SALC Litigation Manual Series

Protecting Rights: Litigating Cases of HIV Testing and Confidentiality of Status

SOUTHERN AFRICA LITIGATION CENTRE

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About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, including, as appropriate, providing legal research and drafting, training and mentoring, and monetary support. While SALC aims primarily to provide support on a specific case-by-case basis, its objectives also include the provision of training and the facilitation of legal networks within the region.

Since 2007, SALC's HIV Programme has focused on strengthening the rights of people living with and affected by HIV in southern Africa through supporting public interest cases in domestic courts. The HIV Programme provides technical and monetary support to public and private lawyers, civil society organisations, and community-based organisations to use the law to achieve concrete policy and legal outcomes that advance and solidify the rights of those infected with and affected by HIV in southern Africa.

Authorship and Acknowledgement

This manual was written and researched by Kitty Grant and Anneke Meerkotter, consultants with SALC, with input from Priti Patel, SALC's deputy director and HIV programme manager. It was edited by Priti Patel. Katie Flannery, SALC intern, provided invaluable research, editing and fact-checking assistance. The manual was reviewed by Nyasha Chingore-Munazvo and Melody Kozah, project lawyers with SALC and Anneke Meerkotter. Melissa Chastang, SALC intern, assisted in fact-checking. Lorraine Kearney copy-edited the manual. It was designed by Limeblue Design.

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Southern Africa Litigation Centre

Second Floor, President Place
1 Hood Avenue, Rosebank
Johannesburg, South Africa 2196
info@salc.org.za
www.southernafricalitigationcentre.org

For hard and electronic copies of the manual, please contact the Southern Africa Litigation Centre.

List of Acronyms and Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
African Court	African Court on Human and Peoples' Rights
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CITC	Client-initiated HIV testing and counselling
HAART	Highly active antiretroviral therapy
HRC	Human Rights Committee
HTC	Voluntary HIV testing and counselling
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
OHCHR	Office of the High Commissioner for Human Rights
PITC	Provider-initiated HIV testing and counselling
Protocol on Women	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
WHO	World Health Organization

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CHAPTER 1

Background

1.1 Purpose and scope of this manual

The UNAIDS Global Report on the AIDS Epidemic reports that in 2009 over one-third of all people living with HIV resided in 10 countries in southern Africa, namely Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.[1] Approximately 40% of all adult women with HIV live in southern Africa,[2] and Swaziland is estimated to have the highest adult HIV prevalence in the world at 25.9%.[3]

However, recent population-based health surveys indicate that less than 40% of people living with HIV know their HIV status.[4] Access to voluntary HIV testing and counselling (HTC) services, whether client or provider-initiated, remains one of the most important global strategies for preventing HIV and for supporting early diagnosis and referral for treatment, care and support.[5] The World Health Organisation (WHO) Global Health Sector Strategy on HIV/AIDS 2011-2015 recommends that countries "rapidly expand access to diversified HIV testing and counselling services" that are voluntary, confidential and accompanied by appropriate counselling as part of an effective strategy to address HIV.[6]

In reality, people living with and affected by HIV across southern Africa face numerous barriers in effectively exercising their health-related human rights. For example, persons with HIV often face stigma, discrimination and violations of their right to voluntary HIV testing and counselling and their right to confidentiality in their interactions with health care services, social welfare services, employers, insurers and even within their own communities and families.[7] Laws, policies and practices in a number of countries give rise

[1] UNAIDS, *Sub-Saharan Africa* 1, 2 (2010), *available at* http://www.unaids.org/documents/20101123_FS_SSA_em_en.pdf.

[2] UNAIDS, Report on the Global AIDS Epidemic 28 (2010), *available at* http://www.unaids.org/globalreport/global_report.htm.

[3] UNAIDS, *supra* note 1.

[4] WHO, Global Health Sector Strategy on HIV/AIDS 2011-2015 11 (2011), *available at* http://whqlibdoc.who.int/publications/2011/9789241501651_eng.pdf.

[5] *Id.* at 13.

[6] *Id.*

[7] AIDS & Rights Alliance for Southern Africa (ARASA), HIV/AIDS & Human Rights in Southern Africa 2 (2009), *available at* http://arasa.info/sites/default/files/ARASA%20Human%20Rights%20Report%202009.pdf.

to various forms of unlawful HIV testing as well as unlawful disclosures of a person's HIV status. These practices violate fundamental rights, such as the rights to equality, non-discrimination, freedom and security of the person and privacy. In addition, evidence shows that these practices engender fear in people living with HIV, exacerbate stigma and self-stigma and discourage people from using existing health care services.[8]

This publication focuses on litigation relating to unlawful HIV testing and unlawful disclosure of a person's HIV status. The manual seeks to be a resource for private and public lawyers in southern Africa who are litigating cases in domestic courts that challenge laws, policies and practices around unlawful HIV testing and breaches of confidentiality. It may also be useful to civil society organisations seeking to use litigation as part of an advocacy strategy to promote and protect the rights of people living with and affected by HIV. It aims to provide concrete legal arguments for use in litigation before domestic courts.

Domestic lawyers will be familiar with the laws of their respective jurisdiction. However, they may fail to use international, regional and comparative jurisprudence to support and bolster their arguments before domestic courts. This is often due to the lack of awareness of international, regional and comparative law and a misconception that they are not useful in domestic litigation. This manual attempts to address these issues in the hopes that more private and public lawyers will utilise international, regional and comparative law in domestic litigation.

The manual starts by outlining arguments a lawyer can make for why domestic courts should look to international, regional and comparative law in its deliberations. It then discusses the international and regional law relevant to litigating cases of unlawful HIV testing and unlawful disclosures of a person's HIV status. The international and regional law sections are organised according to specific rights. This is to provide lawyers easy access to needed information as they are drafting arguments based on particular rights. The manual also discusses comparative jurisprudence from countries where courts have addressed cases of unlawful HIV testing and breaches of confidentiality. Finally, it outlines legal and factual responses to justifications that have routinely been offered in cases of unlawful HIV testing and breaches of confidentiality. The manual does not discuss in detail domestic constitutional or legislative frameworks.

Most of the sections start with a list of important documents and cases discussed in each respective chapter. In addition, two of the sections start with a checklist aimed at guiding lawyers in constructing arguments to support their cases before domestic courts. In addition, each section is extensively referenced. The aim is to provide lawyers with the relevant authoritative sources to strengthen legal arguments before domestic courts. Finally, the manual includes a list of useful online resources for lawyers.

[8] United Nations Dev. Programme, Global Comm'n on HIV & the Law, Rights, Risks & Health 7 & 42 (2012), *available at* http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf.

1.2 Unlawful HIV testing in public and private settings

An HIV test, like other medical procedures, should only be conducted with the voluntary and informed consent of the individual. Unlawful HIV testing primarily occurs when informed consent is not obtained. This can occur in a number of circumstances, such as where the patient is not given full information related to the test, including failure to provide pre- and post-test counselling; where the patient is not informed of the fact that the test is taking place; or where consent is obtained through coercion, such as when a required medical procedure is predicated on consent for HIV testing or where HIV testing is a condition for employment.

Defining informed consent

As may be evident from the phrase, there are two elements to informed consent: *knowledge/information* and *consent*. Neither element on its own is sufficient to satisfy the legal requirement of informed consent. A medical procedure like an HIV test[9] may only be lawfully performed under normal circumstances on an individual who has been fully informed of all relevant *information*, *understands* the information and has *freely agreed* to undergo the procedure. Consent is only present if it is provided freely, without undue influence, coercion, fraud, misrepresentation or mistake.[10]

In order for an individual to give free and informed consent to a medical procedure, information about the purpose, material risks and benefits and alternative options (including non-treatment) must be provided in a way that is understandable to him or her. The World Health Organisation (WHO) explains that "information must be communicated to the patient in a way appropriate to the latter's capacity for understanding, minimising the use of unfamiliar technical terminology. If the patient does not speak the common language, some form of interpreting should be available."[11]

The UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (UN Special Rapporteur on the Right to Health) has stressed that informed consent is not passive acceptance that a procedure is going to take place, but a "voluntary and sufficiently informed decision" that protects the patient's right to be involved in decisions about his or her own health and body.[12] The patient's judgment is decisive. As South Africa's High Court

[9] The South African Pretoria High Court (now the North Gauteng High Court) understood an HIV test to be a medical procedure in *C v Minister of Correctional Services*, 1996 (4) SA 292 (T) (S. Afr.).

[10] Dieter Giesen, International Medical Malpractice Law: a comparative law study of civil liability arising from medical care 252 (1988).

[11] WHO, *A Declaration on the Promotion of Patients' Rights in Europe* at art. 2.4, ICP/HLE 121 (June 28, 1994), *available at* http://www.who.int/genomics/public/eu_declaration1994.pdf.

[12] Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Rep. to the General Assembly (Main Focus: Right to Health and Informed Consent), para. 9, U.N. Doc. A/64/272 (Aug. 10, 2009) [*hereinafter* Rep. of the Special Rapp. on Health: Informed Consent (2009)], *available at* http://www.ohchr.org/EN/Issues/Health/Pages/AnnualReports.aspx.

stated: "It is, in principle, wholly irrelevant that [the patient's] attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment."[13]

Unlawful HIV testing can occur in a variety of settings, both public and private. Common forms of HIV testing without consent which have been reported in southern Africa[14] include the following:

- HIV testing within the armed forces in order to exclude people living with HIV from recruitment, employment or deployment.
- HIV testing of alleged sexual offenders within the criminal justice system for a range of reasons including:
    - To support the complainant to assess his or her risk of exposure to HIV and the need for post-exposure prophylaxis (PEP) to prevent HIV transmission;
    - To be used as an aggravating factor in the sentencing of an accused who is HIV-positive; and
    - For evidentiary purposes in criminal cases.
- HIV testing without informed consent of key populations at higher risk of HIV exposure, such as sex workers and prisoners.
- HIV testing without informed consent of foreign nationals entering or applying for leave to remain within a country.
- HIV testing within the workplace as a prerequisite for employment or a condition for continued employment.
- HIV testing at the request of a private company or public entity prior to acceptance as a member or receipt of benefits, such as funeral insurance, life insurance, or medical insurance.
- HIV testing in health care facilities in various situations including:
    - Where a medical official or other person determines that HIV testing should be carried out in the patient's best interests, irrespective of the patient's wishes;
    - Where HIV testing is a pre-requisite for accessing needed health care services;
    - Where routine HIV testing is carried out without specific consent on specific populations, such as of pregnant women; and
    - Where the information provided or the voluntariness of the consent is compromised due to the lack of quality HIV counselling services.

[13] *Castell v De Greef*, 1994 (4) All SA 63 (CC) at 74 (S. Afr.).

[14] *See, e.g.*, ARASA, *supra* note 7; K. Naidoo & K. Govendor, *Compulsory HIV Testing of Alleged Sexual Offenders – a Human Rights Violation*, 4 South African J. Bioethics & L. 95 (2011), *available at* http://www.sajbl.org.za/index.php/sajbl/article/view/126.

Defining mandatory HIV testing in the working environment

In the South African Labour Court case of *Irvin and Johnson Ltd. v Trawler and Line Fishing Union and others*, the Court defined compulsory testing as: "the imposition by the employer of a requirement that employees (or prospective employees [. . .]) submit to testing on the pain of some or other sanction or disadvantage if they refuse consent. This is to be contrasted with voluntary testing, where it is entirely up to the employee to decide whether he or she wishes to be tested and where no disadvantage attaches to a decision by the employee not to submit to testing."[15]

Discussion: is provider-initiated HIV testing coercive?

The slow uptake in HIV testing and treatment prompted WHO and UNAIDS to recommend that countries with generalised HIV epidemics, such as those in southern Africa, adopt a policy of offering HIV testing and counselling to all patients in all health facilities in order to scale up access to HIV testing. This practice is known as provider-initiated HIV testing and counselling (PITC). This recommendation is a change from the previously accepted practice of client-initiated HIV testing and counselling (CITC), which prevents health care providers from offering an HIV test, instead placing the onus on patients to request the test.

The WHO and UNAIDS Guidance on PITC[16] (WHO/UNAIDS Guidance) emphasises that, irrespective of whether a patient requests HIV testing or is recommended HIV testing by a health care provider, HIV testing and counselling must be **voluntary**, and the principles of **informed consent**, **counselling** and **confidentiality** must be observed at all times.

PITC is arguably lawful, as it is based on voluntariness, informed consent and confidentiality. However, the implementation of a PITC policy can lead to human rights violations. The WHO/UNAIDS Guidance acknowledges this possibility, outlining the minimum information and process required for informed consent, recommending that vulnerable groups, such as pregnant women, have additional safeguards, and emphasising the importance of adequate training and supervision for health care providers.

While PITC is not necessarily unlawful, it may nonetheless lead to conditions where violations of human rights occur. Where PITC policies lead to HIV testing without informed consent, they may be challenged.

[15] *Irvin and Johnson Ltd. v Trawler and Line Fishing Union and Others,* 2003 (24) ILJ 565 (LC) at para. 28 (S. Afr.).

[16] *WHO and UNAIDS, Guidance on Provider-Initiated HIV Testing and Counselling in Health Facilities* (2007) *available at* http://whqlibdoc.who.int/publications/2007/9789241595568_eng.pdf.

1.3 Unlawful disclosure of an individual's HIV status

Every person has the right to confidentiality with regard to his or her medical information, including the fact that he or she tested for HIV, the results of that test and his or her HIV status.

