***

Women also face obstacles in accessing health care, including sexual and reproductive health services, in many countries. Where there are high levels of gender inequality, women may have limited or no opportunities to make informed choices about their health care, particularly if their male partners discourage them from seeking services. This impedes their ability to seek HIV testing or, if they are HIV-positive, to seek the treatment necessary to prevent mother-to-child transmission.

Even when they do have access to health services, women living with HIV may, as a result of stigmatizing attitudes, be advised against having children or be

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<sup>81</sup> Ibid., para. 40.

coerced into undergoing sterilization procedures.<sup>82</sup> Such attitudes play a powerful role in deterring women from seeking needed information and services related to HIV prevention and treatment.

**Country: Namibia**

**Supreme Court of Namibia, *Government v. LM, MI, NH*, Case No. SA 49/2012, Judgement of 3 November 2014**

The Court examined the consolidated case of three pregnant women living with HIV who had undergone sterilization after signing a form consenting to the procedure while they were in labour. The case originally consisted of three different complaints alleging: (1) that sterilization procedures had been performed on them during childbirth without their informed consent; and (2) that the sterilizations were performed as part of a wrongful practice of discrimination against them based on their HIV status. The three claims shared common issues of fact and law and were therefore consolidated and heard together. The Supreme Court dismissed the respondents' claim of discrimination, considering that there was insufficient evidence to support a finding on this issue (paragraph 2).

Recalling the rights set out in the Namibian Constitution, including the right to dignity (Article 8(1)), the right to physical integrity (Article 8(2)(b)), and the right to found a family (Article 14(1)), the Court observed that "... a decision of whether or not to be sterilised is of great personal importance.... and must be made with informed consent, as opposed to merely written consent. Informed consent implies an understanding and appreciation of one's rights and the risks, consequences and available alternatives to the patient. An individual must also be able to make a decision regarding sterilisation freely and voluntarily" (paragraph 3).

In examining the evidence presented, the Court observed that it was "... crucial to determine whether the respondents had the intellectual and emotional capacity to give their informed consent in the light of the peculiar circumstances they found themselves when signing the consent forms" (paragraph 100).

The Court noted that the respondents should have been given the opportunity to decide whether or not to sign the consent form when they were in a sound state of mind and free from influencing circumstances, such as labour pain. In light of the evidence presented, which showed that the women had been asked to consent to sterilization while in pain during the height of childbirth, the Court concluded that the women could not be deemed to have given informed consent to the sterilization procedure. The case was referred back to the High Court to determine the issue of damages.

## **ILO action: Promoting gender equality and women's empowerment**

Since it was first set up, the ILO has promoted the principle of equality of opportunity and treatment in employment and occupation for women and men workers.

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<sup>82</sup> Ibid., para. 32.

**Annex to the ILO Constitution: Declaration concerning the aims and purposes of the International Labour Organization, adopted at Philadelphia on 10 May 1944 (Declaration of Philadelphia), Part II:**

“Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;...”.

As part of its overall strategy to promote this principle, the ILO has adopted two fundamental Conventions, which have been ratified by most ILO member States. The Equal Remuneration Convention, 1951 (No. 100), provides that men and women workers should receive equal pay for work of equal value, while the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), prohibits discrimination in employment and occupation on the basis of, inter alia, sex. In addition, the Workers with Family Responsibilities Convention, 1981 (No. 156), prohibits discrimination against men and women workers with family responsibilities.<sup>83</sup>

The ILO code of practice explicitly recognizes the link between gender inequalities and HIV, and the critical importance of gender equality and women’s empowerment to prevent HIV transmission.

**Section 4.3 of the ILO code of practice provides as follows:**

“The gender dimensions of HIV/AIDS should be recognized. Women are more likely to become infected and are more often adversely affected by the HIV and AIDS epidemic than men due to biological, socio-cultural and economic reasons. The greater the gender discrimination in societies and the lower the position of women, the more negatively they are affected by HIV. Therefore, more equal gender relations and the empowerment of women are vital to successfully prevent the spread of HIV infection and enable women to cope with HIV and AIDS.”

Recommendation No. 200 builds on the code of practice, stressing the importance of recognizing and addressing the gender dimensions of HIV and AIDS in the context of the HIV response.

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<sup>83</sup> ILO, *Giving globalization a human face*, op. cit., para. 786.

**Preamble to ILO Recommendation No. 200:**

“HIV affects both men and women, although women and girls are at greater risk and more vulnerable to HIV infection and are disproportionately affected by the HIV pandemic compared to men as a result of gender inequality, and women’s empowerment is therefore a key factor in the global response to HIV and AIDS.”

Paragraph 14 of the Recommendation contains specific provisions calling for measures to be taken in the workplace to prevent HIV transmission and reduce its impact by, among other things:

- ensuring gender equality and the empowerment of women;
- preventing and prohibiting harassment and violence at work;
- involving men and women workers in the HIV response;
- safeguarding sexual and reproductive health and rights; and
- ensuring the confidentiality of personal medical data.

Addressing the gender dimensions of the HIV epidemic through targeted workplace actions facilitates the development of effective strategies that address the needs and concerns of both women and men in order to reduce their vulnerability to infection and prevent the spread of the virus.

## The role of the courts

Courts play an essential role in ensuring the application of national and international laws that safeguard the human rights of women and girls. They are routinely called upon to examine cases involving discrimination in employment, inheritance, property rights, divorce and custody matters, domestic violence and other issues relevant to gender equality. Their decisions are instrumental in addressing systemic discrimination and violence against women and girls and implementing the principles of equality of opportunity and treatment and equal protection under the law. Judicial decisions that recognize fundamental equality rights support the elimination of discrimination in the workplace and many other settings, as the following examples illustrate.<sup>84</sup>

### *Equality in the courtroom*

Evidentiary rules that accord the testimony of female witnesses less weight than that of male witnesses can put women and girls at a marked disadvantage, increasing their vulnerability to HIV, especially in cases of sexual assault. National courts have upheld women’s right to equal treatment in judicial proceedings, setting aside such rules as discriminatory.

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<sup>84</sup> See also International Association of Women Judges (IAWJ), *The gender and legal dimensions of HIV/AIDS*, op. cit.

**Country: Namibia**

**High Court of Namibia, *S. v. D. And Another*, 1992 (1) SA 517, Judgement of 4 October 1991**

This case involved an appeal from two appellants who were each convicted of rape and sentenced to three years' imprisonment by a regional magistrate's court. The lower court relied on testimony from the two complainants, who testified that they had been taken by the appellants to a burned-out building, and raped. Each complainant was raped by one of the two appellants, but in separate locations. Thus, each complainant was a single witness in relation to the alleged rape. In examining whether the evidence presented supported the lower court's finding of guilt beyond a reasonable doubt, the court considered the traditional cautionary rule in cases of sexual assault. The cautionary rule is based on the assumption that witnesses alleging sexual assault are less truthful than witnesses alleging other crimes, such as theft. The Court took note of case law setting out the rule, calling for caution "in the case of all females alleging sexual assaults" (citing *R. v. J.* 1966 (1) SA 88 (SR) at 92A-C)). In *S. v. D.* the Court declined to apply the cautionary rule, noting that the evidence available did not support the contention that more false charges are laid in sexual assault cases than in other categories of crimes. Moreover, the Court noted that, while the cautionary rule applies to all sexual assault cases, regardless of the sex of the complainant, the overwhelming majority of complainants in such cases are female. The Court concluded that the cautionary rule that had evolved in cases of rape had no rational basis for its existence and that, in fact, "the so-called cautionary rule has no other purpose than to discriminate against women complainants. The rule ... is contrary to art. 10 of the Namibian Constitution, which provides for the equality of all persons before the law regardless of sex."

**Country: Uganda**

**High Court of Uganda at Kampala, *Uganda v. Peter Matovu*, Criminal Session Case No. 146 of 2001, Judgement of 21 October 2002**

The defendant Peter Matovu was indicted on charges of defilement. The Court declined to apply the common law rule that where a victim alleges that the accused committed a sexual offence against her, the court must bear in mind that it is dangerous to act upon the uncorroborated evidence of the victim. The Court observed that the rule discriminated against women, who were the most frequent victims of sexual offences. It was therefore inconsistent with Uganda's Constitution and international law obligations, particularly Article 1 of CEDAW. The Court also noted that "under Article 21 of the Constitution that proclaims equality of all persons under the law, equal protection of the law, and prohibition against discrimination on the ground of sex, Uganda enacted the heart of the above international instruments in one stroke... and therefore Uganda has the obligation to give effect to the contents of those international instruments". The Court thus held that the discriminatory rule was unconstitutional and therefore null and void. The Court noted that defilement was a very serious offence, which exposed young girls to the possibility of being infected with STDs and especially HIV.

### ***Equality of property rights – Inheritance rights***

National courts have used international law in upholding women's equal inheritance rights, as in this case that examined both customary and constitutional law.

**Country: Botswana**

**High Court of Botswana at Gaborone, *Mmusi and Others v. Ramantele and Others*, Case No. MAHLB-000836-10, Judgement of 12 October 2012**

The Court examined the issue of inheritance rights under customary law, which allegedly provided that only the last-born would inherit the family home.

The case was brought by four applicants (a group of elderly sisters). Their father had predeceased their mother by over 30 years. The mother died intestate. The sisters argued that they should be allowed to inherit the family homestead, rather than ceding it to a male nephew (the son of a half-brother of the sisters).

The High Court held that the application of the customary law rule would violate Section 3 of the Constitution of Botswana, which provides for the right to equal protection under the law. In its ruling, the Court considered national law, examined comparative judgements from other African jurisdictions and cited international instruments signed or ratified by Botswana, including the Universal Declaration of Human Rights and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

On appeal, the Botswana Court of Appeal held that the homestead belonged to all of the deceased parents' children, affirming the sisters' right to inherit the homestead. The Court further ordered the sisters to determine who among them would take care of the homestead on behalf of the others. This order had the effect of setting aside the High Court's order and reinstating an earlier order of the Higher Customary Court, with variations. (See *Ramantele v. Mmusi and Others*, Case No. CACGB-104-12, Judgement of 3 September 2013.)

### ***Entitlement to equality of rights in marriage***

National courts have also rejected arguments based on customary law in affirming equal rights for men and women in marriage.

**Country: Uganda**

**High Court of Uganda at Masaka, *Uganda v. Yiga Hamidu*, Criminal Session Case No. 0055 of 2002, Judgement of 2004 (unreported)**

In this criminal proceeding, the Court rejected an argument based on customary law to justify a charge of rape. The complainant claimed that she had broken off her engagement to the defendant on learning that his previous wife had died, possibly of AIDS, and stipulated that they should both be tested for HIV before marrying. She claimed that the defendant had hired two men to



abduct her and then raped her, locking her in his room and forcing himself on her while her two abductors held her down on the floor. The defendant denied the charges, raising the affirmative defence of mistake of fact or honest belief under section 9(1) of the Uganda Penal Code. He claimed that he had honestly believed that the complainant was his wife because he had paid a dowry to her parents and a customary marriage had been sealed. According to the defendant, he was therefore married to the complainant. He argued that, as a consequence, the complainant had implicitly consented to sexual intercourse and that, under Ugandan law, a husband cannot rape his own wife. The Court found no evidence that a marriage had taken place and no evidence that the complainant had consented to intercourse. In convicting the defendant of rape, the Court held that even if the couple had been married, the facts of the case would justify a finding of rape. The Court noted that the provision of the Penal Code dealing with rape does not make an exception for married persons. It found that the existence of a valid marriage, or honest belief of a valid marriage, was no longer a defence of rape in Uganda in light of the Constitution of 1995, which provides for equal rights in marriage and full and equal dignity of the person. The Court observed that the complainant was treated as a “mere sexual instrumentality” and that her “human dignity was trampled upon”. It therefore rejected the defendant’s defence and convicted him of rape.