Unlawful disclosures of a person's HIV status to third parties without consent, either verbally or through publication, occurs in a wide variety of settings. Unlawful disclosures can occur in health care settings, in the workplace and within families and communities. This manual focuses on unlawful disclosure in the following circumstances:

- Breaches of confidentiality regarding a patient's HIV status in the health care sector including:
    - Where a health care worker discloses a patient's HIV status to third parties, including other staff members, other patients or the family and partners of the patient;
    - Where a patient's HIV status is disclosed to a third party after the administering of an unlawful HIV test (e.g. a patient's HIV status is disclosed to an existing or prospective employer who has requested the test as a condition of employment); and
    - Where a health care facility's structures, processes and services are designed or implemented in such a manner that breaches of patients' confidentiality rights are inevitable (e.g. the provision of separate and clearly designated HIV clinic facilities).
- Breaches of confidentiality within the working environment, where an employer or co-worker discloses an HIV-positive employee's status to third parties.

1.4 Related topics outside the scope of this manual

The lived experiences of persons living with HIV do not lend themselves to the neat categorisation and separation of human rights afforded to them under the rubric of international, regional and constitutional laws. Very often, a single event will result in the violation of several rights, all of which should form the basis of subsequent litigation. However, in the interest of clarity, this manual does not address certain topics closely related to unlawful HIV testing and breaches of confidentiality.

For instance, this manual does not address cases where blood samples are drawn with consent, but without pre-test counselling for anonymised HIV prevalence testing in an employment, health care or population survey setting. In addition, this manual does not specifically address HIV testing of children. These types of testing situations implicate a very different set of rights (in addition to some or all of the rights discussed in this manual), and thus are excluded from the more general discussion contained herein.

Unlawful HIV testing is often accompanied by further human rights violations. For example, in cases of unlawful HIV testing at a health facility, the unlawful testing may be coupled with forced sterilisation, patient segregation, or refusal of services. In cases

of unlawful HIV testing in the workplace, the unlawful testing could be accompanied by unlawful dismissals or denial of promotion. These would in all likelihood also form part of any subsequent litigation. However, in this manual we focus on the rights violations *directly* caused by unlawful HIV testing or unauthorised disclosure of an individual's HIV status.

As in the case of HIV testing, breaches of confidentiality with regard to a person's HIV status may often result in additional human rights violations including violence, verbal and physical abuse, marginalisation, exclusion, stigmatisation, dismissals and the denial of benefits and services. The focus in this manual, however, is challenging laws, policies and practices that require, force or unlawfully disclose a person's HIV status without consent.

Litigation of unlawful breach of confidentiality with regard to HIV status poses a risk of disclosure of HIV status when the status of one of the parties is disclosed in public filings and/or a public court room.[17] However, the challenges of litigating unlawful disclosures in these circumstances will not specifically be addressed in this manual.

[17] A lawyer can request that a client's personal details be removed from court papers or that the client's testimony be heard *in camera* where a client fears HIV-related discrimination arising from disclosure. The court can also be requested to make an order that the media does not take photos of the client or reveal his or her identity in any manner. If requesting that the applicant's details be removed from court papers, the founding court papers can include the following paragraph: "This matter concerns *inter alia* the HIV-positive status of the applicant. The applicant elects to preserve her entitlement to confidentiality in respect thereof and, accordingly, brings this action on an anonymous basis. The respondents are fully aware of the applicant's identity and personal particulars. The respondents will not suffer any prejudice in consequence of the applicant maintaining anonymity for the purposes of this action."

CHAPTER
2

Use of international, regional and comparative law in domestic courts

Checklist

- Is your domestic legal system monist or dualist?
- If monist, then international and regional law is directly enforceable.
- If dualist, does your Constitution provide any guidance on the relevance of international, regional and comparative law in domestic litigation?
- If dualist, is there any jurisprudence that outlines the relevance of international, regional and comparative law in domestic litigation and/or which uses international, regional or comparative law in reaching its decision?
- If dualist, cite jurisprudence from other similarly situated countries where courts have taken into account international, regional and comparative law.

Selection of relevant cases discussed in this chapter

- Abacha v Fawehinmi
- Banda v Lekha
- Hoffmann v South African Airways
- Joy Mining Machinery v NUMSA
- Legal Resources Foundation v Zambia
- Longwe v Intercontinental Hotel
- Monare v Botswana Ash Ltd.
- Odafe v Attorney General
- PFG Building Glass v CEPPAWU
- President of the Republic of Mozambique v Bernardo Sacarolha Ncomacha
- Société des Femmes Tchadiennes Transitaires v Ministère des Finances
- Ubani v Director of State Security Services
- Zimbabwe Human Rights NGO Forum v Zimbabwe

International human rights treaties have influenced the constitutions of many African countries.[18] International and regional human rights law may offer a more robust jurisprudence than is available from domestic precedent, allowing for more expansive interpretations and firmer defence of progressive principles. The main role of international and regional human rights law in public interest litigation should be to assist domestic courts in interpreting constitutionally recognised rights.

In most countries in southern Africa, international and regional legal obligations are neither justiciable nor directly enforceable in domestic courts without further action on the part of domestic legislatures. However, a few countries in the region have monist legal systems, whereby ratified international and regional treaties automatically become part of domestic law.[19]

It should be noted that in practice, direct applicability of international and regional law in the courts of monist, civil law African countries is usually avoided by the courts. When civil law courts do refer to international law, it is usually to reinforce existing constitutional provisions. An example is the Chadian Supreme Court case of *Société des Femmes Tchadiennes Transitaires v Ministère des Finances*,[20] where the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is briefly mentioned to support the Court's interpretation of a constitutional non-discrimination clause.

A recent decision[21] by the Supreme Court of Rwanda is also ground-breaking among African civil law jurisdictions: the Court referred to CEDAW, as well as case law from South Africa, the United States and Canada.[22] Military courts in the Democratic Republic of Congo have also expressed willingness to directly apply the Rome Statute of the International Criminal Court and to cite international case law.[23]

The Supreme Court of Mozambique held in *President of the Republic of Mozambique v Bernardo Sacarolha Ncomacha* that traditional authorities were required to consider both constitutional principles and international human rights law in making their judicial decisions.[24]

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[18] Magnus Killander & Horace Adjolohoun, *International law and domestic human rights litigation in Africa: an introduction*, *in* International law and domestic human rights litigation in Africa 3, 3 (Magnus Killander ed., 2010), *available at* http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf.

[19] Civil law countries such as Angola, Mozambique and the Democratic Republic of Congo adopt a monist legal system. In those cases, lawyers may not need to persuade domestic courts to look at international and regional legal obligations in their decision-making. However, the arguments outlined below may be useful in persuading a court to look at comparative constitutional jurisprudence.

[20] (2005) AHRLR 104 (ChSC 2005) at para. 14 (Chad), *available at* http://www.chr.up.ac.za/index.php/browse-by-subject/250-chad-societe-des-femmes-tchadiennes-transitaires-v-ministere-des-finances-2005-ahrlr-104-chsc-2005.html.

[21] Supreme Court of Rwanda, RS/Inconst/Penal.0001/08/CS (Sept. 26, 2008) (Rwanda).

[22] Magnus Killander & Horace Adjolohoun, *supra* note 18 at 8.

[23] *See e.g.*, Military Garrison Court (Ituri District), *Ituri District Military Prosecutor v Kahwa Panga Mandro*, First instance decision, RMP No 227/PEN/2006 (Aug. 2, 2006) (Dem. Rep. Congo); *Military Prosecutor v Bongi Massaba*, RP No 018/2006, RMP No 242/PEN/06 (Mar. 24, 2006) (Dem. Rep. Congo).

[24] *President of the Republic of Mozambique v Bernardo Sacarolha Ncomacha*, criminal section I, Proc.5/2004-A (Moz.).

If the domestic legal system is dualist, whereby a country's international and regional legal obligations are not formally, directly enforceable in domestic courts, international and regional law can still impose obligations on countries that have ratified particular treaties.

The African Commission on Human and Peoples' Rights (African Commission), which is responsible for monitoring compliance with regional human rights treaties, has noted that "international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties".[25]

Moreover, the African Commission noted in *Zimbabwe Human Rights NGO Forum v Zimbabwe* that:

> Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.[26]

When attempting to persuade a court to take into account international, regional and comparative law, lawyers should first look to domestic law.

In some countries, domestic constitutional provisions explicitly command courts to look at international, regional and comparative law in reaching their decisions. For example, section 11(2)(c) of the Malawi Constitution states that, in interpreting the provisions of the Constitution, courts shall "where applicable, have regard to current norms of public international law and comparable foreign case law".[27]

Similarly, in South Africa, the Constitution provides under article 39(1) that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum-

> a. ...;
>
> *b. must* consider international law; and
>
> *c. may* consider foreign law."[28]

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[25] *Legal Resources Foundation v Zambia*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 211/98, para. 60 (2001), *available at* http://caselaw.ihrda.org/doc/211.98/pdf.

[26] *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Afr. Comm'n on Hum. & Peoples' Rts., Communiation No. 245/2002, para. 143 (2006), *available at* http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf.

[27] Const. of Malawi of 1994, § 11(2)(c), *available at* http://www.chr.up.ac.za/images/files/documents/ahrdd/malawi/malawi_constitution.pdf.

[28] S. Afr. Const., 1996, § 39(1) (emphasis added), *available at* http://www.constitutionalcourt.org.za/site/constitution/english-web/ch2.html.

In addition, lawyers should look to decisions by domestic courts to ascertain the accepted relevance of international, regional and comparative law.

For example, in the case of *Joy Mining Machinery v NUMSA*, the South African Labour Court explained that domestic legislation, the Employment Equity Act, should be interpreted "in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation". [29]

The Nigerian Supreme Court went further, holding in *Abacha v Fawehinmi* that the African Charter on Human and Peoples' Rights (ACHPR), which had been ratified and incorporated into domestic law, is superior to all domestic laws except the Constitution.[30] Applying this principle, the Nigerian High Court later found in *Odafe v Attorney General*[31] that the refusal to provide HIV-positive, pre-trial prisoners access to antiretroviral treatment violated their right to enjoy the best attainable state of physical and mental health as guaranteed under the ACHPR. Though there is no right to health care in the Nigerian Constitution, the High Court held that Nigeria was obligated to provide for adequate medical treatment under the ACHPR.[32]

Finally, the Industrial Relations Court in Malawi in *Banda v Lekha*[33] was asked to define the scope of Malawi's constitutional right to be free from discrimination, and whether the right included the basis of HIV status. In answering this question, the Court held:

> Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of one's (*sic*) HIV status, it is to be implied that it is covered under the general statement of anti discrimination in any form . . . Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified Convention 111 on 22 March 1965 both of which, place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law.[34]

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[29] *Joy Mining Machinery (Pty) Ltd. v National Union of Metal Workers of South Africa (NUMSA) and Others*, (2002) 23 ILJ 291 (LC) at para. 16(d) (S. Afr.) [*hereinafter Joy Mining Machinery v NUMSA*], *available at* http://www.saflii.org/za/cases/ZALC/2002/7.html.

[30] *Abacha v Fawehinmi*, [2000] 6 NWLR 228; (2001) AHRLR 172 (NgSC 2000) at para. 15 (Nigeria), *available at* http://www.chr.up.ac.za/index.php/browse-by-subject/412-nigeria-abacha-and-others-v-fawehinmi-2001-ahrlr-172-ngsc-2000.html.

[31] *Odafe v Attorney General*, (2004) AHRLR 205 (Nigeria), *available at* http://www.southernafricalitigationcentre.org/library/item/odafe_and_others_v_attorney_general_and_others_high_court_2004.

[32] *Id.* at paras. 37-38.

[33] *Banda v Lekha,* [2005] MWIRC 44 (Mal.), *available at* http://www.malawilii.org/mw/judgment/industrial-relations-court/2005/44.

[34] *Id.*

Courts in southern Africa have also referred to non-binding international and regional guidelines to interpret the breadth of domestic constitutional and statutory rights, especially when there is no relevant domestic jurisprudence. Guidelines often represent multilateral consensus on best practices in a particular field, for example labour or health administration, and can offer valuable insight into how the international community views human rights issues that may be too specific or "niche" to warrant separate conventions.

In the context of HIV, for example, the Botswana Industrial Court has held that the ILO Code of Practice on HIV/AIDS (ILO Code of Practice)–though not binding–provides "useful guidelines, based on internationally accepted labour standards".[35] The South African Labour Court has cited the same ILO Code of Practice with approval.[36]

Similarly in *Hoffmann v South African Airways*,[37] the South African Constitutional Court, in addition to relying on international and regional law to support its decision to strike down discrimination on the basis of HIV status in employment, was swayed by the non-binding SADC Code on HIV/AIDS and Employment, noting:

> Apart from these Conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment, formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status 'should not be a factor in job status, promotion or transfer.' It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV.[38]

Not all countries' judiciaries have directly confronted the role of international, regional and comparative law in their domestic courts. If the courts of a lawyer's home country have not done so (or have done so disfavourably), he or she can cite decisions from courts in similarly situated countries where international, regional and comparative law was utilised, in order to craft a compelling argument for why these sources of law should be accepted in his or her own jurisdiction. In applying this strategy, the lawyer should draw careful comparisons between the similarly situated country and his or her own country, with specific reference to the case at bar.

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[35] *Monare v Botswana Ash (Pty) Ltd.*, [2004] 1 BLR 121 (IC) at 23 (Bots.), *available at* http://www.elaws.gov.bw/rep_export.php?id=705&type=pdf. *See also Lemo v Northern Air Maint. (Pty) Ltd*, [2004] 2 BLR 317, pg 19 (Bots.) *available at* http://www.southernafricalitigationcentre.org/library/item/lemo_v_northern_air_maintenance_pty_ltd_industrial_court_2004.

[36] *PFG Building Glass v CEPPAWU & Others*, 2003 (24) ILJ 974 (LC) at para. 77 (S. Afr.).

[37] *Hoffmann v South African Airways*, 2001 (1) SA 1 (CC) at para. 51 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2000/17.html.

[38] *Id.*

Conclusion

International and regional law can be useful in assisting domestic courts in determining the breadth and scope of constitutional and other fundamental rights. In monist systems, where international and regional legal obligations are part of domestic law, lawyers can technically rely on international and regional obligations in litigation.

In dualist legal systems where international and regional treaties have not been domesticated, lawyers may be able to rely on domestic constitutional provisions, previous court decisions relying on international and regional law and guidelines to persuade a court to take into account international and regional law. In addition, in cases where courts have not addressed international and regional law, lawyers can look to similarly situated countries in attempting to persuade a court to look to international and regional law.

Case examples of specific rights violations

Acts of mandatory or unlawful HIV testing and disclosure violate a number of fundamental human rights commonly found in international and regional instruments as well as national constitutions. The table below looks at some of the common forms of unlawful HIV testing and disclosure of HIV status. It considers the particular human right violated by each act and the source of this right in international and regional human rights instruments. Note that in many instances, a single act may violate a number of different human rights.

The table is not exhaustive, nor is it intended to be. It merely highlights the major rights that are likely to be implicated in certain common situations. Any litigation should include brainstorming and research about other possible claims a client may have.

The conventions included in the table below are:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- African Charter on Human and Peoples' Rights (ACHPR)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women)

Event	Human Right Implicated	Source
HIV testing is conducted without voluntary and informed consent	**Right to be protected from cruel, inhuman or degrading treatment.** This right protects the physical integrity of all persons and can include the right to be protected from medical or scientific experimentation without consent.	Article 7 of ICCPR Article 5 of ACHPR Article 4 of Protocol on Women
	Right to liberty and security of the person. This right protects every person from acts that constitute unlawful invasions of their physical integrity.	Article 9 of ICCPR Article 6 of ACHPR Article 4 of Protocol on Women
	Right to the highest attainable standard of health. This right protects every person's right to receive appropriate health care services.	Article 12 of ICESCR Article 12 of CEDAW Article 16 of ACHPR Article 14 of Protocol on Women

Event	Human Right Implicated	Source
A person's HIV status is disclosed to others without consent	**Right to privacy.** This right protects the privacy of each person, their property and their information.	Article 17 of ICCPR
Mandatory HIV testing is targeted at certain populations.	**Right to equality before the law and freedom from discrimination.** These rights protect every person from unfair and differential treatment based on an arbitrary ground.	Articles 2 and 26 of ICCPR Article 2(2) of ICESCR Articles 2 and 3 of ACHPR Article 2 of Protocol on Women
	Right to dignity. This right recognises and protects the self-worth of every person.	Preamble of ICCPR Article 5 of ACHPR Article 3 of Protocol on Women
Mandatory HIV testing is conducted within the working environment	**Right to work.** This right includes the right to fair labour practices and just and favourable conditions of work.	Articles 2 and 6 of ICESCR Articles 11, 12 and 14 of CEDAW Article 15 of ACHPR

CHAPTER 3

International law relevant to unlawful HIV testing and unlawful disclosure of HIV status

3.1 Introduction

This chapter outlines the international law jurisprudence that may be relevant when litigating cases of unlawful HIV testing and unlawful disclosure of HIV status. For a discussion on why domestic courts should look to their international and regional law obligations, please refer to chapter 2. For common scenarios in which unlawful testing or disclosure of private medical information occurs and which rights are likely to be violated, please see page 22.

Checklist

- Which international human rights are violated in your particular case?
- Which international treaties provide for the particular rights you have identified? [*See page 22 for Case examples of specific rights violations*]
- Has your country ratified the particular treaty?
- Did the events in your case take place after the ratification of the treaty?
- Has your country made any reservations to the treaty that may exclude its application to the facts of your case?
- Has the treaty monitoring body made any General Comments or General Recommendations that elaborate on the identified right(s)?
- Have there been any concluding observations or statements from UN bodies that are relevant to your case? [*See Chapter 7 for a list of relevant online resources*]
- Are there any relevant international guidelines that provide additional support for your case?

Selection of relevant documents discussed in this chapter

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Elimination of All Forms of Discrimination against Women
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Guidelines on HIV/AIDS and Human Rights
- ILO Code of Practice on HIV/AIDS and the World of Work
- ILO Recommendation Concerning HIV and AIDS and the World of Work

The chapter is divided into the following sections:

- Overview of relevant international law
- The right to privacy
- The right to freedom from cruel, inhuman or degrading treatment
- The rights to liberty and security of the person and to physical integrity
- The right to health
- The right to work
- The rights to equality and freedom from discrimination

3.2 Overview of relevant international law

International treaties and conventions provide the primary source of international law. These agreements are negotiated and finalised within the United Nations (UN) system. There are nine core human rights treaties.[39] In addition to the core treaties, the

[39] These are the International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* http://www2.ohchr.org/english/law/ccpr.htm; International Covenant on Economic, Social and Cultural Rights (ICESCR), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* http://www2.ohchr.org/english/law/cescr.htm; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), *available at* http://www2.ohchr.org/english/law/cedaw.htm; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), *available at* http://www2.ohchr.org/english/law/crc.htm; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987), *available at* http://www2.ohchr.org/english/law/cat.htm; Convention on the Rights of Persons with Disabilities (CRPD), *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008), *available at* http://www2.ohchr.org/english/law/disabilities-convention.htm; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003), *available at* http://www2.ohchr.org/english/law/cmw.htm; and International Convention for the Protection of All Persons from Enforced Disappearances, *opened for signature* Feb. 6, 2007, G.A. Res. A/61/177 (2006), *reprinted in* 14 Int'l Hum. Rts. Rep. 582 (2007) (entered into force Dec. 23, 2008), *available at* http://www2.ohchr.org/english/law/disappearance-convention.htm.

International Labour Organization (ILO)[40] has also developed binding conventions that address unlawful HIV testing in employment settings.

A treaty becomes legally binding on the state once it has been ratified and enters into force.[41] In a dualist system for international treaties to be directly enforceable in domestic courts, countries are required to implement international treaties at the domestic level through the enactment of national laws. For monist states, the ratification of the treaty or convention means that it is immediately and directly applicable at a national level.[42]

Different states have different ratification procedures. In most countries, the treaty must undergo a domestic process of ratification in addition to signing.[43] There is also a process in international law known as accession: this has the same legal effect as ratification, but takes place when a country joins a treaty after it has come into force.[44]

Once an international treaty has been ratified, states are required to take steps to ensure that the provisions of the treaty are respected, protected, promoted and fulfilled at a national level.[45]

Lawyers should determine at an early stage of the litigation whether and when relevant treaties were ratified or acceded to by their state, in order to determine whether they may be applied to the facts of the case. International treaties usually may not be applied retroactively.[46]

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[40] The ILO is the international body responsible for developing and monitoring international labour standards.

[41] It should be noted that, even where states have not signed or ratified conventions or treaties, these can still be binding if their principles form part of customary international law. In addition, signing a treaty obligates the country to abide by the object and purpose of the treaty. *See* Vienna Convention on the Law of Treaties, art. 18(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[42] See discussion in chapter 2, *supra*.

[43] UNICEF, *Definition of Key Terms*, *available at* http://www.unicef.org/crc/files/Definitions.pdf.

[44] *Id*.

[45] However, states can make reservations when ratifying treaties and conventions, expressing their reservation from adhering to certain provisions within the treaty.

[46] Vienna Convention on the Law of Treaties, *supra* note 41, at art. 28.

Table: Dates of ratification of key international instruments[47]

Country	ICCPR	ICESCR	CEDAW
Angola	10/1/1992	10/1/1992	17/9/1986
Botswana	8/9/2000	-	13/8/1996
Dem. Rep. of Congo	1/11/1976	1/11/1976	17/10/1986
Lesotho	9/9/1992	9/9/1992	22/8/1995
Malawi	22/12/1993	22/12/1993	12/3/1987
Mozambique	21/7/1993	-	21/4/1997
Namibia	28/1/1994	28/11/1994	23/11/1992
Swaziland	26/3/2004	26/3/2004	26/3/2004
Zambia	10/4/1984	10/4/1984	21/6/1985
Zimbabwe	13/5/1991	13/5/1991	13/5/1991

Separate UN committees have been created to oversee each core human rights treaty. These expert committees are tasked with monitoring compliance with the treaties, and countries that have ratified the treaties are obliged to make regular, periodic reports to the relevant committee setting out progress towards the realisation of treaty provisions. In fulfilling their function, each committee issues general comments and/or recommendations to define and clarify the scope and nature of the rights enshrined within the respective treaties. They also issue concluding observations after considering country reports, issue decisions on individual cases[48] and make statements with respect to individual country activities.

The committees are not empowered to impose legally binding obligations on states, so their comments, recommendations, and other jurisprudence are not legally binding; however, the committees are tasked with authoritatively interpreting the treaties, making their interpretations highly persuasive.[49] These documents provide additional guidance to lawyers on the nature of relevant rights and their application within states.

[47] As of July 2012, *available at* http://treaties.un.org.

[48] Some human rights treaties have separate Optional Protocols (which must be signed and ratified separately) that allow individuals to bring complaints to the committees alleging violations of treaty rights by their governments. The committees are empowered only to make recommendations to the states if they find a violation; their decisions are not legally binding.

[49] Statement by Mr Stefano Sensi, Office of the High Commissioner for Human Rights, 2d Sess. of the Ad Hoc Comm. on a Comprehensive and Integral Int'l Convention on Protection and Promotion of the Rights of Persons with Disabilities, June 16-27, 2003, at http://www.un.org/esa/socdev/enable/rights/uncontrib-ohchr2.htm ("It has become an increasingly common practice for the treaty monitoring bodies to issue 'general comments' or 'recommendations', which purport to be authoritative – although not legally binding – interpretations of the treaties.").

Additionally, the Human Rights Council[50] has established mechanisms, known as special procedures, to address human rights. Individuals, known as special rapporteurs or groups of experts, referred to as working groups, examine, monitor, advise and publicly report on human rights situations. Their reports may also provide valuable guidance on the application of various rights to specific facts.

Table: Relevant international treaties and their monitoring bodies

International UN Treaty	UN Human Rights Monitoring Body
ICCPR (including its first Optional Protocol)	Human Rights Committee (HRC)
ICESCR	Committee on Economic, Social and Cultural Rights (CESCR)
CEDAW (including its Optional Protocol)	Committee on the Elimination of Discrimination against Women
CAT	Committee against Torture
Optional Protocol to CAT	Subcommittee on Prevention of Torture

Relevant special rapporteurs include the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Special Rapporteur on the Right to Health), the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) and the Special Rapporteur on Trafficking in Persons.

In addition to binding treaties, a number of guidelines and declarations can also be useful when litigating cases of unlawful HIV testing and unlawful disclosures of HIV status. Although these international human rights documents are not legally binding, they nevertheless contain persuasive guidance on human rights. Relevant guidelines and declarations related to HIV include:

- International Guidelines on HIV/AIDS and Human Rights, promulgated by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV and AIDS (UNAIDS);[51]
- ILO Code of Practice on HIV/AIDS and the World of Work;[52] and

[50] The Human Rights Council of the UN is an intergovernmental body that is responsible for the promotion and protection of human rights globally. It consists of 47 member states that are elected periodically by the General Assembly of the UN.

[51] OCHCR & UNAIDS, International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version [*hereinafter* OCHCR & UNAIDS, International Guidelines, 2006 Consolidated Version], *available at* http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf.

[52] ILO, An ILO Code of Practice on HIV/AIDS and the World of Work (2001) [*hereinafter* ILO Code], *available at* http://www.ilo.org/public/libdoc/ilo/2001/101B09_133_engl.pdf.

- ILO Recommendation Concerning HIV and AIDS and the World of Work.[53]

While a wide range of human rights can be affected when an individual is subjected to HIV testing without consent and/or breaches of medical confidentiality, certain rights are more likely to be implicated than others. The sections that follow focus on the rights that are most likely to form the basis of litigation regarding these issues.

3.3 The right to privacy

Unlawful HIV testing may violate the right to privacy. Article 17(1) of the ICCPR states: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." The right to privacy encompasses respect for both physical privacy in the case of HIV testing without consent, and for privacy of information in the case of unauthorised disclosure of HIV status.

The HRC, in a general comment detailing the scope of article 17(1), does not specifically address medical testing. However, it does note that with respect to personal and body searches carried out by medical personnel, among others, such searches should be "carried out in a manner consistent with the dignity of the person who is being searched".[54]

In addition, the HRC has not specifically addressed whether HIV testing without informed consent is a violation of the ICCPR's right to privacy. However, the HRC has considered the forced DNA testing of immigrants and concluded that such testing "may have important implications for the right to privacy" under article 17.[55] DNA testing requires the extraction of bodily fluids from an individual using methodologies similar to those employed in testing for HIV, and there is likewise potential for discrimination and stigma based on the results.[56] DNA testing is therefore of comparable intrusiveness to HIV testing, and the HRC's concerns related to the right to privacy could apply with equal force in the context of HIV.

[53] ILO, Recommendation Concerning HIV and AIDS and the World of Work, No. 200 (2010) [*hereinafter* ILO Recommendation], *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/normativeinstrument/wcms_142706.pdf.

[54] Human Rights Comm., General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), para. 8 (1988) [*hereinafter* Human Rights Comm., General Comment No. 16], *available at* http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[55] Concluding Observations of the Human Rights Comm.: Denmark, para. 15, U.N. Doc. CCPR/CO/70/DNK (Nov. 15, 2000), *available at* http://www.unhcr.org/refworld/docid/3ae6b0654.html. *See also* Concluding Observations of the Human Rights Comm.: France, para. 21, U.N. Doc. CCPR/C/FRA/CO/4 (July 31, 2008), *available at* http://uhri.ohchr.org/Document/File/fe797595-63b7-4222-9687-6022af8bdb9c/84a30842-2ca3-4578-86ad-22f7437811d7 (urging France to only test DNA of refugees with informed consent).