### ***Equality of rights in division of marital property***

National courts have also examined the issue of equal rights to marital property in the context of HIV.<sup>85</sup>

#### **Country: Kenya**

#### **Court of Appeal, *Midwa v. Midwa*, Case No. 197/200, Judgement of 31 July 2001 ((2000) 2 EA 453 (CAK))**

A husband petitioned for divorce from his HIV-positive wife, alleging that she was endangering his life and that he could no longer live with her under the same roof. The lower court ordered the wife to be expelled from the matrimonial home and consigned to the servants’ quarters, granting the husband custody of the children pending the hearing of the case. The wife appealed to the Court of Appeals, stating that part of her salary went towards the payment of the mortgage on the house and challenging her confinement to the servants’ quarter. She argued that there were no exceptional circumstances justifying granting custody of the children to their father.

The Court of Appeals commented on the lower court’s ruling, characterizing it as insensitive, traumatizing and dehumanizing. The Court ordered that the wife be put back in the matrimonial home.

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<sup>85</sup> For abstracts of this and other cases, see Tanzania Women Judges Association (TAWJA), *Case law manual* (Dar es Salaam, 2013).

**Country: United Republic of Tanzania**

**High Court of Tanzania at Dodoma, *Elizabeth Mtawa v. Hassan Mfaume Risasi*, (PC) Civil Appeal No. 12 of 2001[1]**

The appellant, Elizabeth Mtawa, lived with Mwinjuma Mfaume Risasi as husband and wife for nine years and cared for him until his death. The deceased was also survived by his two children, born out of wedlock. The respondent, the deceased's brother, claimed that the appellant was not the deceased's wife, but merely a concubine and thus was not entitled to a share of the deceased's estate. A second brother of the deceased testified that the appellant did not deserve to stay in the house and should have vacated after the funeral.

The lower court found that there was a presumption of marriage under national marriage laws and ordered that the appellant could stay in the disputed house under certain conditions, including that she should vacate the house if she married and that she should not bring another man into the house. The deceased's brother appealed, arguing that the appellant should not benefit from occupation of a house to whose purchase she had not contributed. The appellate court held that the appellant was a mere concubine and that she could not be entitled to a share in the house, as it had not been built by the joint efforts of the appellant and the deceased.

The High Court reversed, holding in favour of the appellant. Finding that there was ample evidence that the appellant and the deceased had lived together as husband and wife, it applied the presumption of marriage under national law. The Court declined to apply either Islamic law or customary law to the case. It noted that customary law precluded a surviving female spouse from asserting ownership rights over real property, enabling her only to assert usufruct rights. The Court found that this provision violated basic human rights principles under Articles 2 and 17 of the Universal Declaration of Human Rights, as well as national law.

The Court noted that the appellant had nursed the deceased until his death and raised his two children, and that there was no evidence that the respondent or his other brothers had provided any assistance. Characterizing the respondent's claim as "unfair" and "repugnant to justice", it considered the appellant's contribution to the welfare of the deceased and his children as a contribution to the acquisition of the family assets. The Court awarded the appellant a half share in the house and the other half to the two children as the lawful heirs.

## Eliminating sex discrimination in employment and occupation

Discrimination against women in employment persists and may be based on other considerations that limit their opportunities of obtaining or remaining in employment, such as civil and marital status, pregnancy and family responsibilities.<sup>86</sup>

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<sup>86</sup> ILO, *Equality in employment and occupation: Special Survey on equality in employment and occupation in respect of Convention No. 111*, International Labour Conference, Report III (Part 4B), 83rd Session (Geneva, 1996), paras 35–36.

## ***Pregnancy discrimination***

Discrimination at work on the basis of sex and pregnancy is encountered by many women. Sex and pregnancy discrimination may be compounded by an HIV-positive diagnosis, as shown by the following decision of the Industrial Court of Kenya.

### **Country: Kenya**

#### **Industrial Court of Kenya at Nairobi, *Veronica Muthio Kioka v. Catholic University of Eastern Africa*, Case No. 1161 of 2010, Judgement of 8 November 2013.**

The claimant, Ms K., was hired as a telephone operator on a casual basis, whereas her two male counterparts employed in similar posts were employed on a permanent basis. As she was not given a permanent contract, she did not receive transportation and housing allowances accorded to her male co-workers, nor did she receive access to health insurance or other benefits. Three years after she was hired, she applied for a different position. At the end of the application process, she was informed that to receive the contract she was first required to take a medical examination.

The employer's physician performed the examination, which included an HIV test. He did not inform her that she was going to be tested for HIV nor did she receive any pre- or post-counselling. Two weeks after the exam, the physician informed her that she was HIV-positive. After her diagnosis, she received no further information regarding the new position.

Ms K. thereafter continued working on a casual basis. In its decision, the court noted that, by this time, three years after she was first hired, Ms K. was earning up to 4.2 times less than her male co-workers. Subsequently, she asked her employer the reason why she had not received a permanent contract. She was informed that she had been denied permanent employment and benefits due to her HIV status. She continued to work with no medical or other benefits.

Six years after she was first hired, Ms K. became pregnant. She did not receive any salary corresponding to her maternity leave as required by Kenyan legislation, and was kept on a casual basis when she returned to work. Upon her return to work, she received a letter of termination from her employer stating that her employment contract had not been renewed six months earlier. Her contract was not renewed at its expiration.

The Court found that Ms K. had been discriminated against on the basis of her sex, having been denied equal remuneration for work of equal value, as well as maternity benefits. The Court also found that Ms K. had been discriminated against on the basis of her HIV status. The discriminatory acts carried out by the employer included: refusing her recruitment on a permanent basis due to her HIV status, undertaking HIV testing without her knowledge or consent, not providing pre- and post-counselling and breaching her privacy rights by disclosing her HIV status. The Court held that employees or prospective employees may not be deemed to be medically unfit solely on the basis of their HIV status. The Court held that the employer had violated national law and cited ILO Conventions Nos 100 and 111 as well as the principles of Recommendation No. 200. The Court awarded Ms K. damages, including compensation for unlawful and unfair termination and exemplary damages for discrimination and gross violation of her dignity.

### ***Family responsibilities***

Women living with or affected by HIV may face discrimination due to their caregiving responsibilities. In the following case example, a female employee was suspended from her employment for having been absent from work to care for her ill son.

**Country: Lesotho**

**Labour Court of Lesotho, *Palesa Peko v. The National University of Lesotho*, Case No. LC/95, Judgement of 1 August 1995**

A female employee was absent from work for two weeks to care for her son, who was recovering from an operation. She had told her employer that she was ill so that she could care for him. The employer suspended her and deducted an amount from her salary corresponding to the period of her absence.

The Labour Court observed that there was a deficiency in the relevant national law, citing section 4 of the Labour Code, which provides as follows:

“In case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of conventions adopted by the Conference of the International Labour Organization and of Recommendations adopted by the Conference of the International Labour Organization.”

The Court relied on the ILO Workers with Family Responsibilities Convention, 1981 (No. 156), to fill the gap in national law, finding that it was empowered under Article 9 of the Convention to give effect to its provisions. On that basis, the Court applied the provisions of Convention No. 156 directly, ordering the suspension to be set aside and instructing the employer to pay her wages due for the period corresponding to the time she had been absent from work to care for her son.

### ***Equal remuneration***

Ensuring economic equality between men and women in employment reduces women’s vulnerability to the epidemic. The Treaty of Versailles, which incorporates the original Constitution of the ILO, sets out as one of the nine principles “of special and urgent importance” the principle that “men and women should receive equal remuneration for work of equal value” and states that “standards set by law in each country with respect to conditions of labour should have due regard to the equitable economic treatment of all workers...”<sup>87</sup>

The ILO Equal Remuneration Convention, 1951 (No. 100), calls for ILO member States to apply the principle of equal remuneration in both law and practice.

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<sup>87</sup> Treaty of Versailles, Part XIII, 1919, Article 427.

**Country: India**

**Supreme Court of India, *MacKinnon MacKenzie & Co. Ltd v. Audrey D'Costa & Anr*,  
Case No. 1987 AIR 1281 1987 SCR (2) 659, Judgement of 26 March 1987**

A female shorthand typist challenged the pay system applied in her firm arguing that there was discrimination between women and men. The discrimination had been recognized in the lower courts. The firm initiated proceedings in the Supreme Court to have the measures taken in favour of the typist cancelled. The company argued that the typist held a post of confidence and that there was no man employed in a similar job. It had, however, been recognized that a male shorthand typist would have received a higher salary for the same work.

The Court noted that ILO Convention No. 100 was applicable to the matter, stating that:

“Article 39 (d) of the Constitution of India provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men and women. The Convention concerning Equal Remuneration for Work of Equal Value was adopted by the General Conference of the ILO on June 29, 1951. India is one of the parties to the said Convention.”

Referring to both Convention No. 100 and the approach taken by the European countries in relation to equal pay, the Court of India found that the complainant had received much lower pay than her male colleagues performing work of equal value. The fact that there was no man employed in the same position in the company was irrelevant, since the principle of equal remuneration called for the same level of pay to be guaranteed not only to persons performing equal work but to men and women workers performing work that was different but deemed to be of equal value.

## Sexual harassment

Sexual harassment and violence increase women's vulnerability to HIV. National courts have formulated general principles and guidelines on sexual harassment in the workplace with a view to ensuring greater gender equality.

**Country: India**

**Supreme Court of India, *Vishaka & ORS v. State of Rajasthan & ORS*,  
Case No. 6 SCC 241, Judgement of 13 August 1997**

The Supreme Court examined a class action brought by a group of petitioners under Article 32 of the Indian Constitution. The action arose out of allegations of a gang rape. The petitioners sought to have the Court issue directions for the enforcement of fundamental rights in the Constitution that were allegedly being violated by practices of sexual harassment of women in the workplace. Noting that domestic law did not address the issue of sexual harassment, the Court decided



to formulate general principles and guidelines on the subject. In doing so, it relied on the Convention for the Elimination of All Forms of Discrimination against Women and on comments by the supervisory body responsible for overseeing its application.

The Court noted: “Gender equality includes protection from sexual harassment and the right to work with dignity, which is a universally recognized human right... The international conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.”

## **Judicial application of other relevant international instruments**

In addition to ILO instruments, other international and regional instruments guarantee women’s right to equality, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, the Inter-American Convention against all Forms of Discrimination and Intolerance, and the European Convention on Human Rights. These may be useful in examining cases involving allegations of sex discrimination in national settings, particularly where the issues raised are not covered by national legislation.

### **Discussion points**

1. Has your country ratified international conventions and standards on gender equality? If so, have these been applied in national jurisprudence? What legislative protections has your country adopted to provide for protection against discrimination in employment on the basis of sex?
2. Do these measures provide protection from employment-related discrimination equivalent to that envisaged in ILO Convention No. 111 and Recommendation No. 200?
3. What challenges to gender equality exist in your country/region and what can courts do to help meet these challenges?