[56] *See e.g.*, 42 U.S.C. § 2000ff-1(a) (2006) (banning genetic discrimination in the workplace under the Genetic Information Nondiscrimination Act (GINA) of the United States).

Example: International Guidelines on HIV/AIDS and Human Rights

Guidelines 3 and 5 of the International Guidelines on HIV/AIDS and Human Rights recommend that states enact laws that:

- Provide for HIV testing only with voluntary and informed consent;
- Protect the right to medical confidentiality with regard to HIV-related information;
- Authorise (but not require) a health care worker to disclose a person's HIV status to a sexual partner at significant risk of HIV transmission only under determined circumstances, which include providing appropriate counselling to the person with HIV; and
- Give powers to professional bodies to discipline cases of breaches of confidentiality and privacy.

Other UN entities have expressed concern directly over unlawful testing for HIV and breaches of confidentiality, noting these events may violate the right to privacy. In a 2009 report on informed consent, the Special Rapporteur on the Right to Health recognised that non-consensual HIV testing, especially of women and asylum-seekers, was a human rights violation, including of the right to privacy.[57] The Special Rapporteur highlighted the special need to ensure that public health measures are based on voluntary participation, so as "to be fully effective and to minimize compromising the rights to privacy and self-determination".[58]

In addition, the Special Rapporteur on Trafficking in Persons has stated that: "[g]iven that the right to privacy is restricted by mandatory HIV/AIDS testing, public health, criminal and anti-discrimination legislation should prohibit mandatory HIV testing of targeted groups, including migrant workers".[59]

The argument that unlawful HIV testing is a violation of the right to privacy is reinforced by international guidelines. The International Guidelines on HIV/AIDS and Human Rights (the Guidelines) state that the right to privacy is "known to have been restricted" by states through both mandatory HIV testing and the release of HIV status to third parties.[60] The Guidelines argue that the right to privacy under the ICCPR requires that informed consent be obtained prior to testing for HIV.[61]

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[57] Rep. of the Special Rapp. on Health: Informed Consent (2009), *supra* note 12, at paras. 57, 62 and 75.

[58] *Id.* at 30.

[59] Report of Special Rapporteur on Trafficking in Persons, Especially Women and Children: Mission to Bahrain, Qatar and Oman, para. 95(p), U.N. Doc. A/HRC/4/23/Add.2 (Apr. 25, 2007), *available at* http://www2.ohchr.org/english/bodies/chr/special/sp_reportshrc_6th.htm.

[60] OCHCR & UNAIDS, International Guidelines, 2006 Consolidated Version, *supra* note 51, at para. 105.

[61] *Id.* at 119.

The right to privacy is also implicated in cases of unlawful disclosure of an individual's HIV status. The HRC in a general comment advises that public authorities should only be permitted to demand information relating to an individual's private life if knowledge of that information is "essential in the interests of society as understood under the [ICCPR]".[62] The HRC has not yet addressed the right to privacy in connection with unlawful disclosure of an individual's HIV status; however, the Guidelines reinforce the view that unlawful disclosure would violate the right to privacy. The Guidelines emphasise that states have a duty to protect the right to privacy and should accordingly ensure that safeguards are in place to protect confidentiality.[63]

3.4 The right to freedom from cruel, inhuman or degrading treatment

Article 7 of the ICCPR prohibits the use of torture and cruel, inhuman or degrading treatment or punishment. As part of this prohibition, it further notes that "no one shall be subjected without his free consent to medical or scientific experimentation".[64] In addition to the provisions in the ICCPR, CAT also prohibits cruel, inhuman or degrading treatment under article 16(1), which obligates states to:

> undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture [. . .], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[65]

In its general comment on Article 7, the HRC stated that the purpose of the article was to "protect both the dignity and the physical and mental integrity of the individual" from acts that cause physical and mental suffering.[66] African courts have readily acknowledged that disclosure of a person's HIV status without consent is capable of causing great mental suffering.[67]

The potential for harm from a breach of HIV-related confidentiality is reinforced by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which recommended that Paraguay ensure that prisoners' medical records were kept confidential to ensure compliance with CAT.[68]

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[62] Human Rights Comm., General Comment No. 16, *supra* note 54, at para. 7.

[63] OCHCR & UNAIDS, International Guidelines, 2006 Consolidated Version, *supra* note 51, at paras. 119 & 121.

[64] ICCPR, *supra* note 39, at art. 7.

[65] CAT, *supra* note 39, at art. 16.

[66] Human Rights Comm., General Comment No 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, para. 2 (1992) [*hereinafter* Human Rights Comm., General Comment No. 20], *available at* http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[67] *See e.g.*, *Maje v Botswana Life Insurance*, 2001 (2) BLR 626 (HC) (Bots.), *available at* http://www.elaws.gov.bw/desplaylrpage.php?id=304&dsp=2.

[68] Report on the Visit of the Subcomm. on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay, para. 174, U.N. Doc. CAT/OP/PRY/1 (June 7, 2010).

Jeopardising an individual's dignity by forcing him or her to undergo testing for HIV can also give rise to the type of suffering that constitutes a violation of article 7 of the ICCPR or article 16 of CAT. The Special Rapporteur on Torture has considered forcible HIV testing of drug users. His report states that wherever possible, HIV testing should be voluntary and based on informed consent.[69] He concludes that if forcible testing is conducted in a discriminatory manner and without informed consent, it may constitute a form of degrading treatment.[70] In addition, the Committee against Torture has specifically expressed concern about pre-screening of persons with HIV/AIDS prior to employment, thereby impliedly rejecting mandatory testing under CAT.[71]

In cases where there is a loss of liberty, such as if the individual is in penal or medical detention, the likelihood of HIV testing without consent amounts to degrading treatment, according to the Special Rapporteur on Torture.[72]

Example: WHO Guidelines on HIV Infection and AIDS in Prisons[73]

- Compulsory testing of prisoners for HIV is unethical and ineffective, and should be prohibited.
- Voluntary testing for HIV infection should be available in prisons when available in the community, together with adequate pre- and post-test counselling. Voluntary testing should only be carried out with the informed consent of the prisoner. Support should be available when prisoners are notified of test results and in the period following.
- Test results should be communicated to prisoners by health personnel who should ensure medical confidentiality.

3.5 The rights to liberty and security of the person and to physical integrity

Unlawful HIV testing may violate an individual's right to liberty and security of the person. Article 9(1) of the ICCPR states that "everyone has the right to liberty and security of the person . . . No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

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[69] Report of Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 63, U.N. Doc. A/HRC/10/44 (Jan. 14, 2009) [*hereinafter* Report of Special Rapp. on Torture (2009)], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.44AEV.pdf.

[70] *Id.* at para. 65.

[71] Concluding Observations of the Comm. against Torture: Mongolia, para. 25(b), U.N. Doc. CAT/C/MNG/CO/1 (Jan. 20, 2011), *available at* http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.MNG.CO.1_en.pdf.

[72] Report of Special Rapp. on Torture (2009), *supra* note 69, at para. 65.

[73] UNAIDS, 1993 (reprinted 1999) *WHO Guidelines on HIV Infection and AIDS in Prisons,* UNAIDS/99.47/E at 5, *available at* http://data.unaids.org/publications/IRC-pub01/jc277-who-guidel-prisons_en.pdf.

It seems that there has been limited discussion by UN committees on the right to liberty and security of the person in the context of HIV testing. However, the Special Rapporteur on the Right to Health has stated:

> Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health care services . . . Informed consent invokes several elements of human rights that are indivisible, interdependent and interrelated. In addition to the right to health, these include the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation, *security and dignity of the human person*, recognition before the law, freedom of thought and expression and reproductive self-determination.[74]

Mandatory HIV testing as a violation of the right to liberty and security of person also finds support in international guidelines. The International Guidelines on HIV/AIDS and Human Rights note that "compulsory HIV testing can constitute a deprivation of liberty and a violation of the right to security of a person" and that "respect for the right to physical integrity requires that testing be voluntary and that no testing be carried out without informed consent".[75] Similarly, disclosing vital medical information, such as an individual's HIV status without his or her consent could violate the right to liberty.

3.6 The right to health

Article 12(1) of the ICESCR recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

The CESCR provides detailed guidance on the scope of article 12(1) in General Comment No. 14.[76] In addition to interpreting the right and the duties it imposes on the state, the CESCR also notes the obstacles created by formerly unknown diseases, including HIV/AIDS, and the need to take the impact of these diseases into account when interpreting article 12.[77]

Acts such as HIV testing without consent and unauthorised disclosures of a person's medical information, which arguably violate the right to control one's health and to be free from interference, infringe upon the right to health. Likewise, where access to health services is made dependent upon HIV testing or disclosure of HIV status, this may infringe upon a person's entitlement to a system of health protection that provides equality of opportunity to enjoy the highest attainable level of health.

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[74] Rep. of the Special Rapp. on Health: Informed Consent (2009), *supra* note 12, at paras. 18-19 (emphasis added).

[75] OCHCR & UNAIDS, International Guidelines, 2006 Consolidated Version, *supra* note 51, at para. 135.

[76] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [*hereinafter* CESCR, General Comment No. 14], *available at* http://www2.ohchr.org/english/bodies/cescr/comments.htm.

[77] *Id.* at para. 10.

Significantly, General Comment No. 14 explains that the right to health is closely related to and sometimes dependent on the realisation of other human rights, including *inter alia* the rights to non-discrimination, equality, privacy and the prohibition against torture.[78]

In particular, the CESCR notes that the right to health includes the right to freely consent to medical treatment. The CESCR explains:

> The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[79]

Protection of the right to confidentiality is furthermore seen as a core component of creating acceptable health care services in terms of the right to health.[80] General Comment No. 14 also acknowledges that accessibility to health information should not impair the right to have medical information treated confidentially,[81] and that all health facilities, goods and services must be designed to protect the right to confidentiality.[82]

In cases where the general welfare is used as an argument for limiting the exercise of other fundamental rights, the CESCR requires states to justify its actions in terms of article 4 of the ICESCR:

> [A] State party . . . has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.[83]

The Special Rapporteur on the Right to Health has affirmed that the right to health is implicated when informed consent has not been obtained.[84] He defines a rights-based approach in the clinical setting as one where counselling, testing and treatment for all diseases are part of a "voluntary health-care continuum".[85] In this regard, he recognises specifically that respecting a patient's right to health through appropriate counselling and consent before testing for HIV is an essential aspect of delivering health care services to those in need.[86]

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[78] CESCR, General Comment No. 14, *supra* note 76, at para. 3.

[79] *Id.* at para. 8.

[80] *Id.* at para. 12(c).

[81] *Id.* at para. 12(b)(iv).

[82] *Id.* at para. 12(c).

[83] *Id.* at para. 28. Practically speaking, the CESCR has never demanded a state justify its rights-limiting actions. *See generally* Amrei Miller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 Hum. Rts L. Rev. 557 (2009).

[84] Rep. of the Special Rapp. on Health: Informed Consent (2009), *supra* note 12, at para. 5.

[85] *Id.* at para. 24.

[86] *Id.*

In recognition of women's particularly vulnerable status, the CEDAW Committee's General Recommendation No. 24 states that the right to quality health care services under article 12(1) of CEDAW includes an obligation that states provide acceptable services, which "are those which are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives".[87] The CEDAW Committee adds: "States parties should not permit forms of coercion, such as non-consensual sterilization, *mandatory testing for sexually transmitted diseases* or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity."[88]

The Special Rapporteur on the Right to Health similarly has called attention to certain groups who are at increased risk of having their right to health violated through mandatory HIV testing, due to structural power imbalances that make it especially difficult for members of vulnerable populations, including women, asylum-seekers and refugees, sex workers, and drug users to give truly informed consent.[89]

3.7 The right to work

Unlawful HIV testing and unlawful disclosure of an individual's HIV status often occur within the working environment. While in most cases litigation focuses on the discriminatory outcome of such testing or disclosure, it is important to consider whether the *requirement itself* of HIV testing or the disclosure of an employee or job applicant's HIV status infringes on the right to work.

The right to work and to favourable conditions of work is protected under article 6 of the ICESCR. According to the CESCR in General Comment No. 18, the right to work includes "the right not to be deprived of work unfairly".[90] The CESCR further notes that the ICESCR "prohibits any discrimination in access to and maintenance of employment on the grounds of . . . health status (including HIV/AIDS)" under its articles 2(2) and 3.[91] By specifically mentioning both access to *and* maintenance of work, General Comment No. 18 provides explicit support for the argument that discrimination on the basis of HIV status is impermissible against individuals who are seeking work and as a condition for continued employment.

Emphasizing the importance of non-discrimination in access to work, the CESCR notes later in General Comment No. 18 that states are obligated to respect the right to work by "refraining from denying or limiting equal access to decent work for all persons, especially

[87] CEDAW Comm., General Recommendation No. 24: Article 12: Women and Health, para. 22 (1999) [*hereinafter* CEDAW Comm., General Recommendation No. 24], *available at* http://www2.ohchr.org/english/bodies/cedaw/comments.htm.

[88] *Id.* at para. 22 (emphasis added).

[89] Rep. of the Special Rapp. on Health: Informed Consent (2009), *supra* note 12, at paras. 55 (women), 62 (asylum-seekers and refugees), 86 (sex workers) and 89 (drug users).

[90] CESCR, General Comment No. 18: The Right to Work, para. 4, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) [*hereinafter* CESCR, General Comment No. 18], *available at* http://www2.ohchr.org/english/bodies/cescr/comments.htm.

[91] *Id.* at para. 12(b)(i).

disadvantaged and marginalized individuals and groups".[92] For example, if HIV testing is used to target specific job applicants or employees in a discriminatory way (e.g. if only job applicants from foreign countries or with convictions for drug use are required to test), this policy would violate the ICESCR, according to the CESCR.[93]

Various UN committees have expressed their concern regarding HIV testing without informed consent as a condition for employment, but have not specifically noted that such action implicates the right to work.[94]

International guidelines further reinforce the view that HIV testing or disclosure of one's HIV status violate the right to work. The ILO has adopted two relevant guidelines regarding unlawful HIV testing and disclosure of status in the employment context: Code of Practice on HIV/AIDS and the World of Work (ILO Code),[95] adopted in 2001, and the Recommendation Concerning HIV and AIDS and the World of Work 200 of 2010 (ILO Recommendation).[96]

While southern African courts recognise that these guidelines are not legally binding, they nevertheless have relied on them in HIV-related employment cases.[97]

The ILO Code applies to all employers and workers, regardless of whether they are employed or seeking work in the public or private sector, or in formal or informal sectors.[98] Key principles of the ILO Code include the prohibition of HIV screening for purposes of evaluating job applicants or employees.[99] In addition, the ILO Code states that there is "no justification" for an employer to ask an applicant or employee to disclose personal HIV-related information; if an individual chooses to do so, strict maintenance of confidentiality is essential.[100]

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[92] CESCR, General Comment No. 18, *supra* note 90, at para. 23.

[93] *Id.* at para. 33.

[94] *See e.g.,* Concluding Observations of the CEDAW Comm.: Singapore, para. 31, U.N. Doc. CEDAW/C/SGP/CO/4/REV.1 (Jan. 16, 2012), *available at* http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-SGP-CO-4-Rev1.pdf (expressing concern over mandatory testing for pregnancy and sexually transmitted diseases among foreign domestic workers in Singapore); Concluding Observations of the Comm. on the Protection of the Rights of All Migrant Workers and Members of Their Families: Egypt, paras. 32-33, U.N. Doc. CMW/C/EGY/CO/1 (May 25, 2007), *available at* http://www2.ohchr.org/english/bodies/cmw/docs/cmw_c_egy_co1.doc (recommending that medical tests of migrant workers in Egypt be in conformity with ILO regulations and that HIV testing not be required at the time of recruitment).

[95] ILO Code, *supra* note 52.

[96] ILO Recommendation, *supra* note 53.

[97] *See Monare v Botswana Ash (Pty) Ltd*, [2004] 1 BLR 121 at 23; *Lemo v Northern Air Maint. (Pty) Ltd*, [2004] 2 BLR 317 at 19; *PFG Building Glass v CEPPAWU & Others*, 2003 (24) ILJ 974 at para. 77.

[98] ILO Code, *supra* note 52, at art. 3.1.

[99] *Id.* at art. 4.6 ("HIV/AIDS screening should not be required of job applicants or persons in employment.").

[100] *Id.* at art. 4.7.

The ILO Code discourages mandatory HIV testing as a condition of continued employment and specifically states that "routine medical testing, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing."[101]

Example: HIV testing in the ILO Code of Practice on HIV/AIDS and the World of Work

Section 8: HIV Testing

Testing for HIV should not be carried out at the workplace except as specified in this code. It is unnecessary and imperils the human rights and dignity of workers: test results may be revealed and misused, and the informed consent of workers may not always be fully free or based on an appreciation of all the facts and implications of testing. Even outside the workplace, confidential testing for HIV should be the consequence of voluntary informed consent and performed by suitably qualified personnel only, in conditions of the strictest confidentiality.

8.1. Prohibition in recruitment and employment

HIV testing should not be required at the time of recruitment or as a condition of continued employment. Any routine medical testing, such as testing for fitness carried out prior to the commencement of employment or on a regular basis for workers, should not include mandatory HIV testing.

8.2. Prohibition for insurance purposes

(a) HIV testing should not be required as a condition of eligibility for national social security schemes, general insurance policies, occupational schemes and health insurance.

(b) Insurance companies should not require HIV testing before agreeing to provide coverage for a given workplace. They may base their cost and revenue estimates and their actuarial calculations on available epidemiological data for the general population.

(c) Employers should not facilitate any testing for insurance purposes and all information that they already have should remain confidential.

8.3. Epidemiological surveillance

Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with the ethical principles of scientific research, professional ethics and the protection of individual rights and confidentiality. Where such research is done, workers and employers should be consulted and informed that it is occurring. The information obtained may not be used to discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.

[101] ILO Code, *supra* note 52, at art. 8.1.

8.4. Voluntary testing

There may be situations where workers wish at their own initiative to be tested, including as part of voluntary testing programmes. Voluntary testing should normally be carried out by the community health services and not at the workplace. Where adequate medical services exist, voluntary testing may be undertaken at the request and with the written informed consent of a worker, with advice from the workers' representative if so requested. It should be performed by suitably qualified personnel with adherence to strict confidentiality and disclosure requirements. Gender-sensitive pre- and post-test counselling, which facilitates an understanding of the nature and purpose of the HIV tests, the advantages and disadvantages of the tests and the effects of the results upon the worker, should form an essential part of any testing procedure.

8.5. Tests and treatment after occupational exposure

(a) Where there is a risk of exposure to human blood, body fluids or tissues, the workplace should have procedures in place to manage the risk of such exposure and occupational incidents.

(b) Following risk of exposure to potentially infected material (human blood, body fluids, tissue) at the workplace, the worker should be immediately counselled to cope with the incident, about the medical consequences, the desirability of testing for HIV and the availability of post-exposure prophylaxis, and referred to appropriate medical facilities. Following the conclusion of a risk assessment, further guidance as to the worker's legal rights, including eligibility and required procedures for workers' compensation, should be given.

Similarly, the ILO Recommendation covers all workers working under all forms or arrangements and at all workplaces, including:

- Persons in any employment or occupation;
- Those in training, including interns and apprentices;
- Volunteers;
- Jobseekers and job applicants;
- Laid-off and suspended workers;
- Participants in all sectors of economic activity, including the private and public sectors and the formal and informal economies; and
- Members of the armed forces and uniformed services.[102]

A key principle of the ILO Recommendation is that "no workers should be required to undertake an HIV test or disclose their HIV status".[103] It also protects the privacy of

[102] ILO Recommendation, *supra* note 53, at art. 2.

[103] *Id.* at art. 3(i).

workers, their families and their dependents, with particular regard to confidentiality of HIV status.[104]

Example: ILO Recommendation Concerning HIV and AIDS and the World of Work

Testing, privacy and confidentiality

24. Testing must be genuinely voluntary and free of any coercion and testing programmes must respect international guidelines on confidentiality, counselling and consent.

25. HIV testing or other forms of screening for HIV should not be required of workers, including migrant workers, job seekers and job applicants.

26. The results of HIV testing should be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement.

27. Workers, including migrant workers, job seekers and job applicants, should not be required by countries of origin, of transit or of destination 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.

28. Migrant workers, or those seeking to migrate for employment, should not be excluded from migration by the countries of origin, of transit or of destination on the basis of their real or perceived HIV status.

29. Members should have in place easily accessible dispute resolution procedures which ensure redress for workers if their rights set out above are violated.

3.8 The rights to equality and freedom from discrimination

Laws and practices may require mandatory HIV testing or forced disclosures of HIV status of certain groups of people, such as pregnant women, sex workers or foreign nationals. Thus, it is important to consider whether HIV testing without informed consent or forced disclosures applied in this manner implicate the right to non-discrimination and to equality.[105]

[104] ILO Recommendation, *supra* note 53, at art. 3(h).

[105] The outcomes of unlawful HIV testing or breaches of confidentiality may also result in discriminatory treatment (such as dismissals in the workplace). This issue is dealt with extensively in the SALC Manual *Equal Rights for All: Litigating Cases of HIV-Related Discrimination*.

The ICCPR protects the right to freedom from discrimination and equality under article 2(1) and 26, respectively. The ICESCR also protects the right to be free from discrimination under article 2(2).

Freedom from discrimination

Both article 2(1) of the ICCPR and article 2(2) of the ICESCR only guarantee non-discrimination with respect to the rights provided for in each of those treaties. Thus, in a case alleging a violation of an individual's right to be free from discrimination, one must argue that the alleged conduct violated not only the right to be free from discrimination, but also in the exercise of another right contained in the ICCPR or ICESCR.

The HRC has defined discrimination as:

> imply[ing] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[106]

A slightly broader definition of discrimination has been adopted by the CESCR with respect to the discrimination provisions in the ICESCR.[107]

The protection against discrimination under the ICESCR and ICCPR extends to both direct and indirect discrimination.[108] Direct discrimination "occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground".[109] For example, requiring foreign nationals to submit to HIV testing as part of a job application while citizens are not subjected to such requirements is an example of direct discrimination. Direct discrimination also includes detrimental acts or omissions on the basis of a prohibited ground where there is no comparable similar

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[106] Human Rights Comm., General Comment No. 18: Non-Discrimination, para. 7 (1989) [*hereinafter* Human Rights Comm., General Comment No. 18], *available at* http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[107] CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, para. 7 (2009) [*hereinafter* CESCR, General Comment No. 20], *available at* http://www2.ohchr.org/english/bodies/cescr/comments.htm. ("[D]iscrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.").

[108] *Id.* at para. 10; Human Rights Comm., *Simunek et al. v the Czech Republic*, Comm. No. 516/1992, para. 11.7, U.N. Doc. CCPR/C/54/D/516/1992 (July 31, 1995) ("A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory."). *See also* Human Rights Comm., *Derksen v Netherlands*, Comm. No. 976/2001, para. 9.3, U.N. Doc. CCPR/C/80/D/976/2001 (Apr. 1, 2004) ("The Committee recalls that Article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons.").

[109] CESCR, General Comment No. 20, *supra* note 107, at para. 10(a).

situation.[110] For example, where pregnant women are required to test for HIV before accessing antenatal services, they are directly discriminated against.

Indirect discrimination, on the other hand, "refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of [ICESCR and ICCPR] rights as distinguished by prohibited grounds of discrimination".[111] For example, a life insurance company that requires disclosure of all medical conditions by applicants indirectly discriminates against persons living with HIV/AIDS if the company also refuses coverage on the basis of HIV status.

Non-discrimination does not mean identical treatment in every situation,[112] as is made explicit by certain provisions in the ICCPR and ICESCR. For example, ICCPR article 6(5) prohibits capital sentencing of minors and pregnant women, and article 10(3) requires juvenile offenders to be segregated from adults in prison. However, the differential treatment must be "reasonable and objective" and the aim of the treatment must be for a legitimate purpose.[113]

Equality

The ICCPR also broadly requires that all national laws be free from discrimination under article 26, which states that:

> 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*.[114]

Unlike article 2 of the ICCPR, this article does not limit the scope of the rights protected from discrimination to those under the ICCPR. In other words, article 26 prohibits discrimination and guarantees equal protection of the law in *all* areas regulated and protected by public authorities, not just those enumerated under the ICCPR.[115]

Thus when appropriate, it is useful to allege violations of article 26 of the ICCPR in addition to the non-discrimination articles of the appropriate treaties. Even if the non-discrimination articles are ultimately found not to apply, article 26 may serve as a backstop protection against discriminatory testing and/or disclosure of HIV status.

3.9 Conclusion

Numerous fundamental rights may be implicated in cases of unlawful HIV testing and disclosure of an individual's HIV status, such as the rights to privacy; freedom from

[110] CESCR, General Comment No. 20, *supra* note 107, at para. 10(a).

[111] *Id.* at para. 10(b).

[112] Human Rights Comm., General Comment No. 18, *supra* note 106, at para. 8.

[113] *Id.* at para. 13.

[114] ICCPR, *supra* note 39, at art. 26 (emphasis added).

[115] Human Rights Comm., General Comment No. 18, *supra* note 106, at para. 12.

cruel, inhuman or degrading treatment; liberty and security of the person; health; work; equality; and freedom from discrimination.

Though international bodies have not fully interrogated and applied all of these rights in cases of HIV testing and disclosure of status, international law can still be useful in identifying the scope and nature of these fundamental rights.

CHAPTER 4

Regional law relevant to unlawful HIV testing and unlawful disclosure of HIV status

4.1 Introduction

This chapter focuses on regional jurisprudence relevant in cases of unlawful HIV testing and unlawful disclosure of HIV status. For a discussion on why courts should look at the jurisprudence of likeminded countries, please refer to chapter 2. For common scenarios in which unlawful testing or disclosure of private medical information occurs and which rights are likely to be violated, please see page 22.

Checklist

- Which regional human rights are violated in your particular case? [*See page 22 for Case examples of specific rights violations*]
- Which regional treaties provide for the particular rights you have identified?
- Has your country ratified the particular treaty?
- Did the events in your case take place after the ratification of the treaty?
- Has your country made any reservations to the treaty that may exclude its application to the facts of your case?
- Has the African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, or Southern African Development Community (SADC) issued any relevant decisions or statements on these rights? *[See Chapter 7 for a list of relevant online resources.]*
- Are there any relevant resolutions, statements or guidelines issued by the African Commission on Human and Peoples' Rights or the Southern African Development Community?

Selection of relevant documents and cases discussed in this chapter

- African Charter on Human and Peoples' Rights
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- Charter of Fundamental Social Rights in SADC
- Code on HIV/AIDS and Employment in SADC
- Declaration of the Pretoria Seminar on Economics, Social and Cultural Rights in Africa
- Doebbler v Sudan
- Good v Botswana
- Huri-Laws v Nigeria
- Legal Resources Foundation v Zambia
- Ouku v Kenya
- Purohit and Moore v Gambia
- Zimbabwe Lawyers for Human Rights v Zimbabwe

The chapter is divided into the following sections:

- Overview of relevant regional law
- The rights to dignity and freedom from cruel, inhuman or degrading treatment
- The rights to liberty and security of the person and to physical integrity
- The right to health
- The right to work
- The rights to equality and non-discrimination

4.2 Overview of relevant regional law

Lawyers litigating cases of unlawful HIV testing and disclosure of private medical information can utilise a number of regional treaties promulgated by the African Union to support their arguments, including:

- The African Charter on Human and Peoples' Rights (ACHPR);[116] and
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women).[117]

[116] African Union, African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, 21 I.L.M. 58 [*hereinafter* African Charter], *available at* http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

[117] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* July 1, 2003, OAU Doc. CAB/LEG/66.6 [*hereinafter* Protocol on Women], *available at* http://www.au.int/en/sites/default/files/Protocol%20on%20the%20Rights%20of%20Women.pdf.