## Module 9: Key groups

The HIV epidemic tends to run along the fault lines of society. HIV prevalence rates are significantly higher in certain key groups that are already marginalized in many countries due to pre-existing stigmas. These groups include men who have sex with men (MSM), sex workers, transgender persons, prisoners, and injecting drug users (IDUs). The UNAIDS 2012 World AIDS Day Report notes, for example, that HIV disproportionately affects sex workers, MSM and IDUs.<sup>88</sup>

### ***UNAIDS Terminology Guidelines (revised October 2011), page 18:***

“The term ‘key populations’ or ‘key populations at higher risk of HIV exposure’ refers to those most likely to be exposed to HIV or to transmit it – their engagement is critical to a successful HIV response i.e. they are key to the epidemic and key to the response. In all countries, key populations include people living with HIV. In most settings, men who have sex with men, transgender persons, people who inject drugs, sex workers and their clients, and seronegative partners in serodiscordant couples are at higher risk of HIV exposure to HIV than other people. There is a strong link between various kinds of mobility and heightened risk of HIV exposure, depending on the reason for mobility and the extent to which people are outside their social context and norms. Each country should define the specific populations that are key to their epidemic and response based on the epidemiological and social context.”

Certain key groups, such as MSM, sex workers or IDUs, are deemed to be “at-risk” populations when they engage in behaviours or lead lifestyles that place them at higher risk of exposure to HIV. There are other groups that, due to socio-economic and cultural factors, may be more vulnerable to HIV than others, including children and young persons, women, migrant workers, persons with disabilities, refugees and internally displaced persons.<sup>89</sup>

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<sup>88</sup> UNAIDS, *World AIDS Day Report 2012*, op. cit., p. 42.

<sup>89</sup> See also UNAIDS, *UNAIDS Terminology guidelines*, revised version (Geneva, October 2011), p. 30. Available at: [http://www.unaids.org/sites/default/files/media\\_asset/JC2118\\_terminology-guidelines\\_en\\_0.pdf](http://www.unaids.org/sites/default/files/media_asset/JC2118_terminology-guidelines_en_0.pdf).

Members of key population groups are often subjected to multiple layers of stigma and tend to experience higher levels of discrimination than others, especially when they are also HIV-positive.<sup>90</sup> As a result, they often encounter barriers to accessing health services, education and employment opportunities.

**United Nations General Assembly: *Implementation of the Declaration of Commitment on HIV/AIDS and the Political Declarations on HIV/AIDS: United to end AIDS: achieving the targets of the 2011 Political Declaration, Report of the Secretary-General, A/66/757, 2 April 2012, paragraph 58:***

“In 2010, 46 per cent of countries reported having laws, regulations or policies that impede key populations at higher risk of HIV infection from accessing prevention, treatment, care and support services. Seventy-six countries criminalize same-sex sexual relations between consenting adults, most countries criminalize some aspect of sex work and most impose criminal penalties on people who are drug-dependent. Not only do these laws marginalize and expose members of key populations to violence, criminal sanctions and prison, they also result in the exclusion of these groups from national economic, health and social support programmes.”

## Key vulnerable and at-risk groups

This Module will address a range of key affected groups among the working population, or among those who interact with the world of work, who are either particularly vulnerable to HIV infection or who engage in behaviours that may put them at a higher risk of infection. These key groups are not necessarily the only relevant ones, but they are mentioned in this context for two reasons: either because they are specifically referred to in Recommendation No. 200, or because they have been identified as groups with a higher HIV prevalence in a significant number of national epidemics. Key groups and the risk factors for each group also vary from country to country, depending on the characteristics and evolution of the national HIV epidemic.

### *Sex workers*

Since the beginning of the HIV epidemic, HIV prevalence in national epidemics has been significantly higher among the female, male and transgender sex worker populations than among most other population groups.<sup>91</sup> According to the

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<sup>90</sup> See UNAIDS/Programme Coordinating Board, Thirty-first meeting, PCB (31)/12.25 (Geneva, 2012), para. 15. Available at: [http://www.unaids.org/en/media/unaids/contentassets/documents/pcb/2012/20121111\\_PCB%2031\\_Non%20Discrimination\\_final\\_newcoverpage\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/pcb/2012/20121111_PCB%2031_Non%20Discrimination_final_newcoverpage_en.pdf).

<sup>91</sup> UNAIDS, *Sex work and HIV/AIDS: UNAIDS Technical Update*, UNAIDS Best Practice Collection (Geneva, 2002).

UNAIDS 2012 Global Report, a recent review of available data from 50 countries concluded that female sex workers are 13.5 times more likely to be living with HIV than women who are not engaged in sex work.<sup>92</sup>

It is important to recall that the sex worker population includes male and transgender sex workers, who have also been shown to have high rates of HIV infection in comparison to the general population in many countries.

**WHO/UNAIDS/UNICEF, *Global HIV/AIDS Response: Epidemic update and health sector progress towards universal access, Progress Report 2011* (Geneva, 2011), page 31:**

“Data for male sex workers and transgender people are scarce but show very high HIV prevalence: between 9% and 25% of surveyed male sex workers have tested HIV-positive in China (102), Indonesia and Thailand, for example, as have 34% of transgender (hijra) sex workers in Jakarta (Indonesia), 16% of their peers in Mumbai (India) and 14% of transgender people in Bangkok (Thailand).”

The UNAIDS 2012 Global Report observes that, due to high rates of stigma and discrimination faced by the estimated 15 million transgender people worldwide, they often rely on sex work as their only source of income and survival, with rates of involvement in sex work estimated at up to 44 per cent of transgender people.<sup>93</sup>

Some national courts have addressed employment-related issues in the context of sex work.

**Country: Colombia**

**Colombian Constitutional Court, *Lais v. PANDEMO*, Case No. T- 629/10, Judgement of 13 August 2010**

In this decision, the Constitutional Court examined allegations of unfair dismissal in the context of sex work. The complainant was a female sex worker employed in a bar/discotheque. The employer summarily dismissed the complainant upon learning that she was pregnant. In reaching its decision, the Constitutional Court addressed the approach taken to sex work under international law and in the jurisprudence of other countries. The Court noted that the complainant was a single head of household and that she was entitled to the same maternity protection afforded to any other worker under Colombian legislation, citing Articles 236 and 239 of the Colombian Labour Code. The Court held that sex workers, regardless of whether they are men or women, have the same rights as those who perform any other work. The Court awarded the complainant compensation.

<sup>92</sup> UNAIDS, *Global Report 2012*, op. cit., p. 21.

<sup>93</sup> *Ibid.*, p. 76.

**Country: South Africa**

**South African Labour Appeal Court, *Kylie v. Commission for Conciliation Mediation and Arbitration and Others*, Case No. CA 10/08, Judgement of 26 May 2010 ((CA10/08) [2010] ZALAC 8; 2010 (4) SA)**

The South African Labour Appeal Court examined a case of unfair dismissal of a sex worker who was allegedly terminated from her employment without a prior hearing. The lower court dismissed the claim, concluding that it did not have jurisdiction over the case. In its decision, the lower court noted that sex work was unlawful under South African legislation and that the complainant's contract of employment was therefore invalid. It held that the protection of fair labour practices afforded under Article 23 of the South African Constitution did not apply to a person engaged in illegal employment. The complainant appealed the dismissal.

The appellate court examined the scope of Article 23 of the Constitution, which provides under subsection (1) that "everyone has the right to fair labour practices". Noting Constitutional Court precedent interpreting this provision broadly, the appellate court concluded that the constitutional right to fair labour practices vests in everyone and that it includes not only parties to an employment contract but also those persons in an employment relationship. The Appeals Court noted that "the illegal activity of a sex worker does not per se prevent [her] from enjoying a range of constitutional rights".

Taking all of the circumstances into account, the Court stated:

"It is important to emphasise the precise findings of this judgement and what [it] does not so hold. [It] cannot and does not sanction sex work. That is a matter for the legislature. ... However, the fact that prostitution is rendered illegal does not... destroy all the constitutional protections which may be enjoyed by someone as appellant, were they not to be a sex worker"(paragraph 54).

Accordingly, the Court concluded that the protections under section 193 of the Labour Relations Act applied to the appellant notwithstanding the illegality of the work performed (paragraph 55).

**Country: Bangladesh**

**Supreme Court of Bangladesh, *Bangladesh Society for the Enforcement of Human Rights v. Government of Bangladesh*, Judgement of 14 March 2000 (published in *Dhaka Law Report*, Volume LIII, 2001 (53 D.L.R. 1)**

The Supreme Court examined allegations brought by a group of some 54 non-profit organizations on behalf of a group of female sex workers and their children. The petitioners, who included the Bangladesh National Women Lawyers' Association and the Bangladesh Society for the Enforcement of Human Rights, among others, alleged that a group of sex workers and their children had been illegally and forcibly evicted from their residences in the neighbourhoods of Tanzabar and Nimtali. The petitioners



alleged that the Government was regularly taking measures to harass the women in prostitution and their children, “hounding them from their peaceful occupation of house/rooms rented by them”. They alleged that the women and children had been evicted, taken from their beds in the early hours of the morning by the local police, physically and verbally abused and taken to a home for vagrants, violating their right to life and livelihood under the Bangladeshi Constitution and national legislation.

The Court noted that the right to life guaranteed by Article 31 of the Bangladeshi Constitution includes the right to livelihood. It concluded that the sex workers “upon their wholesale eviction... have as well been deprived of their right to livelihood which amounts to deprivation of the right to life, making the action unconstitutional and illegal.”

In 2013, the Canadian Supreme Court held that provisions of the Canadian criminal code outlawing sex work violated Canada’s Charter of Rights and Freedoms.<sup>94</sup>

### Country: Canada

#### **Supreme Court of Canada, Canada (*Attorney General*) v. Bedford, Case No. 34788, Judgement of 20 December 2013 (2013 SCC 72, [2013] 3. S.C.R. 1101)**

The three respondents, B., L. and S., current or former sex workers, sought a declaration that three provisions of the Canadian Criminal Code, criminalizing activities related to sex work, violated their rights under section 7 of the Canadian Charter of Rights and Freedoms and were therefore unconstitutional. While sex work is not prohibited, the Criminal Code of Canada prohibited: keeping or being in a “bawdy-house”(Section 210); living off “the avails of prostitution” (Section 212(1)); and communicating in public for the purposes of prostitution (Section 213(1)). The respondents argued that these restrictions put the safety and lives of sex workers at risk by preventing them from implementing safety measures that could protect them from violence. They also claimed that Section 213(1) of the Criminal Code infringed on the freedom of expression rights guaranteed under the Charter. The Supreme Court unanimously held that the provisions were unconstitutional, although it suspended the declaration of invalidity by one year to allow Parliament to devise a new approach.

<sup>94</sup> See also *Agency for International Development et al. v. Alliance for Open Society International, Inc. et al.*, 133 S. Ct. 398 (2013), Judgement issued on 20 June 2013. In that case, the United States Supreme Court struck down a federal law setting conditions for accessing government funding available to non-governmental organizations to fund efforts against HIV and AIDS. The legislation provided that the funding could not be used “to promote or advocate the legalization or practice of prostitution” and that no funds may be used by an organization “that does not have a policy explicitly opposing prostitution”, thereby effectively requiring funding recipients to denounce sex work as a condition of accessing AIDS funding. The Supreme Court held that the second condition, commonly known as the “anti-prostitution pledge”, violated the constitutional right of freedom of speech.