The process of ratification for these regional human rights instruments is similar to that of the international instruments, described in chapter 3.

The African Commission on Human and Peoples' Rights (the African Commission) is responsible for protecting and promoting human rights and monitoring country compliance with the ACHPR and the Protocol on Women.

Example: African Commission on Human and Peoples' Rights

The ACHPR provides that the African Commission will:

> "draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries . . . as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations . . . ."

It furthermore notes that as subsidiary principles of law, the African Commission will:

> "take into consideration . . . other general or specialised international conventions . . . expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law . . . as well as legal precedents and doctrine."

The African Commission has a number of special experts and committees that oversee and monitor country compliance of specific human rights issues, such as the Special Rapporteur on Prisons and Conditions of Detention in Africa, the Special Rapporteur on the Rights of Women in Africa, the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa and the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV.

The African Court on Human and Peoples' Rights (African Court) was set up to complement the work of the African Commission. It has jurisdiction over all disputes concerning the application and interpretation of the ACHPR and human rights instruments ratified by African states.[118]

[118] African Union, Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights art. 3, *adopted* June 10, 1998 [hereinafter African Court Protocol], *available at* http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf.

Recommendations, reports and decisions of the African Commission and special rapporteurs, as well as decisions of the African Court assist in determining the nature and scope of regional legal obligations.[119]

In addition, resolutions, protocols and declarations issued by regional bodies, including the African Union (AU) and the SADC can provide guidance to domestic courts in southern Africa on the nature and scope of rights enshrined in national constitutions and legislation.

Relevant regional resolutions, protocols and declarations include:

- Treaty of SADC;[120]
- SADC Protocol on Health;[121]
- Code on HIV/AIDS and Employment in SADC;[122] and
- Charter of Fundamental Social Rights in SADC.[123]

Table: Dates of ratification/accession to regional instruments

Country	ACHPR	Protocol on Women	Treaty of SADC	SADC Protocol on Health
Angola	2/3/1990	30/9/2007	20/8/1993	-
Botswana	17/7/1986	-	7/1/1998	9/2/2000
Dem. Rep. of Congo	20/7/1987	9/6/2008	28/2/2009	-
Lesotho	10/2/1992	26/10/2004	26/8/1993	31/7/2001
Malawi	17/11/1989	20/5/2005	12/8/1993	7/11/2000
Mozambique	22/2/1989	9/12/2005	30/8/1993	13/11/2000
Namibia	30/7/1992	11/8/2004	14/12/1992	10/7/2000
Swaziland	15/9/1995	Signed 7/12/2004	16/4/1993	-
Zambia	10/1/1984	2/5/2006	16/4/1993	-
Zimbabwe	30/5/1986	15/4/2008	17/11/1992	13/5/2004

[119] African Court Protocol, *supra* note 118, at art. 7.

[120] SADC, Amended Treaty of the Southern African Development Community, Aug. 17, 1992 [hereinafter SADC Treaty], *available at* http://www.sadc.int/index/browse/page/120.

[121] SADC, Protocol on Health, Aug. 18, 1999, *available at* http://www.sadc.int/index/browse/page/152.

[122] SADC, Code on HIV/AIDS and Employment in the Southern African Development Community (1997) [hereinafter SADC Code], *available at* http://www.chr.up.ac.za/undp/subregional/docs/sadc5.pdf.

[123] SADC, Charter of Fundamental Social Rights in SADC, Aug. 26, 2003 [hereinafter Charter of Fundamental Social Rights], *available at* http://www.sadc.int/index/browse/page/171.

4.3 The rights to dignity and freedom from cruel, inhuman or degrading treatment

Forcing an individual to test for HIV or to disclose medical information without his or her consent may infringe upon the right to freedom from cruel, inhuman and degrading treatment and the right to dignity, given the wide interpretation of these rights accorded by the African Commission.

The ACHPR links the right to freedom from cruel, inhuman and degrading treatment with the right to dignity. It says in article 5: "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The African Commission has held that:

> [h]uman dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.[124]

The African Commission has elaborated on what constitutes the right to dignity, noting that "exposing victims to personal sufferings and indignity violates the right to human dignity" and further noting that "personal suffering and indignity can take many forms".[125]

In addition, the African Commission has allowed for a broad interpretation of actions that constitute torture, cruel, inhuman or degrading treatment or violate human dignity.

In the case of *Huri – Laws v Nigeria* the African Commission noted that "the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental".[126]

In the case of *Doebbler v Sudan* the African Commission emphasized that article 5 of the ACHPR prohibits not only cruel but also inhuman or degrading treatment or punishment, which includes:

[124] *Purohit v The Gambia*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 241/01, para. 57 (2003), *available at* http://caselaw.ihrda.org/doc/241.01/pdf/.

[125] *Sudan Human Rights Org. & Ctr. on Hous. Rights and Evictions (COHRE) v Sudan*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 279/03-296/05, para. 158 (2009), *available at* http://caselaw.ihrda.org/doc/279.03-296.05/pdf/.

[126] *Huri – Laws v Nigeria*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 225/98, para. 40 (2000), *available at* http://www1.umn.edu/humanrts/africa/comcases/225-98.html.

> not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience . . . . [T]he prohibition of cruel, inhuman or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.[127]

Significantly, vulnerable populations such as women, children and prisoners, who may be more likely to be subjected to unlawful HIV testing or breaches of confidential medical information, are specifically protected from cruel, inhuman or degrading treatment in regional human rights treaties.

The Protocol on Women affirms both the right to dignity under article 3(1) and protection from cruel, inhuman or degrading treatment under article 4(1). Article 3(1) says: "[e]very woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights". Article 4(1) states that: "[e]very woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment or treatment shall be prohibited."

Prisoners are also entitled to be treated with dignity and to be protected from cruel, inhuman or degrading treatment or punishment in terms of article 5 of the ACHPR.[128]

The African Commission has not yet applied this right in cases of HIV testing without informed consent and disclosure of another's HIV status. However, given that these actions not only require an individual to act against his or her will, but also create the possibility for psychological suffering,[129] it is certainly arguable that being forced to undergo HIV testing or for one's HIV status to be published without informed consent would violate the right to dignity and the right to be protected from cruel, inhuman or degrading treatment.

4.4 The rights to liberty and security of the person and to physical integrity

Regional human rights treaties contain protection for the rights to liberty and security of the person which may be relevant in litigation relating to unlawful HIV testing. Although there is limited interpretation of these rights in the context of medical testing, the protection of the rights themselves is worth noting.

Article 6 of the ACHPR provides that "every individual shall have the right to liberty and to the security of his person" and article 4 of the Protocol on Women protects rights to life, integrity and security of the person. The Protocol on Women goes further in mentioning specific acts that are prohibited in the context of these rights (and the freedom from

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[127] *Doebbler v Sudan*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 236,00, paras. 36-37 (2003), *available at* http://www.achpr.org/files/sessions/33rd/comunications/236.00/achpr33_236_00_eng.pdf.

[128] *See e.g.*, *Ouko v Kenya*, Afr. Comm'n on Hum. & Peoples' Rts., Communication No. 232/99 (2000), *available at* http://www.achpr.org/files/sessions/28th/comunications/232.99/achpr28_232_99_eng.pdf.

[129] *See e.g.*, *Doebbler*, African Commission, Communication No. 236/00, paras. 36-37.

cruel, inhuman and degrading treatment), which includes a prohibition on "all medical or scientific experiments on women without their informed consent".[130]

Article 4 of the ACHPR also protects the right to physical integrity; it states that "every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

The African Commission has yet to address these rights specifically in cases of HIV testing without informed consent.

4.5 The right to health

The ACHPR provides for the right to health. Article 16 of the ACHPR provides that every person has the "right to enjoy the best attainable state of physical and mental health".

In *Purohit and Moore v The Gambia*, the African Commission held that the legislative regime in the Gambia for mental health patients violated both articles 16 and 18(4). In so doing, the African Commission explained:

> [e]njoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.[131]

The African Commission also "read into Article 16 the obligation on the part of States party to the ACHPR to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind".[132]

Arguably, this means that where HIV testing or disclosures of HIV status are prerequisites for obtaining health care services, this may violate the right to health. For instance, where pregnant women are required to test for HIV for purposes of accessing antenatal health care services, the discriminatory treatment towards pregnant women may violate the right to health.

With particular relevance to women, article 14(1) of the Protocol on Women provides that states "shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted".[133] Article 14 emphasizes the rights of women to make informed decisions about their reproductive health, which would include making informed decisions about testing for HIV.

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[130] Protocol on Women, *supra* note 117, at sec. 4(2)(h).

[131] *Purohit v The Gambia*, African Commission, Communication No. 241/01, para. 80.

[132] *Id.* at para. 84. *See also*, *Sudan Human Rights Org. & COHRE v Sudan*, African Commission, Communication No. 279/03-296/05, paras. 206-12 (finding violation of article 16 in recommendation arising from conflict in Darfur).

[133] The Protocol on Women is the first regional or international human rights convention to explicitly refer to HIV and to include a right to self-protection against HIV.

Mandatory HIV testing and disclosures of HIV status may breach the right to health in that they fail to provide access to acceptable health care services. Furthermore, where HIV testing or disclosures of HIV status are applied in a manner that is discriminatory or that results in discriminatory treatment and the denial of services, they may lead to consequential violations of the right to health.

4.6 The right to work

Employees and job applicants may be required to test for HIV or to disclose their HIV status within the working environment. In most cases, the outcome of HIV testing and disclosures of HIV status results in discriminatory treatment, which often forms the basis of litigation. However, it is equally important to consider whether the requirement of testing and/or disclosure itself violates the right to work, separately from the outcome of the testing or disclosures.

The ACHPR states that "[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".[134]

In 2004, the African Commission adopted a Resolution on Economic, Social and Cultural Rights in Africa which adopted the Declaration of the Pretoria Seminar on Economics, Social and Cultural Rights in Africa.[135] The adopted Declaration held that the right to work in article 15 of the ACHPR entails, amongst other things, equality of opportunity in accessing gainful work and equitable and satisfactory conditions of work.[136] HIV testing and disclosure of one's status as a prerequisite to employment, promotion or continued employment arguably violates the right to work under the ACHPR as it limits an individual's access to work.

Similarly, SADC guidelines also provide useful guidance on HIV testing and disclosure of status in the employment context. The Charter of Fundamental Social Rights in SADC (the Charter) "embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the ACHPR, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments".[137] The signatories to the Charter further commit themselves to the implementation of relevant conventions promulgated by the ILO.[138]

More specifically, the SADC Employment and Labour Sector established a code setting out industrial relations standards on HIV and AIDS in the workplace known as the Code

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[134] African Charter, *supra* note 116, at art. 15.

[135] African Comm'n on Human and Peoples' Rights, Res. 73, 36th Ord. Sess., at para. 1 (Dec. 7, 2004), *available at* http://www.achpr.org/sessions/36th/resolutions/73/.

[136] African Comm'n on Human and Peoples' Rights, Declaration of the Pretoria Seminar on Economics, Social and Cultural Rights in Africa, at para. 6 (Dec. 7, 2004), *available at* http://www.achpr.org/files/sessions/36th/resolutions/73/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf.

[137] Charter of Fundamental Social Rights, *supra* note 123, at art. 3(1).

[138] *Id.* at art. 5(b).

on HIV/AIDS and Employment in SADC (the Code).[139] The Code covers all employees and prospective employees as well as all workplaces and contracts of employment; specifically prohibits compulsory workplace testing (including pre-employment HIV testing); and requires that all workplace HIV testing be voluntary and done by a suitably qualified person in a health facility with informed consent and pre- and post-test counselling.[140] It also protects an employee's right to confidentiality with regard to his or her HIV status.[141]

Code on HIV/AIDS and Employment in SADC

2. Job Access

There should be no direct or indirect pre-employment test for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV. Indirect screening methods such as questions in verbal or written form inquiring about previous HIV tests and/or questions related to the assessment of risk behaviour should not be permitted.

3. Workplace Testing and Confidentiality

1. There should be no compulsory workplace testing for HIV. Voluntary testing for HIV on the request of the employee should be done by a suitably qualified person in a health facility with informed consent of the employee in accordance with normal medical ethical rules and with pre- and post-test counselling.

2. Persons with HIV or AIDS should have the legal right to confidentiality about their HIV status in any aspect of their employment. An employee is under no obligation to inform an employer of his HIV/AIDS status. Information regarding the HIV status of an employee should not be disclosed without the employee's written consent.

3. Confidentiality regarding all medical information of an employee or prospective employee should be maintained, unless disclosure is legally required. This applies also to health professionals under contract to the employer, pension fund trustees and any other personnel who obtain such information in ways permitted by the law, ethics, the Code or from the employee concerned.

[139] SADC Code, *supra* note 122.

[140] *Id.* at 2-3.

[141] *Id.* at 3.

4.7 The rights to equality and non-discrimination

As set out in chapter 3, laws and practices that require mandatory HIV testing or forced disclosures of HIV status only of certain individuals such as pregnant women, sex workers, foreign nationals or job applicants may also violate the right to non-discrimination and to equality before the law.

The ACHPR protects the right to equality and the right to be free from discrimination on various grounds under article 3 and article 2 respectively.

Discrimination

Article 2 of the ACHPR states: "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth *or other status*".[142]

The ACHPR also specifically protects women from discrimination under article 18(3), which states that countries "shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions".

The African Commission has emphasised the importance of the principle of non-discrimination, describing it as "a fundamental principle in international human rights law. All international and regional human rights instruments and almost all countries' constitutions contain provisions prohibiting discrimination. The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally *in law and practice*."[143]

The African Commission has also linked this right to the enjoyment of all other rights. In *Legal Resources Foundation v Zambia*, the African Commission considered the ACHPR's article 2 protection against discrimination. It found that the Zambian constitutional provisions that rendered persons not of Zambian descent ineligible for presidential office violated article 2 of the ACHPR.[144] It explained as follows:

> [Article 2 of the ACHPR] abjures (sic) discrimination on the basis of any of the grounds set out, among them "language . . . national or social origin . . . birth or other status . . . ". [*sic*] The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or the lack of it affects the capacity of one to enjoy many other rights.[145]

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[142] African Charter, *supra* note 116, at art. 2 (emphasis added).

[143] *Good v Republic of Bots. Rapporteur*, Afr. Comm'n on Hum. and Peoples' Rts., Communication No. 313/05, para. 218 (2010) (emphasis added), *available at* http://caselaw.ihrda.org/doc/313.05/view.

[144] *Legal Res. Found. v Zambia*, African Commission, Communication No. 211/98, para. 71.

[145] *Id.* at para. 63 (omissions in original) (first [sic] in original).

In determining whether impermissible discrimination has taken place under the ACHPR, the African Commission looks to:

- Whether equal cases are treated in a different manner;
- Whether a difference in treatment has an objective and reasonable justification; and
- Whether there is proportionality between the legitimate aim sought and the means employed.[146]

Equality

Article 3 of the ACHPR provides a broad right to equal protection, which requires all laws in a country to be non-discriminatory. Article 3 states that "[e]very individual shall be equal before the law" and "entitled to equal protection of the law". This provision is similar to article 26 under the ICCPR.

The African Commission has held that article 3 "guarantees fair and just treatment of individuals within the legal system of a given country".[147] It has further clarified that "[t]he aim of [article 3] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation".[148] To establish a claim under article 3, a lawyer must show that the client was not treated the same as others in a similar situation under the law or that another in the same situation was given more favourable treatment than the client.[149]

Laws and practices that require or allow unlawful HIV testing and disclosures of private medical information of a specific population as well as those that sanction different treatment to those who test HIV-positive may be challenged in a court of law on the grounds that it violates the rights to non-discrimination and equality.

4.8 Conclusion

A number of rights under regional law may be implicated in cases of HIV testing without informed consent and disclosures of another's HIV status, including the right to dignity; freedom from cruel, inhuman or degrading treatment; liberty; security of the person; physical integrity; health; work; equality; and non-discrimination.

Regional bodies have yet to fully address the application of these rights specifically in cases of HIV testing without informed consent and unauthorised disclosure of HIV status. However, African Commission decisions expanding on the scope of these rights in other contexts can be useful in domestic litigation.

[146] *Good v Botswana,* African Commission, Communication No. 313/05, para. 219.

[147] *Zim. Lawyers for Human Rights v Zimbabwe*, Afr. Comm'n on Hum. and Peoples' Rts., Communication No. 284/03, para. 155 (2009), *available at* http://caselaw.ihrda.org/doc/284.03/pdf/.

[148] *Id.* at para. 155.

[149] *Id.* at para. 158.

CHAPTER 5

Comparative law relevant to unlawful HIV testing and disclosure of HIV status

5.1 Introduction

This chapter focuses on comparative law relating to HIV testing and disclosures of a person's HIV status without informed consent. For a discussion on why courts should look at the jurisprudence of similarly situated countries, please refer to chapter 2.

This chapter looks at how the various rights, such as rights to security of the person, protection from cruel, inhuman or degrading treatment, physical integrity and privacy, have been interpreted by courts of various countries in cases of unlawful HIV testing and unlawful disclosures of a person's HIV status. Where courts in southern Africa have addressed the issue, the manual focuses on these decisions. In the absence of jurisprudence from southern Africa, decisions from other countries have been included.

Selection of relevant cases and laws discussed in this chapter

- Allpass v Mooikloof Estates (Pty) Ltd
- C v Minister of Correctional Services
- Castell v De Greef
- Diau v Botswana Building Society
- Doe v City of New York
- Doe v Delie
- Hoffmann v South African Airways
- I v Finland
- Irvin and Johnson Ltd v Trawler and Line Fishing Union
- Jimson v Botswana Building Society

- Joy Mining Machinery v NUMSA
- Kingaipe and Another v Attorney General
- Maje v Botswana Life Insurance
- Moore v Prevo
- NM v Smith
- Van Vuuren v Kruger

Unlawful HIV testing and breaches of confidentiality often result in HIV-related discrimination. For instance, HIV testing in the workplace may result in refusal to appoint or dismissal of a person testing HIV-positive. While this is not the focus of this manual, it may be an important part of litigation relating to HIV testing and disclosures of HIV status.[150]

5.2 Principle of informed consent

The constitutions of many countries in southern Africa recognise a range of fundamental rights relevant to protecting individuals from medical procedures and disclosures of private medical information unless informed consent is provided, such as rights to the security of the person, privacy, dignity, physical integrity and protection from cruel, inhuman or degrading treatment. In addition, the common and/or civil law in most countries has long recognised the right of an individual to *dignitas* or bodily and psychological integrity. This legal principle protects individuals from unwanted medical procedures, unless the necessary consent has been provided.[151]

When assessing whether informed consent is present, courts have looked at both the nature and extent of information provided to the patient, as well as the manner in which this information was provided. They have also considered various factors that may affect the presence or absence of informed consent, including whether an individual is able to understand the information provided; the language in which the information is provided; the time available to make a considered decision; the psychological state of the patient at the time of the decision;[152] and the existing power relations between the individual and person requiring or conducting the HIV test.

[150] Refer to the SALC Manual *Equal Rights for All: Litigating Cases of HIV-Related Discrimination* for a discussion of how to litigate cases dealing with equality and non-discrimination in the context of HIV.

[151] Common law and statutory law sometimes allow for exceptions to the requirement of voluntary informed consent by an individual to medical testing and treatment. In these instances, medical testing and treatment without consent is lawful provided that the laws are reasonable limitations of rights, in line with constitutional principles.

[152] For example, a person who has been raped would benefit from taking post-exposure prophylaxis (PEP) to prevent possible HIV transmission as a result of the rape. Clinical management of rape requires that patients are tested for HIV before being provided with a full course of PEP. However, medical practice recognises that some patients are too traumatised to immediately provide informed consent for an HIV test. In these situations, the patients should be provided with a PEP starter pack and asked to return within a few days for an HIV test. *See* WHO & ILO, Post-Exposure Prophylaxis to Prevent HIV Infection 55 (2007), *available at* http://whqlibdoc.who.int/publications/2007/9789241596374_eng.pdf.

In the landmark 1994 South African decision of *Castell v de Greef*,[153] the Supreme Court adopted a subjective, patient-centred test for informed consent. The Court held that a health practitioner must disclose all information and risks about a procedure that a "reasonable person in the patient's position would want to know before making a decision".[154] The Court in *Castell v De Greef* found that informed consent requires a patient to:

- Know the nature and extent of the risk or harm that accompanies a procedure;
- Understand the nature and extent of the risk or harm;
- Agree in detail to the procedure under discussion; and
- Agree in detail to all parts of the risk or possible harm.[155]

The holding in *Castell v de Greef* is significant because a subjective, patient-centred test for informed consent is in line with fundamental rights to self-determination and individual autonomy.

Similarly, in Botswana, the Industrial Court in *Diau v Botswana Building Society*[156] described informed consent this way: "[T]he person to be tested [for HIV], must not just consent, but must give informed consent, meaning that before the person who is tested may give consent he or she must be made to fully appreciate the consequences and implications of his or her consent."[157]

Particularly, with respect to HIV testing, courts have found pre-test counselling to be an essential component of informed consent. In the South African case of *C v Minister of Correctional Services*,[158] a prisoner had been informed that he was being tested for HIV and that he had the right to refuse the test, while he was standing in a hallway with a group of other prisoners. This information was later repeated while he was in the consulting room when his blood was drawn, in the presence of another prisoner. The High Court held that the lack of privacy and reasonable time for reflection accorded to the prisoner before being asked for consent to the test, and the absence of any pre-test counselling resulted in the failure to obtain informed consent.[159] Rather than seeking to determine the appropriate standards of informed consent, the Court specifically noted that the prison had already adopted the policy that informed consent for an HIV test requires adequate pre-test counselling, which includes providing the patient with information on the meaning of HIV infection, the manner of transmission of the disease; the nature of the test and that consent was required; the social, psychological and legal implications of

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[153] *Castell v de Greef,* 1994 (4) All SA 63 (C) (S. Afr.).

[154] *Castell*, 1994 (4) All SA 63 at 80.

[155] *See* Health and Democracy: A Guide to Human Rights, Health Law and Policy in Post-Apartheid South Africa, 250 (Adila Hassim, Mark Heywood & Johnathan Berger eds., 2007), *available at* http://www.section27.org.za/wp-content/uploads/2010/04/Chapter8.pdf.

[156] *Diau v Bots. Bldg. Soc'y,* 2003 (2) BLR 409 (BwIC) (Bots.), *available at* http://www.southernafricalawcenter.org/library/category/4.

[157] *Diau*, 2003 (2) BLR 409 at 41-42.

[158] *C v Minister of Correctional Services,* [1997] JOL 407 (T) (S. Afr.).

[159] *Id.*

the test; and what was expected if the result of the test proved positive.[160]

For information that must be provided under pre-test counselling to ensure informed consent, the WHO and UNAIDS recommend that the health care provider should at a minimum give the patient the following information:

- The reasons why HIV testing and counselling is being recommended;
- The clinical and prevention benefits of testing and the potential risks, such as discrimination, abandonment or violence;
- The services that are available in the case of either an HIV-negative or an HIV-positive test result, including whether antiretroviral treatment is available;
- The fact that the test result will be treated confidentially and will not be shared with anyone other than heath care providers directly involved in providing services to the patient;
- The fact that the patient has the right to decline the test and that testing will be performed unless the patient exercises that right;
- The fact that declining an HIV test will not affect the patient's access to services that do not depend upon knowledge of HIV status;
- In the event of an HIV-positive test result, encouragement of disclosure to other persons who may be at risk of exposure to HIV; and
- An opportunity to ask the health care provider questions.

For post-test counselling, the WHO and UNAIDS recommend that the health care provider should:

- Inform the patient of the result and give the patient time to consider it;
- Ensure that the patient understands the result;
- Allow the patient to ask questions;
- Help the patient cope with the emotions arising from the result;
- Discuss any immediate concerns and help the patient to identify potential individuals who can offer support;
- Provide information on how to prevent transmission of HIV, preventative health measures, such as good nutrition;
- Discuss the nature and extent of disclosure of status;
- Assess the emotional well-being of the patient; and
- Arrange a specific date and time for follow-up.

Similarly, in cases of disclosure of an individual's HIV status, courts have found that disclosure is likely to be legitimate if the individual at issue has consented to the disclosure or the individual's HIV status is common knowledge.[161]

[160] *C v Minister of Correctional Services,* [1997] JOL 407 at 21-22, 26.

[161] *NM v Smith,* 2007 (5) SA 250 at para. 44.

5.3 HIV testing without informed consent

Although HIV testing without informed consent is imposed in various settings (e.g. antenatal clinics, prisons, educational institutions), the vast majority of legal challenges have been in the context of the workplace. As a result, the primary focus of much of the litigation often relates to HIV-related discrimination flowing from the outcome of HIV tests, rather than challenging the requirement of testing in the first place. However, there is some relevant case law specifically on HIV testing.

In the Botswana Industrial Court case of *Diau v Botswana Building Society*, the applicant was required to test for HIV and to submit a certified document of her HIV status as a condition of employment. When she refused to do so, she was dismissed by her employer.

The Industrial Court held that requiring an employee to submit to an HIV test as a condition for ongoing employment (making the test effectively "mandatory") constituted a denial of the applicant's constitutional rights to liberty, dignity and protection from inhuman or degrading treatment or punishment.[162]

The Court said:

> In effect the respondent in this case is saying to the applicant "Agree to test for HIV/AIDS and keep your job; or maintain your right to make the inherently personal decision of whether or not to have an HIV test and lose the employment opportunity." In my view the very fact of this irrational demand, it being wholly unrelated to the inherent requirement of the job, is a veritable assault on the applicant's right to liberty and human dignity.[163]

The Court added, in connection with the violation of the right to dignity and to be protected from cruel, inhuman or degrading treatment:

> [T]he right to dignity requires us to respect that . . . an individual is the master of his or her own body and . . . destiny and that he or she is free to resist any potential violation to his or her privacy or bodily integrity. 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.[164]

The Industrial Court in *Diau* additionally found that the employer's demand for an HIV test ignored the importance of pre- and post-test counselling.[165] The importance of these principles and the recognition that mandatory testing violates important constitutional rights goes a long way in establishing that employers may not require their workers or job applicants to undergo HIV tests as a condition of employment.

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[162] *Diau*, 2003 (2) BLR 409 at 40, 46-47.

[163] *Id.* at 46-47.

[164] *Id.* at 38.

[165] *Id.* at 41-42.

Similarly, in the Zambian High Court case of *Kingaipe and Another v Attorney General*,[166] two members of the Zambian Air Force were instructed to go for compulsory medical examinations and blood tests. They were each tested for HIV without their informed consent and without pre- or post-test counselling.