### ***Lesbian, gay, bisexual, transgender and intersex (LGBTI) populations***

As of May 2013, it is estimated that over 70 countries still criminalize consensual same-sex relations, with some providing for harsh penalties, including imprisonment, and a few even the death penalty.<sup>95</sup> LGBTI persons are at risk of physical and psychological violence, including murder, beatings and sexual assault.<sup>96</sup> Lesbian, bisexual or transgender women are frequently the target of violence, particularly rape, due to their sexual orientation or gender identity. The Office of the High Commissioner for Human Rights has expressed its concern about the practice of “corrective rape” in certain countries.<sup>97</sup> Stigma and discrimination on the basis of sexual orientation in employment is widespread, and LGBTI persons may be subject to discrimination on the basis of their sexual orientation alone or discrimination may be linked with real or presumed HIV status. These circumstances deter LGBTI persons from revealing their behaviour to health service providers, making them more vulnerable to HIV and contributing to the spread of the virus.<sup>98</sup>

A number of countries have adopted legislation containing explicit protections against discrimination on the basis of sexual orientation. For example, the constitutions of South Africa, Ecuador and Portugal prohibit such discrimination.<sup>99</sup>

The right to be free of discrimination on the basis of sexual orientation includes the right to privacy.

#### **Country: United Kingdom**

#### **European Court of Human Rights, *Smith and Grady v. United Kingdom*, Application Nos 33985/96 and 33986/96, Judgement of 27 September 1999**

The Royal Air Force, which at the time had a policy against hiring homosexuals, carried out investigations concerning the homosexuality of a female and a male employee. They were both dismissed, and they alleged that they had been dismissed on account of their sexual orientation and that this violated the right to private life set out in Article 8 of the European Convention on Human Rights. The Court held that the investigation was a violation of the right to private life.

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<sup>95</sup> OHCHR, *Born free and equal: Sexual orientation and gender identity in international human rights law* (Geneva, 2012), p. 30. See also: International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA), *State-sponsored homophobia: A world survey of laws: criminalisation, protection and recognition of same-sex love* (Brussels, 2013).

<sup>96</sup> OHCHR, *Born free and equal*, op. cit., p. 15.

<sup>97</sup> *Ibid.*, p. 18.

<sup>98</sup> The Global Forum on MSM and HIV (MSMGF), *Social discrimination against men who have sex with men (MSM): Implications for HIV policy and programs* (Oakland, CA, 2010), p. 2.

<sup>99</sup> See section 9, subsection 3 of the Constitution of the Republic of South Africa, No. 108, of 1996, as amended; Article 11, subsection 2 of the Constitution of the Republic of Ecuador, 2008; See also Article 13 of the Constitution of Portugal, No. 1/2005 of 12 August 2005, as amended. In addition, see ILGA, op. cit.

Men who have sex with men<sup>100</sup> are consistently among the key populations with the highest HIV prevalence in national epidemics. A survey of HIV infection in MSM populations in capital cities around the world showed prevalence rates 13 times higher than in the general population.<sup>101</sup> Those who also experience high levels of discrimination are more likely to engage in higher levels of risky behaviour, thereby increasing their vulnerability to HIV.<sup>102</sup>

### **Transgender persons**

Transgender persons, particularly male-to-female, face especially high HIV-related risks and vulnerabilities. They are often victims of the harshest forms of discrimination and stigma due to the ways in which they express their gender identity. According to the International HIV/AIDS Alliance, transgender persons often face abuse and violence; indeed, more than 200 transgender persons were murdered for reasons linked to their gender identity worldwide in 2008 and 2009.<sup>103</sup> Discrimination on the basis of sexual orientation and gender identity in employment and occupation is widespread. Transgender persons have a disproportionately high risk of HIV infection, with prevalence as high as 68 per cent in certain regions.<sup>104</sup>

#### **Country: South Africa**

#### **South African Labour Court, *Christine Ehlers v. Bohler Uddeholm Africa (PTY) Ltd*, Case No. JS 296/09, Judgement of 13 August 2010**

The complainant, a transsexual, brought a claim of unfair dismissal against her employer, alleging that she had been dismissed due to her gender identity.

Commenting on the facts of the case, the Labour Court noted: “This case shows what discriminated people undergo daily in the workplace. It is a sad indictment to our society that despite our discriminatory past and all the non-discriminatory laws that we have in place, that discrimination in the workplace still thrives. The applicant is one such victim. Not only did she suffer discrimination and rejection in her family but was also subjected to ridicule by some of her colleagues. Some people believed that they had the right to call her names simply because she was



<sup>100</sup> UNAIDS *terminology guidelines*, op. cit., provide the following definition of MSM, p. 19: “the term ... describes males who have sex with males, regardless of whether or not they have sex with women or have a personal or social gay or bisexual identity. This concept is useful because it also includes men who self-identify as heterosexual but have sex with other men.”

<sup>101</sup> UNAIDS, *Global Report 2012*, op. cit., p. 25.

<sup>102</sup> Ibid.

<sup>103</sup> United Nations Human Rights Council, *The protection of human rights in the context of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS)*, op. cit.

<sup>104</sup> UNAIDS, *Global Report 2012*, op. cit., p. 76.

different. This is a rather sad state of affairs. She excelled in her workplace. She was the best. I do not understand why her changed gender would now affect her performance.” The Court found in favour of the complainant, holding that the employer had unfairly discriminated against her on the grounds of her sex and gender, in violation of Article 9 of the South African Constitution and section 51.2 of the Labour Relations Act. The Court ordered that the complainant be reinstated and that the employer take measures to prevent similar discrimination from reoccurring in the future, in addition to tendering a written apology to the complainant.

**Country: South Africa**

**South African Labour Court, *Quinton Atkins v. Datacentrix (PTY) Ltd*,  
Case No. JS 02/07, Judgement of 2 December 2009**

The complainant accepted the respondent’s offer of employment following a successful interview. Subsequently, he informed his employer that he intended to undergo a gender reassignment process to change his sex from male to female. The respondent then terminated the complainant’s employment on the grounds of misconduct, stating that the complainant had failed to disclose a material fact during the job interview. The Court rejected the respondent’s argument that the complainant had been dishonest, noting that he was under no legal duty to inform the respondent that he wished to undergo a gender reassignment. Noting that the claim raised issues of discrimination under both sex and gender, the Court concluded that the complainant had been discriminated against and awarded him compensation for unfair dismissal in violation of the Equality Clause in Section 9 of the South African Constitution, the Employment Equity Act, No. 55, of 1998 and the Labour Relations Act, No. 66, of 1995.

A number of countries have adopted legislation establishing the right to gender identity. On 23 May 2012, Argentina adopted Law No. 26.743 on the Gender Identity of Persons. In 2009, Uruguay adopted Law No. 18.620 on the Right to Gender Identity and to Change of Name and Sex on Identity Documents. On 15 March 2011, Portugal adopted Law No. 7/2011 providing for the right to gender identity and name change.<sup>105</sup>

***Prisoners***

The number of prisoners living with HIV varies between countries, but as a rule HIV prevalence is higher for incarcerated populations than for the population as a whole. Access to HIV prevention and health care (including HIV treatment) in prisons is often minimal or non-existent.

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<sup>105</sup> These laws are available at: <http://www.ilo.org/aids/legislation/lang--en/index.htm>.

**R. Jürgens, M. Nowak and M. Day, “HIV and incarceration: Prisons and detention”, in *Journal of the International AIDS Society*, 14:26 (2011).**

“The high prevalence of HIV infection among prisoners and pre-trial detainees, combined with overcrowding and sub-standard living conditions, ... make prisons and other detention centres a high-risk environment for the transmission of HIV. Ultimately, this contributes to HIV epidemics in the communities to which prisoners return upon their release.”

Some countries have addressed the issue of prisons in their HIV legislation, providing for prevention measures and protecting the human rights of prisoners.

**Country: Republic of the Congo**

**Act No. 30-2011 of 3 June 2011 to combat HIV and AIDS and to provide for the protection of rights for people living with HIV, section 13(1):**

“The ministry in charge of justice should make available to prisoners condoms and other materials for sexual relations without risk, as well as adequate information on their use and their importance in preventing HIV infection and other sexually transmitted diseases.”

Prisons are also workplaces, and prison employees can benefit from HIV policies and programmes that reduce HIV-related discrimination and facilitate access to prevention, treatment, care and support services. For example, in 2010, the Ghana Prisons Service adopted an HIV/TB Workplace Policy covering its employees and prisoners.<sup>106</sup>

HIV-related stigma and discrimination are common in prison settings and many prisons across the world operate segregation policies for HIV-positive prisoners.

**Country: United States**

**Human Rights Watch/American Civil Liberties Union (ACLU), *Sentenced to stigma: Segregation of HIV-positive prisoners in Alabama and South Carolina* (2010).**

Upon entering the state prison system in Alabama and South Carolina, each prisoner must submit to a test for HIV. Those who test – or who are already known to be – HIV-positive are housed in separate prison accommodation. In Alabama and South Carolina most prisoners who test positive are required to wear an armband or badge to signify their HIV-positive status.

An Alabama Federal district court examined the policy of the Alabama Department of Corrections of segregating HIV-positive prisoners from the general

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<sup>106</sup> The policy incorporates the key principles of Recommendation No. 200 and is available at: [www.ilo.org/aids](http://www.ilo.org/aids).

prison population. The court held that the policy discriminated against prisoners on the basis of a disability (their HIV status), in violation of the Americans with Disabilities Act.<sup>107</sup>

National courts have also held that the State has an obligation to provide antiretroviral treatment to prisoners living with HIV.

**Country: Nigeria**

**Federal High Court of Nigeria, *Festus Odafe & Ors v. Attorney General of the Federal Republic of Nigeria*, Case No. FHC/PH/CS680/2003, Judgement of 23 February 2004 (published in AHRLR 205 (NgHC 2004))**

The High Court has held that the refusal to provide HIV-positive pre-trial prisoners with access to treatment violated their right to enjoy the highest attainable standard of physical and mental health as guaranteed under the African Charter. In the case at issue, a number of prisoners awaiting trial were diagnosed with HIV while in detention. They were segregated and denied medical treatment. Although the Nigerian Constitution does not provide for the right to health care, the Court nevertheless held that the State was obligated to provide for adequate medical treatment under the African Charter, which Nigeria had ratified. The Court noted the economic cost involved, but held that the State had the obligation to provide ARV treatment to prisoners regardless of the offence they had been charged with.

## Other key groups

### *Children and young persons*

Children and young persons are among the most vulnerable of all groups affected by HIV and AIDS. Accordingly, Recommendation No. 200 calls for special measures to be taken to safeguard both children and young workers (Paragraphs 35, 36 and 40).

#### *Child labour*

One of the most tragic aspects of the HIV epidemic is that it leaves the children of those who are incapacitated by HIV-related illnesses or who die from AIDS at particular risk. Such children often lose family members and others who care for them. In many cases, especially in high-prevalence countries and regions, the local community has been so devastated by HIV and AIDS that there is no one to take in these orphaned and abandoned children, who may be forced into the worst forms of child labour, including selling their bodies in order to survive.

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<sup>107</sup> Alabama District Court, Northern Division, *Henderson et al. v. Alabama Department of Corrections*, Case 2:11-cv-00224-MHT-WC, Judgement of 21 December 2012.

### *Young workers*

Recognizing that young persons may be placed in situations of higher risk, Recommendation No. 200 calls for measures to be taken to provide young persons with “objective sexual and reproductive health education, in particular the dissemination of information on HIV and AIDS through vocational training and in youth employment programmes and services” (Paragraph 36). While this approach may give rise to some controversy in certain cultures, it does address the needs of young workers who may be away from the family environment for the first time and are at greater risk of engaging in unprotected sexual behaviour, irrespective of whether that behaviour is voluntary or coerced.

In examining situations involving child labour or the work of young people, judges should be aware of the special provisions of Recommendation No. 200 and be cognizant of the possible implications involving HIV and AIDS.

### *Persons with disabilities*

Social and economic inequalities increase the vulnerabilities of persons with disabilities to HIV. Persons with disabilities are more likely to be unemployed than non-disabled persons. When they are employed, persons with disabilities often earn less than their non-disabled colleagues and are more likely to work in informal jobs. They may also incur extra expenses on account of their disability, for example, for care or assistive devices. As a result, they require more resources than non-disabled people to achieve the same outcomes.

#### **WHO/World Bank, *World report on disability* (Geneva, 2011), page 27:**

“Currently more than 15 per cent of the world’s population – roughly 650 million people – lives with a disability. Almost everyone will be temporarily or permanently impaired at some point in his or her life, and those persons who reach old age will experience increasing difficulty in certain areas of functioning.

Many people with disabilities do not have equal access to health services, education and employment opportunities and experience exclusion from many activities of daily life.”

While there is little research available, it is generally accepted that persons with disabilities have significant unmet needs in relation to reproductive and sexual health and rights. Disabled adolescents and adults, for instance, are more likely to be excluded from sex education programmes, and women with disabilities are less likely to be asked about contraceptive use during visits to general practitioners.

The ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), calls for effective measures to be taken at the international and national levels to promote the “full participation” of persons

with disabilities in social life. The United Nations Convention on the Rights of People with Disabilities (2006) is the most recent and comprehensive instrument that outlines the civil, cultural, political, social, and economic rights of persons with disabilities.

### **Domestic workers**

In recent years, the demand for domestic work has increased due to a number of factors: the growing participation of women in the labour force, coupled with the growing need for care services, the feminization of international migration, and the ageing of societies. Nevertheless, domestic work remains undervalued and poorly regulated. In particular, live-in female migrant domestic workers may be subjected to mistreatment. Sexual harassment and abuse are prevalent, which increase their HIV risk.<sup>108</sup>

In many countries, domestic work is largely performed by female child labourers, which increases the health risks of girls in general. The domestic work relationship is not covered under many national labour law frameworks, leaving domestic workers highly vulnerable to inequitable, unfair and often abusive treatment at the hands of their employers. Recognizing the need to improve their living and working conditions, the International Labour Conference adopted the Domestic Workers Convention (No. 189), and its accompanying Recommendation (No. 201) in 2011.

#### **Domestic Workers Recommendation, 2011 (No. 201), Paragraph 3:**

“In taking measures for the elimination of discrimination in respect of employment and occupation, Members should, consistent with international labour standards, among other things:

...

(c) ensure that no domestic worker is required to undertake HIV or pregnancy testing, or to disclose HIV or pregnancy status”

### **Migrant workers**

Migrant workers often work and live in precarious conditions, generally far from their families and culture. These are factors that call for special attention to protect them from stigma and discrimination, as well as to ensure their access to HIV-related services. For this reason, Recommendation No. 200 contains a number of provisions that explicitly refer to migrant workers (See Paragraphs 3(c), 25, 27, 28, 40 and 47).

International labour standards and United Nations Conventions establish that migrant workers should enjoy the same basic protections as other workers.

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<sup>108</sup> ILO, *Decent work for domestic workers*, Report IV(1), International Labour Conference, 99th Session (Geneva, 2010) pp. 5–8.

While their conditions of work and residence in their host countries may be subject to certain qualifications – for example, in the case of undocumented<sup>109</sup> migrant workers – they are nevertheless entitled to enjoy the same fundamental rights as other workers, including the right to health and to be free from discrimination.

These protections apply even when the States concerned have not ratified the ILO Migration for Employment Convention, 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), or the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). Migrant workers’ rights are also provided for under the widely ratified International Covenant on Economic, Social and Cultural Rights (1966).

**UNAIDS, *HIV-related restrictions on entry, stay and residence*, UNAIDS Human Rights and Law Team (Geneva, 2012, updated 1 January 2013)**

According to UNAIDS, as of 1 January 2013, 44 countries still required HIV testing for people seeking to enter their territory, whether as workers or in another capacity – although a number of countries are now abolishing this requirement.

Migrant workers are required to undergo HIV testing in many countries. While national requirements do not necessarily state this explicitly, the compulsory testing of migrant workers usually results in HIV-positive migrants being denied the right to be documented on the same basis as other workers. In many cases, access to migration for employment is the only opportunity for workers to earn an income if their home country is suffering from high rates of poverty and unemployment. Migration is often a survival strategy for the poor, and if HIV-positive persons are denied legal access to migration, they may attempt to migrate illegally.

Furthermore, denying migrant workers the opportunity to work means that they may have little or no access to prevention, care, treatment and support services, which are often available only in or through the workplace. This makes migrant workers more vulnerable to HIV infection and to developing AIDS and its symptoms, and denies them and their families’ access to income and livelihoods. These factors have been recognized by a number of countries, which have explicitly rejected the testing of migrants for employment – and in some cases they have removed previous restrictions.

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<sup>109</sup> Also referred to as “irregular” migrant workers.

**Country: Russian Federation**

**European Court of Human Rights, *Kiyutin v. Russia*, Application No. 2700/10, Judgement of 10 March 2011**

The Court held unanimously that the refusal of the Russian authorities to grant a residency permit to a national of Uzbekistan on the basis of his HIV-positive status was arbitrary and discriminatory. The Court found that the refusal constituted a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights (read in conjunction with Article 8 on the protection of home and family life).

The applicant, a national of Uzbekistan, had been living in Russia since 2003 and was married to a Russian national, with whom he had a child. Upon application for a residence permit, he underwent a medical examination and tested positive for HIV. His application was then refused on the basis of a legal provision precluding the issuance of residency permits to HIV-positive non-nationals.

In its ruling, the Court noted that people living with HIV represented a vulnerable group in society which had been discriminated against in many ways in the past. The Court observed that HIV-related travel restrictions were not imposed on tourists, short-term visitors or Russian nationals. It noted that the mere presence of an HIV-positive individual in the country did not constitute a threat to public health and that the selective imposition of HIV-related travel restrictions only on foreigners seeking residence was not justified. The Court found that the complainant had been a victim of discrimination on the basis of his health status in violation of Article 14, in conjunction with Article 8.

Migrant workers encounter other difficulties related to HIV and AIDS. They may be denied HIV-related prevention and education services, both pre-departure and in receiving countries. They may not be familiar with the language, culture and procedures of the receiving country, which makes it more difficult for them to access HIV-related information and services. In addition, undocumented migrant workers are generally unable to access public health services in countries in which they are working.

***Economic sectors at higher risk***

Many workers are also engaged in occupations that place them at a higher risk of HIV infection. For instance, health-care workers may be exposed to needles carrying infected blood. Other workers may have jobs requiring them to work in isolated and confined situations, or to live far from their families and in segregated employer-provided housing, such as seafarers, or workers in the mining and construction sectors. Mobile workers, such as long-distance truck drivers, are vulnerable, as they are frequently far from home for extended periods and may engage in unprotected sex with casual partners or seek the services of sex workers, a group at particular risk of HIV transmission.

## Discussion points

1. What groups would you consider to be particularly vulnerable or at risk of HIV infection in your country? What are the characteristics of these groups, and how would you recommend that their needs be addressed in law and practice?
2. Are migrants entering your country subject to compulsory HV testing? What would happen if it was determined that a prospective migrant was HIV-positive?
3. Does your national law or policy provide for protections against discrimination on the basis of sexual orientation and/or gender identity?



## Module 10: The role of judges and legal professionals

Judicial authorities and legal professionals play a crucial role in protecting the fundamental human rights – including labour rights – of persons living with or affected by HIV. National courts are entrusted with the effective implementation of existing legal protections, while legal professionals can play an essential role in advocating for the observance of existing legal frameworks.

They should also understand the reasons why the implementation of a legal and policy framework that promotes respect for human rights is an essential component of effective HIV responses. In addition, the more familiar judges and legal professionals are with the approach taken to HIV-related employment issues in other cases, including in other jurisdictions, the more effectively they can address similar issues when they encounter them

### **Labour judges and legal professionals in many countries:**

- are increasingly called upon to examine and rule on allegations of HIV-related stigma and discrimination in employment and occupation, as well as on alleged violations of associated rights, including breaches of privacy rights and entitlements to employment-related benefits;
- play a crucial role in ensuring the development and application of legislative protections against discrimination;
- support the establishment of an enabling legal environment that reinforces HIV prevention efforts and respect for the workplace rights of people living with or affected by HIV;
- contribute towards calling for legal reforms that provide protection from HIV-related stigma and discrimination; and
- ensure that legal protections are effectively applied in domestic settings.

The Universal Declaration of Human Rights recognizes the need to ensure effective mechanisms and remedies to uphold fundamental human rights.

### **Article 8 of the Universal Declaration of Human Rights states that:**

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Legislation can either support or hinder national HIV responses. When courts apply the law to safeguard the rights of those living with affected by HIV, it can help create a positive, non-discriminatory environment in employment settings. Such an environment encourages workers living with or affected by HIV to continue being productive members of their communities and safeguards their access to earned income and HIV-related services and benefits, including antiretroviral treatment. By contrast, the manner in which courts have handled cases of HIV-related employment discrimination has, on occasion, created precedent that could have the effect of perpetuating or compounding HIV-related discrimination.

**Country: Portugal**

**Supreme Court of Justice/ Supremo Tribunal de Justiça,  
*Mário Pereira v. Sociedade Hoteleira de BB, SA*, Case No. SJ20080924037934,  
Judgement of 24 September 2008**

In this case, the Court examined allegations of unfair dismissal. The complainant had been employed by a four-star hotel for a number of years as a cook in its restaurant. When he tested positive for HIV, he was dismissed. The Court concluded that the complainant could no longer work in the kitchen because he could pose a danger to his co-workers or to the clients of the hotel. The Court held that the dismissal did not constitute discrimination and that the termination was justified since the complainant's HIV status made performance of the employment contract impossible.

**Country: Greece**

**Hellenic Supreme Court/Areios Pagos, *Spyridoula Georgiou Karyotou v. X*,  
Case No. 676/2009, Judgement of 24 February 2009 (published 17 March 2009)**

The Court considered allegations of unfair dismissal brought by the complainant, who was dismissed after testing positive for HIV. The complainant's co-workers, once they learned of his HIV-positive status, demanded that management remove him from the workplace. A number of the co-workers signed a petition demanding that the complainant be removed. Ultimately, the employer ceded to the pressure placed upon her by her employees and dismissed the complainant. The Court held that this action did not constitute discrimination, but was justified in the circumstances, given the pressure the employer was under and the danger posed to the smooth operation of the enterprise by the complainant's continued presence.

The decision of the Hellenic Supreme Court was appealed to the European Court of Human Rights, which reversed the ruling in *I.B. v. Greece*, Application No. 552/10, Judgement of 3 October 2013. (See Module 6.)

## Conduct in the courtroom

In some instances, judges unfamiliar with the modes of HIV transmission have dealt with HIV in their own courtrooms in a stigmatizing manner. For example, in adjudicating a complaint involving the alleged termination of an employee on the basis of her HIV status, a court ordered that before the plaintiff could give testimony, she would be required to provide a medical report guaranteeing that she would not pass on the virus to the lawyers, judge and others attending the trial.<sup>110</sup>

## Implementing human rights at work for HIV-affected workers and their families

Over the more than three decades since the first case of AIDS was diagnosed, many countries have either enacted legislation protecting the human rights of people living with or affected by HIV, or have interpreted existing legislation to cover real or perceived HIV status as a prohibited ground of discrimination. Nevertheless in 2012, 61 per cent of countries reported the existence of anti-discrimination laws protecting people with HIV.<sup>111</sup> Even where such legislation exists, it is not always effectively enforced.

Recommendation No. 200 calls for countries to establish mechanisms and procedures that also ensure effective implementation.

### Paragraph 12 of Recommendation No. 200 states that:

“When existing measures against discrimination in the workplace are inadequate for effective protection against discrimination in relation to HIV and AIDS, Members should adapt these measures or put new ones in place, and provide for their effective and transparent implementation.”

There is an extensive body of HIV-related case law from a number of countries with high HIV prevalence. In such countries, conditions are conducive to seeking redress through the courts given that detailed legal and regulatory regimes addressing HIV have been developed in response to the epidemic. For example, South African legislation and policy in the area of HIV and AIDS are highly developed and integrate human rights principles, including the key principles of

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<sup>110</sup> J. Oziegbe, “Litigating HIV/AIDS-related cases – Festus Odafe & Ors v. Attorney General of the Federal Republic of Nigeria and Ors (2005)”, in *Interights Bulletin*, 2005, Vol. 15, No. 2, pp. 89–91, available at: <http://www.interights.org/document/47/index.html>.

<sup>111</sup> UNAIDS, *Global Report 2012*, op. cit., p. 80.

Recommendation No. 200 (see for example, the amended South African Code of Good Practice on HIV and AIDS and the World of Work, 2012).

In addition, redress through the judicial system has been facilitated by the existence of civil society organizations that have undertaken litigation as a method of influencing law or policy.<sup>112</sup> For example, trade unions, which are also civil society organizations, have been active in lobbying for the development and adoption of employment protections for HIV-affected workers and in disseminating information to workers to inform them of their labour rights and to support them in seeking to enforce those rights.

## Challenges to effective enforcement

It is not enough to develop and adopt legislation – there must also be implementation. International labour standards provide that implementation can be achieved through a number of different means, taking into account the circumstances of each individual member State.

### Paragraph 37 of Recommendation No. 200 states that:

- “National policies and programmes on HIV and AIDS and the world of work should:
- (a) be given effect, in consultation with the most representative organizations of employers and workers and other parties concerned, including relevant public and private occupational health structures, by one or a combination of the following means:
    - (i) national laws and regulations;
    - (ii) collective agreements;
    - (iii) national and workplace policies and programmes of action; and
    - (iv) sectoral strategies, with particular attention to sectors in which persons covered by this Recommendation are most at risk.”

There are numerous institutional challenges to the enforcement on HIV and AIDS and human rights. These may include: the reduced capacity of governments to enforce the provisions of legislative instruments or to fulfil human rights; inadequate legal provisions to meet the demands of those seeking recourse in the legal system; weak sanctions for non-compliance; lengthy litigation processes; and lack of awareness by the general public, particularly women, of their rights and the redress they might seek when their rights have been violated.

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<sup>112</sup> For example, the case *Bangladesh Society for the Enforcement of Human Rights v. Government of Bangladesh*, Judgement of 14 March 2001 (Published in *Dhaka Law Report*, Volume LIII, 2001, pp. 1–19) was brought by a group of 54 non-governmental organizations on behalf of a group of female sex workers forcibly evicted from their homes.

Before there can be effective enforcement, the general public must be aware of the anti-discrimination legislation in force in the country. Provision must also be made to establish easily accessible (and affordable) mechanisms and procedures to enforce laws on equality of opportunity and treatment in employment, so that persons who consider that their rights have been violated may take action to seek remedies for alleged violations. In order to promote the effective enforcement of human rights protections, the national labour administration and judicial authorities must also be aware of the basic factors involved, including common myths and misconceptions surrounding HIV that fuel stigma and discrimination in the workplace.

The ILO has examined the advantages and disadvantages of various enforcement bodies in the areas of gender and migration for work – and from the standpoint of good labour administration practices.<sup>113</sup> Tools have been developed for labour administration authorities in relation to HIV and AIDS, which provide detailed guidance on this issue.<sup>114</sup> The ILO supervisory bodies have also examined various non-discrimination monitoring systems, and noted a trend towards the quasi-jurisdictional functions of these bodies.<sup>115</sup> In most countries, the institutions set up to oversee equality laws are not the civil courts, although appeals to a civil court may be possible at the national level. However, their structure, as well as their investigatory and decision-making powers, may give them a status similar to that of courts. These equality bodies are often distinct from the labour courts as well, the latter having broader jurisdiction over any dispute concerning worker–employer relations.

## Engagement in the development of national policies on HIV and AIDS and the world of work

Judges and legal professionals can identify strengths and weaknesses in national laws and policies, especially when applied to an evolving situation such as the HIV epidemic. Legal reform is often, however, a lengthy and iterative process. When a situation such as the HIV epidemic evolves rapidly, the law may lag behind in meeting the needs of those affected.

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<sup>113</sup> See, for example: C. Thomas and R. Taylor, *Enforcement of equality provisions for women workers, an interdepartmental project*, Working Paper No. 20 (ILO, Geneva, 1994); I. McClure and M. Reischle, *Law and practice in combating discrimination against immigrant workers*, International Migration Branch Working Paper (ILO, Geneva, 2002); B. Lust (ed.), *Labour administration: A powerful agent of a policy of gender equality in employment and occupation*, Labour Administration Branch Working Paper No. 55–1 (ILO, Geneva, 1999).

<sup>114</sup> See the ILO website at <http://www.ilo.org/labadmin>.

<sup>115</sup> ILO, *Equality in employment and occupation*, op. cit., paras 225–234.

**Country: Kenya**

**High Court of Kenya, *P.A.O. & 2 others v. Attorney General*, Petition No. 409 of 2009, Judgement of 20 April 2012**

The petitioners argued that Kenya's Anti-Counterfeit Act, Act No. 13 of 2008, could have the effect of limiting their access to affordable and essential drugs and medicines, including generic medicines for HIV and AIDS, thereby putting their rights in jeopardy.

The Court said in its ruling that the Act "is vague and could undermine access to affordable generic medicines since [it] had failed to clearly distinguish between counterfeit and generic medicines". The Court called on Kenya's Parliament to review the Act and remove ambiguities that could result in arbitrary seizures of generic medicines under the pretext of fighting counterfeit drugs. The judgement also stated that intellectual property rights should not override the right to life and health.

In the early stages of the HIV epidemic, misinformation and fear led to many instances in which people were dismissed from their jobs on the pretext of protecting other workers and the public with whom they came into contact. As correct information on the modes of HIV transmission became more widely available, the courts in many countries were able to counter the effects of such fears by making decisions based on facts rather than misconceptions. This led to greater public awareness of HIV and AIDS and helped public policy-makers and legislatures make better decisions on how to handle the epidemic.

Existing legislation does not always specify that real or perceived HIV status is a prohibited ground for discrimination. Judges can apply existing laws to new situations, whenever the wording of the law so allows, or can make it clear that existing law does not allow them to apply protection to new categories of persons. This in turn highlights strengths and weaknesses in the laws and invites reform.

## **Catalysts for change**

Judges and legal professional can be agents for reform, and judicial precedents can have profound implications for social and policy change. For example, the High Court of Botswana embraced this proactive role in its landmark decision affirming women's right to equality in the context of property rights. In setting aside the lower court's decision applying customary law that prohibited women from inheriting family property and applying the equality provisions in the Botswana Constitution, the Court demonstrated that it could act as a catalyst in promoting social change.

**Country: Botswana**

**High Court of Botswana, *Mmusi and Others, v. Ramantele and Others***

**Case No. MAHLB-000836-10, Judgement of 12 October 2012**

In its ruling, the Court emphasized the essential function of national judicial authorities “to keep the law alive, in motion, and to make it progressive for the purposes of rendering justice to all” (para. 211).

## Influencing one’s local community

Judges and legal professionals are prominent people in their own communities. They may serve on boards of educational facilities, as patrons of charities, or simply be in demand for public speaking. By reflecting publicly on developing situations such as the spread of HIV and changing possibilities for its treatment, they can exercise a positive influence on public attitudes.

## Peer educators

Judges and legal professionals who are aware of developments in the field of HIV and AIDS can play a vital role in educating their peers who either have not yet been exposed to the epidemic in their professional lives, or who are more reluctant to apply a human rights approach to litigation dealing with it.

In most countries there are training institutions, which dispense either training for newly appointed judges and legal professionals or continuing training for judges and legal professionals. Participation in such training allows them to share their knowledge of HIV and AIDS issues that have arisen both in the national and international contexts.

## Discussion points

1. What is the role played by judicial authorities or legal professionals in your jurisdiction in establishing law and policy?
2. How can you contribute through your professional role to the HIV response in your country?
3. How can you promote change in your workplace, either in the courtroom or law office, through peer education?



## Module 11: Access to justice: mechanisms, procedures and remedies

Persons who seek redress for discrimination or other violations of their workplace rights often encounter a range of obstacles, both structural and procedural. The first barrier encountered by a potential plaintiff could simply be the absence of remedies under the national legal framework.

**United Nations General Assembly: *Implementation of the Declaration of Commitment on HIV/AIDS and the Political Declarations on HIV/AIDS: United to end AIDS: Achieving the targets of the 2011 Political Declaration, Report of the Secretary-General, A/66/757 (New York, 2 April 2012)***

**Paragraph 57:**

“... One in every three countries in 2010 reported not having laws in place prohibiting discrimination against people living with HIV. A growing number of countries have enacted unsound and counterproductive laws criminalizing HIV non-disclosure, exposure or transmission, with high-income countries leading in actual prosecutions under such laws.”

**Paragraph 59:**

“Consistent with commitments made in the 2011 Political Declaration on HIV and AIDS, countries should immediately review national legal and policy frameworks and, where indicated, enact strong anti-discrimination provisions and repeal or revise other laws that impede sound HIV responses. As only 51 per cent of countries had a legal aid system in place in 2010 for HIV-related cases, countries should strive to provide legal aid and invest in legal rights literacy programmes for people living with HIV and for key populations. Urgent efforts are also needed to sensitize judicial personnel and law enforcement officials.”

Where remedies exist, there may be little public awareness of their existence. It is relevant to establish whether workers have a high – or low – awareness of their labour rights. If complaints of HIV-related discrimination are not brought before the courts, this does not necessarily indicate the absence of discrimination. It may

simply indicate a low awareness among workers that they have a means of recourse if their labour rights are violated. A very small number of complaints – or even their total absence – may be an indicator that complaint procedures are not sufficiently accessible or that they are not being used due to other factors that should be identified and addressed.

The second issue is whether existing remedies are in fact accessible in practice. Judges and legal professionals should consider whether there are easily accessible mechanisms and procedures in place to examine complaints of HIV-related employment discrimination.

Recommendation No. 200 provides that member States should establish effective and transparent mechanisms to implement protections against discrimination. These mechanisms may take different forms, and countries may have more than one avenue of redress in place. Regardless of the specific procedures and mechanisms available, courts should consider whether these are accessible in practice and meet the needs of the populations they are intended to serve.

The mechanisms that are available to examine cases of HIV-related discrimination vary. Some countries have provided for HIV-specific grievance mechanisms and procedures. For example, section 25 of Kenya's HIV and AIDS Prevention and Control Act (No. 14 of 2006) establishes a mechanism focused on HIV-related issues: the HIV and AIDS Tribunal. A number of countries, such as Sweden, have established an "Equality Ombudsperson" to ensure implementation of existing legal protections (see Act No. 568 of 5 June 2008 concerning the Equality Ombudsperson). Other countries have established different bodies competent to examine complaints of HIV-related discrimination. The Ethiopian National Human Rights Commission, for instance, has competence to review cases of discrimination, including on the basis of HIV status.

Paragraph 29 of Recommendation No. 200 also envisages the establishment of informal mechanisms and procedures, calling on member States to put in place easily accessible dispute resolution procedures to ensure redress for workers in the event that their rights are violated.

As the CEACR observed in its 2012 General Survey, facilitating access to mechanisms and procedures to address employment discrimination remains a challenge. Obstacles that deter people living with or affected by HIV from bringing a formal complaint of discrimination include: cost, protracted delays, difficulties in meeting the burden of proof, and fear of victimization.<sup>116</sup>

In addition, structural obstacles, such as lack of physical access to available mechanisms, may constitute significant barriers. This is the case in countries where

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<sup>116</sup> ILO, *Giving globalization a human face*, op. cit., para. 884.

dispute resolution bodies mandated to examine cases of HIV-related discrimination are found only in the capital city, far from rural areas.<sup>117</sup>

The expense involved in bringing a complaint of discrimination is often a major deterrent for workers. Where a worker has lost his or her job due to HIV-related discrimination, the cost of bringing legal proceedings may well be prohibitive. In addition, as has been noted, people belonging to key affected populations are also those most vulnerable to HIV and may be subjected to discrimination on multiple grounds. This also means, among other things, that they may have sparse financial resources to bring legal action. It is therefore important as a matter of public policy to provide or facilitate access to free or inexpensive legal assistance to persons who may have suffered HIV-related discrimination, with a view to facilitating their access to justice.

Another obstacle for an HIV-positive complainant may be the protracted period of time that formal complaints may take to make their way through the judicial system – a process that may take years.<sup>118</sup> Where a person has been subjected to discrimination because of his or her HIV status and has developed an HIV-related illness, including AIDS, lengthy delays may mean that the victim will not survive to see the final outcome of the case.

### Country: France

#### European Court of Human Rights, *X. v. France*, Application No. 18020/91, Judgement of 31 March 1992

The applicant, a haemophiliac, had undergone several blood transfusions between September 1984 and January 1985. On 21 June 1985 it was discovered that he was HIV-positive. Together with a large number of other haemophiliacs affected, the applicant sought compensation from the State. In pleadings filed during the proceedings, he emphasized the urgency of his case in the light of his HIV status. On 19 February 1991, he lodged his application with the European Commission on Human Rights, alleging that his case had not been heard within a reasonable time as required under Article 6, paragraph 1 of the European Human Rights Convention. The applicant died on 2 February 1992.

The European Court of Human Rights, to whom the Commission had referred the matter, noted the urgent circumstances and the “risk that any delay might render the question to be resolved by the court devoid of purpose”. The Court concluded that exceptional diligence was called for in the circumstances and held that there had been a violation of Article 6, paragraph 1 of the Convention.

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<sup>117</sup> Ibid.

<sup>118</sup> For example, in the South African Labour Court’s case *Gary Shane Allpass v. Mooikloof Estates (Pty) Ltd.*, Case No. JS178/09, the complainant was terminated in November 2008 and the court decision concluding that the termination was discriminatory was handed down on 16 February 2011, more than two years later.

**Country: El Salvador**

**Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez and Others v. El Salvador*, Case No. 12.249, Report No. 27/09 of 20 March 2009**

In a petition filed by an HIV-positive applicant regarding the right to treatment on his own behalf and that of persons in the same situation, the Commission noted that the fundamental right to simple and prompt recourse “is one of the basic pillars, not only of the American Convention, but also of the rule of law itself in a democratic society”. Noting the complainant’s state of health and his demand for access to treatment, the Commission concluded that the effectiveness of the remedy was “inextricably linked to promptness”.

Courts should therefore, where appropriate, consider putting in place special fast-track procedures in HIV and AIDS-related proceedings.

## Burden of proof

The issue of burden of proof presents particular difficulties in HIV-related employment litigation. Placing the burden of proof on the worker in a discrimination case may present an insurmountable obstacle, particularly when the information and documentation necessary to establish a prima facie case of discrimination are in the hands of the employer, as in cases of denial of access to employment.<sup>119</sup>

Recognizing this difficulty, international labour standards relating to termination of employment, protection of workers’ representatives and protection of maternity, place the burden of proof on the employer.

**Termination of Employment Convention, 1982 (No. 158), Article 9(2):**

“... (2) In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation refer to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer:
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.”

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<sup>119</sup> ILO, *Giving globalization a human face*, op. cit., para. 885; see also: J. Hodges, *Guidelines on addressing HIV/AIDS in the workplace through employment and labour law*, op. cit., pp. 50–51.

**Workers' Representatives Recommendation, 1971 (No. 143), Paragraph 6:**

“(1) Where there are not sufficient relevant protective measures applicable to workers in general, specific measures should be taken to ensure effective protection of workers' representatives.

(2) These might include such measures as the following:

....

(e) provision for laying upon the employer, in the case of any alleged discriminatory dismissal or unfavourable change in the conditions of employment of a workers' representative, the burden of proving that such action was justified;...”

**Maternity Protection Convention, 2000 (No. 183), Article 8:**

“(1) It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.”

For example, an individual may lodge a formal complaint of discrimination alleging that he or she was not hired or was terminated on account of his or her HIV-positive status or association with an HIV-positive spouse or family member. The complainant may, however, be unable to establish that there was any discrimination, simply because he or she has no access to information that is under the employer's control. In many countries, the initial burden of proof lies on the complainant to establish a *prima facie* case of discrimination, and the defendant employer may not be required to produce evidence of non-discriminatory motives for his or her actions. Placing the burden of proof on complainants in other types of cases raises similar difficulties, as the following case illustrates:

**Country: Namibia**

**High Court of Namibia, *LM, MI, NH v. the Government*,  
Case Nos I 1603/2008, I 3518/2008 and I 3007/2008, Judgement  
of 30 July 2012, paragraphs 83 and 84:**

“83. In respect of the second claim the plaintiffs allege that the sterilisation procedures were performed on them because of their HIV status and that this resulted in an unlawful practice of impermissible discrimination against them. Since the plaintiffs claim that they were sterilised because they were HIV positive I am of the



view that the *onus* is on them to prove this to be the case on a preponderance of probabilities.

84. I am of the view that there is no credible and convincing evidence that the sterilisation procedures had been performed on the plaintiffs due to the fact that they are HIV positive. The second claim stands accordingly to be dismissed.”

Acknowledging these difficulties, some countries have provided for a shifting burden of proof. For example, in a case alleging discriminatory failure to hire, the burden of proof will shift to the employer to show that there were other reasons for rejecting the candidate – once the complainant has produced plausible or prima facie evidence of discrimination. In Switzerland, section 6 of the Federal Act on equality between women and men, which came into force in mid-1996, provides for the presumption of alleged discrimination “as long as the person invoking the procedure makes a plausible case”. The CEACR has stated that allocating the burden of proof in this way may be a helpful tool to correct a situation that could otherwise result in inequality.<sup>120</sup>

A number of European countries, such as France, Germany and Italy, have adopted provisions for shifting the burden of proof to the employer in cases of employment discrimination, based on European Directives.

## European Union

### European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Official Journal L 180, 19/07/2000 P. 0022 – 0026*), Article 8:

#### “Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.”

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<sup>120</sup> ILO, *Equality in employment and occupation*, op. cit., para. 231; see also ILO, *Giving globalization a human face*, op. cit., para. 885.

## European Union

### European Union, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (*Official Journal*, L 204/23, 26 June 2006), Article 19:

“1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.”

The United States Supreme Court handed down a landmark ruling in 1973 on the issue of the burden of proof and the order in which evidence should be presented in cases of employment discrimination under federal law.<sup>121</sup> The *McDonnell Douglas* case involved a claim of racial discrimination brought under Title VII of the Civil Rights Act of 1964. The ruling established the framework for a shifting burden of proof to be applied in adjudicating employment discrimination claims that are based on indirect or circumstantial evidence of discriminatory intent.

## Country: United States

### United States Supreme Court, *McDonnell Douglas Corp. v. Green*, Case No. 72-490, Judgement of 14 May 1973 (411 U.S. 792 (1973))

“The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.(..) In the instant case, we agree with the Court of Appeals that respondent proved a *prima facie* case. 463 F.2d 337, 363.



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<sup>121</sup> Title VII of the Civil Rights Act of 1964 is a federal law in the United States that prohibits discrimination in employment on the basis of a number of specified grounds, including race, colour, religion, sex and national origin. Following the ruling in *McDonnell Douglas*, the Civil Rights Act of 1991 (Pub. L. 102-166) amended sections of Title VII.

Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not dispute respondent's qualifications, and acknowledges that his past work performance in petitioner's employ was "satisfactory." (...)

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage, and to meet respondent's *prima facie* case of discrimination."

National courts have ruled on the issue of burden of proof in cases involving allegations of HIV-related discrimination in employment. The Brazilian Federal Superior Labour Tribunal has held that, where the employer knows of the worker's HIV status, the burden rests on the employer to show that his or her decision to dismiss the worker was not discriminatory.

**Country: Brazil**

**Federal Superior Labour Tribunal/Tribunal Superior do Trabalho (TST), *Adriana Ricardo da Rosa v. Sociedade de Ônibus Porto Alegre LTDA – SOPAL*, Case No. TST-RR-104900-64.2002.5.04.0022, Judgement of 3 August 2011 (published 2 September 2011)**

In 2011, the Brazilian Federal Superior Labour Tribunal, basing itself on ILO Convention No. 111 and the related CEACR comments, held that the respondent employer – not the complainant – has the duty of proving that the dismissal was not due to the complainant's HIV status.

## Protection from victimization

A complainant may be deterred from bringing a complaint of employment discrimination due to fear of negative consequences. For example, a worker may be afraid of public disclosure of his or her HIV status, especially if the case is likely to be publicized in the media. The worker may also be anxious about the negative publicity or negative reactions from family, friends and the community that might arise from such a disclosure. Fear of retaliation by an employer against both the worker and witnesses is another significant deterrent. These fears, which may prove well-founded, must be addressed effectively and transparently by national courts and other dispute resolution bodies so that they do not impede the effective application of anti-discrimination legislation.

Judges can address these concerns by ensuring that complaints are dealt with in a manner that protects the privacy interests of those who come before them. All parties and witnesses should be cautioned to respect the confidentiality of the proceedings. Courts can also take measures, such as issuing name suppression orders to safeguard the privacy of the parties and ordering that certain evidence be inspected during *in camera* proceedings.

Some countries have also included explicit provisions in their national legislation guaranteeing the right to legal assistance, as well as to judicial mechanisms and procedures, to ensure that persons living with or affected by HIV or AIDS have access to justice.

**Country: Mozambique**

**Act No.12/2009 of 12 March 2009 establishing the rights and obligations of persons living with HIV and AIDS and adopting necessary measures for prevention, protection and treatment/Lei n° 12/2009: Estabelece os direitos e deveres da pessoa vivendo com HIV e SIDA, e adota medidas necessárias para a prevenção, protecção e tratamento da mesma, section 44:**

“(1) The State guarantees the right to legal assistance and judicial procedures for persons living with HIV and AIDS or their representatives.

(2) Non-governmental organizations and other similar social entities engaged in prevention and in combating HIV and AIDS may provide legal support to persons living with HIV and AIDS or their representatives.”

Where mechanisms exist, legislation may make provision for accommodating the specific needs of a party living with or affected by HIV or AIDS, as well as witnesses that may be present in the courtroom. Kenya’s national law provides an example:

**Country: Kenya**

**HIV and AIDS Prevention and Control Act No. 14 of 2006**

**Section 27: Powers of the Tribunal**

“(1) On the hearing of a complaint or an appeal made pursuant to section 26, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

(2) Where the Tribunal considers it desirable for the purpose of minimizing expense or avoiding delay or for any other special reason, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.



(3) In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of the matter before it, notwithstanding that the evidence would not otherwise be admissible under the Evidence Act.”

## Special measures to protect privacy rights

A complainant may be significantly concerned about unwanted publicity, if he or she brings a case alleging discrimination on the basis of HIV status. Many individuals might be afraid to claim their rights if this would involve exposing themselves to criticism or stigmatization from co-workers, members of their family or local community. For this reason, special procedures should be put in place and utilized to help protect the privacy rights of HIV-positive complainants, such as name suppression orders that would prevent a complainant’s full name from appearing on court records.

In addition, the parties to the case, as well as any witnesses who might be called to appear on either side of the case, should be cautioned to maintain confidentiality of the proceedings, and protection against retaliation against the complainant or witnesses should be guaranteed.

### Country: South Africa

#### **High Court of South Africa, *South African Security Forces Union (SASFU) v. Surgeon General*, Case No. 18683/07, Judgement of 16 May 2008, page 4:**

“The names of the individuals mentioned in a) above are not to be disclosed or publicised in any manner or form by the registrar, the respondents or any other person or entity.”

## Effective remedies and sanctions

The CEACR has consistently highlighted the importance of ensuring adequate remedies and sanctions in cases of employment discrimination. Victims of discrimination should benefit from suitable remedies, which should also have a deterrent effect upon those who may consider engaging in discriminatory practices. It should be borne in mind that by instituting such procedures, a worker is taking both material and moral risks. Legislation might, for instance, include protective provisions; but if it allows employers, in practice, to terminate the employment of a worker who has been the victim of discrimination, by stipulating that they must merely pay compensation, this does not always constitute sufficient protection. In addition, to ensure that an appeals procedure in the case

of discrimination is effective, it is equally important that the matter be dealt with quickly, so as to prevent a potentially unlawful situation from continuing – with the possible irremediable and negative consequences this might have. The CEACR has noted that, in the context of protection against victimization, where a worker has been dismissed for lodging a complaint, an appropriate remedy could include reinstatement.

Reinstatement may, however, not be an appropriate remedy in cases of HIV-related discrimination, where a worker may prefer not to return – or may simply be incapable of returning – to a hostile working environment. Appropriate remedies in the event of denial of access to employment or unjustified dismissal could include compensatory damages, including lost earnings, as well as moral or punitive damages, where envisaged under the law.

In HIV-related employment discrimination cases, remedies awarded by national courts have included instructing employers to develop and implement workplace policies on HIV and AIDS to raise awareness among workers and eliminate stigma and discrimination.<sup>122</sup> In addition, where a worker's privacy rights have been violated, courts have taken action to provide redress and deter employers and other third parties from breaching confidentiality. For example, in a case brought before the Constitutional Court of Colombia (*XX v. Gun Club Corporation et al.*, Case No. SU-256/96, Judgement of 30 May 1996), the Court noted that the employer's physician had disclosed the employee's HIV status to the employer, resulting in the employee's termination. As part of its order finding that the termination was discriminatory, the Court ordered that a copy of its judgement be conveyed to the medical ethics board for consideration of the physician's conduct.

## Discussion points

1. If discrimination against HIV-positive persons is prohibited by law:
  - a. what are the appropriate remedies when a person is fired from his or her job due to HIV status?
  - b. what are the appropriate penalties for refusal to engage a person who is HIV-positive?
3. What structural or procedural obstacles do you consider exist in your jurisdiction that may impede access to justice for persons living with or affected by HIV and AIDS?
4. Are there special practices or procedures that have been applied in your jurisdiction to facilitate access to justice for persons in cases alleging HIV-related discrimination?

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<sup>122</sup> See Canadian Human Rights Tribunal/Tribunal canadien des droits de la personne: *Fontaine v. Canadian Pacific Ltd.*, Case No. TD 14/89, Judgement of 26 September 1989.



## Module 12: Sample training agenda and learning activities

This section and the accompanying CD bring together learning activities and exercises that can be adapted to make up a workshop or seminar of varying durations. A sample three-day programme is provided that can serve as a basis for a training of trainers programme or be adapted for shorter presentations. These are only examples, and facilitators are encouraged to tailor these ideas to the time available and to the needs and interests of their target audiences.

### General instructions for facilitators/trainers

If you are a facilitator delivering some or all of the sample modules, it may be useful to keep in mind a few general principles:

- Learners generally retain a limited amount of the material presented at any given session. Therefore, short focused presentations with clear messages will have a more lasting impact and can be reinforced by the resource material contained in the Handbook and Appendices.
- A key principle essential to adult learning is participation. The more participants are encouraged to ask questions, seek clarification and share their experiences, as well as participating actively in group activities and presenting results and conclusions of group work, the more they will internalize and retain the essential elements of the training.
- It is helpful to remain open and flexible in facilitating the modules so that participants' examples and experiences can be included. Some participants may have a great deal of experience in the areas addressed. Use this experience to the best advantage by encouraging such participants to share their experiences. Be ready to adapt some aspects of the course to meet the needs and interests expressed by participants as the course progresses.
- Even in larger groups and plenary sessions there can be active learning. Prepare questions to ask at regular intervals, stop and check that participants are keeping up with the information presented, and invite comments.
- A plenary can also be broken up for short sessions of group work. Simply breaking up into pairs for a few minutes can be a very effective way of keeping

the whole group involved. If arrangements can be made for the participants to be sitting in groups of six to eight around a table, this is also conducive to informal group work, even during a plenary.

## **Suggested agenda for a three-day workshop**

The learning activities and exercises suggested below are available on the accompanying CD. These may be printed out and used as individual handouts.

### **DAY ONE: HIV and AIDS – An issue for judges and legal professionals**

#### ***Opening: Welcoming remarks***

Appropriate speakers for the opening session could be selected from the national judiciary authority, national AIDS authority, ministries of labour, health or justice, the Attorney General's Office, other national human rights and/or equal opportunity bodies and organizations of employers and workers and UN agencies (ILO, UNAIDS). Persons living with HIV should be included, either in the opening session or following the presentation on Modes of HIV transmission.

#### ***Presentation of workshop objectives***

Explain the aims of the workshop, which include:

- familiarizing judges and legal professionals with the realities of HIV and the modes of transmission
- reviewing international and regional human rights instruments relevant to HIV and AIDS
- exploring how courts can use and have used international law in handling HIV-related cases

*Introduction exercise: Activity No. 1*

#### **BREAK**

*Test your knowledge about HIV and AIDS: Activity No. 2 (Handout)*

#### ***Presentation on the modes of HIV transmission***

This presentation could be based on Module 1 of the Handbook. It could also be supplemented by an overview of the status of the epidemic by an expert, possibly from the Ministry of Health or national AIDS authority, as appropriate. The questions at the end of Module 1 can be used to facilitate group discussion.

### **General discussion**

#### **LUNCH**

*Group activity: Case study No. 1 (Handout)*

This case study could be used to stimulate group discussion around workplace discrimination and to prepare the ground for the presentation and activities that follow during the afternoon.

#### **BREAK**

### ***Presentation on discrimination against people living with HIV***

This session would provide examples of stigma and discrimination encountered by people living with or affected by HIV and/or AIDS in different settings, including in access to health services, education and housing, with a focus on discrimination in employment and occupation.

In providing examples, the facilitators could select a number of the court cases summarized in Modules 6 through 8 to illustrate different aspects of discrimination in employment and occupation.

*Group activity: Case study No. 2 (Handout) or Activity No. 3*

## **DAY TWO: Applying key human rights principles – the legal and policy framework**

*Recap of Day one and objectives for Day two (10–15 minutes)*

Ask two or three participants to summarize the main elements covered during Day one. The trainers could then present a brief statement of the objectives for the second day of the workshop.

### ***Presentation on international and regional instruments relevant to HIV***

This session would provide an overview of international and regional human rights instruments applicable to HIV and how they have been used by national courts. This session could be based on Modules 2 and 3 of the Handbook and use the questions at the end of each Module to facilitate group discussion.

### **General discussion**

### ***Presentation on the ILO and international labour standards***

This session would provide an overview of the ILO structure, international labour standards and supervisory mechanisms. This session could be based on Module 4 of the Handbook and use the questions at the end of the Module to facilitate group discussion.

## ***General discussion***

### **BREAK**

#### ***Presentation of the key principles of Recommendation No. 200***

This session would provide an overview of the key principles of the Recommendation. It could also address the ILO code of practice. The distinction should be made between the Recommendation as an international labour standard and the code as a set of voluntary guidelines developed by a group of tripartite experts. Other Conventions could be addressed in this presentation, as appropriate, but should cover at a minimum ILO Conventions Nos 111, 156 and 158 (see List of relevant ILO instruments at Appendix 2 on the accompanying CD). This session could be based on Modules 4 and 5 of the Handbook and use the questions at the end of the modules.

*General discussion on how real or perceived HIV status is protected under national laws and policies*

### **LUNCH**

#### ***Presentation on gender equality***

A presentation on gender equality issues and their relevance to HIV could be based on the examples provided in Module 8, and the questions at the end of the module could be used to facilitate group discussion.

As an alternative, or in addition to the presentation, a panel session activity on gender equality could be held. Pre-select a small group of two to four participants, seeking to have an equal number of men and women on the panel, if possible. Ask each panel member to prepare a short (5–10 minutes) presentation on the measures taken in their jurisdiction under both national and international law to promote gender equality in employment and other settings.

*Group activity: Case study No. 3 (Handout) or Activity No. 4*

### **BREAK**

#### ***Presentation on key groups***

A presentation on key groups vulnerable to or at higher risk of HIV could be prepared on the basis of the material and examples provided in Module 9. Trainers may wish to stimulate discussion around key groups in national epidemics by providing extracts from documents identifying the key groups in the participants' countries. For example, relevant information can be found in the periodic reports submitted by countries under the UN Declaration of Commitment on HIV/AIDS (2001) and in national AIDS strategies. The discussion could be based on the questions at the end of Module 9.

***General discussion***

**DAY THREE: Using the law in support of the HIV response**

*Recap of Day two and objectives for Day three (10–15 minutes)*

Ask two or three participants to summarize the main elements covered during Day two. The trainers could then present a brief statement of the objectives for the third day of the workshop.

***Presentation on procedural issues: Courtroom safeguards***

A presentation on procedural measures to protect the rights of persons living with or affected by HIV could be prepared on the basis of the material and examples provided in Module 10.

***Group discussion***

**BREAK**

*Group activity: Case study No. 4 (Handout)*

**LUNCH**

***Presentation of the role of judges and legal professionals in HIV responses***

A presentation on the role of judges and legal professionals could be prepared on the basis of the material and examples provided in Module 10, followed by a smaller group activity around action planning.

*Group activity: Activity No. 3 (Handout)*

**BREAK**

*Wrap-up and closing remarks*

**End of workshop**



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