The High Court noted that "extracting a blood sample from any person without his or her consent" has been found to infringe on the constitutional rights to privacy and freedom from cruel, inhuman and degrading treatment.[167] In reaching its decision, the Court recognised the importance of obtaining not just consent but *informed* consent, as well as providing pre- and post-test counselling in the case of HIV testing, which were not provided in this case.[168]

South African courts have clarified what is legally needed if employers choose to provide for voluntary HIV testing for employees. Under South Africa's Employment Equity Act (EEA), employers must obtain a court order authorising a particular HIV testing scheme in the workplace.[169] Requiring court authorisation has provided guidance on what is necessary for lawful HIV testing in the workplace.

For example, in the South African Labour Court case of *Joy Mining Machinery v NUMSA*,[170] Joy Mining, with the support of its union and most non-union employees, wanted to test its workers for HIV to determine incidence amongst its staff in order to develop HIV workplace programmes. It applied for permission in terms of the EEA. The Court granted an order allowing anonymous voluntary HIV testing on the conditions that, *inter alia*, all testing was voluntary, counselling was provided, confidentiality was maintained, and measures were put in place to prevent the possibility of unfair discrimination.[171] To ensure voluntariness was preserved, the Court included a requirement that no prejudicial inferences could be drawn by Joy Mining against an employee who refused to participate in the testing programme.[172]

[166] *Kingaipe and Another v Attorney-Gen.*, (2010) 2009/HL/86 (HC) (Zam.).

[167] *Id.* at J42.

[168] *Id.* at J43-J44.

[169] Employment Equity Act, 55 of 1998, art. 7(2) (S. Afr.).

[170] *Joy Mining Machinery v NUMSA*, 2002 ZALC 7 (LC) (S. Afr.).

[171] *Id.* at paras. 2.1-2.10.

[172] *Id.* at para. 2.11.

Example: Employment Equity Act, No. 55 of 1988

Section 7
(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act.

Section 50
(4) If the Labour Court declares that the medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to –

- the provision of counselling;
- the maintenance of confidentiality;
- the period during which the authorisation for any testing applies; and
- the category of categories of jobs or employees in respect of which the authorisation for testing applies.

Similarly, in *Irvin and Johnson Ltd. v Trawler and Line Fishing Union*,[173] the applicant wanted to arrange for the voluntary and anonymous HIV testing of employees and approached the court for authorisation. The South African Labour Court determined that the prohibition against HIV testing in the workplace was not intended to discourage the provision of voluntary HIV counselling and testing, which the Court held was an important means of encouraging openness and acceptance of HIV:

> In considering the permissibility of voluntary testing, it is perhaps appropriate to observe that the avoidance of discrimination against those infected with HIV is not likely to be best served by encouraging a climate of secrecy. It is one thing to protect employees against compulsory testing. It is quite another thing to place obstacles in the way of voluntary testing.[174]

As a result, the Court held that anonymous and voluntary HIV testing of employees does not require authorisation under the EEA.[175]

[173] *Irvin & Johnson Ltd. v Trawler & Line Fishing Union,* (2003) 24 ILJ 565.

[174] *Id.* at para. 29.

[175] *Id.* at para. 44(a).

Reference to countries' national policies on HIV and AIDS

Countries' national HIV polices are often far more comprehensive and progressive than national legislation and specifically address issues related to HIV not dealt with in law. For example, many countries have detailed health policies relating to the requirements for lawful HIV testing, including what information should be provided and the counselling that should accompany HIV testing.

For this reason, HIV testing and disclosure of status litigation may wish to refer to a country's national HIV and AIDS policies as an indication of the government's commitment to certain values and principles, and as guidance in its interpretation of constitutional provisions or national laws.

Case law indicates that courts in southern Africa have considered the content of their domestic HIV policies alongside national, regional and international principles in guiding their decision-making. For instance, in the South African case of *C v Minister of Correctional Services*, the Court used the content of the correctional services' policy on HIV as an indication of the state's understanding of the requirements for voluntary HIV testing.

There may be situations where laws and/or practices provide for mandatory HIV testing (or forced disclosure of HIV status) of specific populations. For instance there are anecdotal reports of practices that require persons arrested on charges related to sex work being tested for HIV in some countries.[176] These practices and others like them arguably discriminate against those populations singled out for mandatory HIV testing and/or disclosure. However, currently there are no judgments from courts in southern Africa that address this issue.[177]

[176] *See e.g.*, UNAIDS, UNAIDS Calls on Greece to Protect Sex Workers and Their Clients through Comprehensive and Voluntary HIV Programmes (2012), *available at* http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/may/20120510psgreece/; Chi Mgbako, *Malawian Sex Workers Fight Forced HIV Testing*, Pambazuka News, (June 14, 2012), http://allafrica.com/stories/201206151142.html.

[177] There is a pending case in the Malawi High Court, *Butao v State*, which challenges the subjection of sex workers to HIV tests without their consent and the disclosure of their status in open court.

Legal basis for cases relating to unlawful HIV testing

It is important to note that cases relating to compulsory HIV testing can be based on constitutional law or other legal grounds, such as an HIV-specific law, contract law, labour law or even penal laws. It is often effective to combine these approaches in framing one's case.

For example, in the Botswana case of *Jimson v Botswana Building Society*, the applicant was advised that a medical examination was a condition for employment with the respondent. The respondent complied with a further instruction to undergo an HIV test, ostensibly as part of the pre-employment medical examination. He tested positive and was subsequently advised that his "probationary employment with the Society" was to be terminated.

The Industrial Court did not decide the matter based on any constitutional rights. Instead, the Court held that the requirement to undergo an HIV test amounted to post-employment testing and that the conduct of the respondent was a breach of the contract of employment entered into between the respondent and the applicant.

5.4 Unlawful disclosure of HIV status

The right to have one's private medical information kept confidential has long been recognised as an essential aspect of medical law and ethics, both because it protects the patient's right to privacy, dignity and psychological integrity and because it serves the public interest by promoting trust in medical professionals and health-seeking behaviour.

The exceptions to the principle of confidentiality are very narrow. Often people who have breached confidentiality will try to invoke one of these exceptions to justify their unlawful disclosure; courts often reject these attempts. For a detailed discussion of justifications for disclosure and courts' responses, see chapter 6.

This section will look at case law relating to unlawful disclosures of a person's HIV status – where a person's confidential medical information relating to his or her HIV status is disclosed without informed consent and without legal justification. In most cases, unlawful disclosures occur within the health care setting by a health care provider to other providers or to the patient's family, partner or employer. While all medical information is entitled to protection, there is widespread recognition among courts all over the world that the stigma and ignorance surrounding HIV makes unlawful disclosure related to that disease especially serious and damaging to human rights.

Cases relating to breaches of confidentiality can be challenged on the basis of constitutional or common law rights (e.g. rights to privacy, dignity and psychological integrity) or in terms of health or HIV-specific laws, where they exist. Most case law has been based on constitutional and common law rights.

A number of courts in southern Africa have addressed unlawful disclosure of an individual's HIV status under the common law principle of *actio iniuriarum*, which protects an individual's dignity and privacy.[178]

For example, in the South African case of *Van Vuuren v Kruger*, decided prior to the new South African Constitution, the plaintiff sued his doctor under the common law principle of *actio iniuriarum* after the latter informed others of the plaintiff's HIV-positive status.

The Appellate Division of the South African Supreme Court (now the Supreme Court of Appeal) held that the disclosure violated the plaintiff's rights and established that the "duty of a physician to respect the confidentiality of his patient is not merely ethical but is also a legal duty recognised by the common law".[179]

The Court stressed the particular aspects of HIV that warranted consideration:

> There are in the case of HIV and AIDS special circumstances justifying the protection of confidentiality. By the very nature of the disease, it is essential that persons who are at risk should seek medical advice or treatment. Disclosure of the condition has serious personal and social consequences for the patient. He is often isolated or rejected by others which may lead to increased anxiety, depression and psychological conditions that tend to hasten the onset of so-called full-blown AIDS.[180]

In reaching its decision, the Court took note not only of the right to confidentiality, but also of the impact of unlawful disclosure of a person's HIV status. The Court commented that preserving confidentiality promotes trust within the doctor-patient relationship, and thus promotes both public and private health.[181]

Similarly, South Africa's Constitutional Court decided the case of *NM v Smith*, in which the Court considered a claim by three women whose HIV status was disclosed in the biography of a famous politician without their consent. The women sued the politician, her biographer and the book's publisher, claiming that their common law rights to privacy, dignity and psychological integrity had been violated, based on the *actio iniuriarum*.[182]

The Court found that the applicants had not provided consent to the disclosure of their HIV status, nor was their infection a matter of public knowledge.[183] The Court explained how medical confidentiality applies outside the health care setting:

> The assumption that others are allowed access to private medical information once it has left the hands of authorised physicians and other personnel involved in the facilitation of medical care, is fundamentally flawed. It fails to take into account an individual's desire to control information about him or herself and to keep it confidential from others.

[178] *Van Vuuren v Kruger*, 1993 (4) SA 842 (A) at 11 (S. Afr).

[179] *Id.* at 14.

[180] *Id.* at 31.

[181] *Id.* at 13-14 (quoting X v Y, 1988 (2) All ER 648 (QBD) at 653(a)-(b)).

[182] The Court considered whether it had jurisdiction to hear the complaint and held that "[w]hile the claim falls to be dealt with under the *actio iniuriarum* the precepts of the Constitution must inform the application of the common law". *NM v Smith,* 2007 (5) SA 250 at para. 28.

[183] *Id.* at para. 44.

> It does not follow that an individual automatically consents to or expects the release of information to others outside the administration of health care. As appears from what has gone on before there is nothing on the record to suggest that the applicants' HIV status had become a matter of public knowledge.[184]

It is noteworthy that, as with the *Van Vuuren* case, the impact of stigma, discrimination and access to health care was given considerable attention in weighing the potential harm caused by breaches of privacy in relation to HIV status. The Court noted that:

> [t]he disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. The affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS. As a result, it is imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure. The involved parties should weigh the need for access against the privacy interest in every instance and not only when there is an implication of another fundamental right, in this case the right to freedom of expression.[185]

The Court also examined the right to dignity, since the *actio iniuriarum* protects both privacy and dignity. It held that "[i]t is . . . an affront to the infected person's dignity for another person to disclose details about that other person's HIV status or any other private medical information without his or her consent".[186] The Court ultimately held that the publication of the HIV status in the book constituted a wrongful publication of a private fact in violation of the applicants' right to privacy.[187]

Like South Africa, the Botswana High Court in *Maje v Botswana Life Insurance*,[188] also addressed whether disclosure of the plaintiff's HIV status implicated her rights under common law. In *Maje*, the plaintiff sued the defendant life insurance company for the publication, without her consent, of her photograph in the company's newsletter under the heading "So you're HIV positive, where do you go from here?"

In determining whether the case ought to proceed to trial, the High Court held that "the publication of a person's photograph without that person's consent in circumstances where the publication caused offence or humiliation to that person is an actionable wrong for which the remedy lies in the *actio injuriarum*".[189]

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[184] *NM v Smith,* 2007 (5) SA 250 at para. 44.

[185] *Id.* at para. 42-43.

[186] *Id.* at para. 48.

[187] *Id.* at para. 47.

[188] *Maje v Botswana Life Insurance,* 2001 (2) BLR 626.

[189] *Id.* at 3.

Other courts outside southern Africa have addressed disclosure of an individual's HIV status based on human rights or constitutional law under the right to privacy.

The European Court of Human Rights considered the implications of the unauthorised disclosure of HIV status in *I v Finland*.[190] In that case, an HIV-positive Finnish woman's confidential patient record at a public hospital was unlawfully accessed by a third party, leading to an unauthorised disclosure of her HIV status. She brought suit against Finland for a breach of its positive obligation under article 8 of the European Convention on Human Rights to secure respect for her private life "by means of a system of data protection rules and safeguards".[191] The Court found that the protection of medical information is an essential element of the right to respect for private and family life:

> [Respecting the confidentiality of health data] is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.[192]

Finding that the records system in the hospital was clearly not in accordance with Finnish data privacy law, the European Court found a violation of the article 8 right to privacy.[193]

In the United States, the Court of Appeals in *Doe v City of New York* recognised a right to confidentiality with respect to one's HIV status as part of the constitutional right to privacy, after the plaintiff's status was made public by a city agency.[194] The Court said:

> Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition . . . There is . . . a recognized constitutional right to privacy in personal information. More precisely, this right to privacy can be characterized as a right to "confidentiality," to distinguish it from the right to autonomy and independence in decision-making for personal matters . . .[195]

Describing the specific reasons for applying the right to confidentiality to medical information, the Court explained:

[190] *I v Finland*, 48 Eur. H.R. Rep. 31 (2009), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87510.

[191] *Id.* at para. 37.

[192] *Id.* at para. 38.

[193] *Id.* at para. 49. *See also Z v Finland*, 25 Eur. H.R. Rep. 371 (1998) (holding that the Finnish Court of Appeal's decision to identify the applicant and her HIV-positive status and to publish her medical records after 10 years violates article 8 of the European Convention), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58033.

[194] *Doe v City of New York*, 15 F.3d 264 (2d Cir. 1994) (U.S).

[195] *Id.* at 267.

> Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over. Clearly, an individual's choice to inform others that she has contracted what is at this point invariably and sadly a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV or living with AIDS, considering the unfortunately unfeeling attitude among many in this society toward those coping with the disease. An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information. We therefore hold that Doe possesses a constitutional right to confidentiality . . . in his HIV status.[196]

Particular settings leave individuals vulnerable to unlawful disclosure of a person's HIV status. These include the working environment and prisons.

With respect to unlawful disclosures in the workplace, the South African Labour Court in *Allpass v Mooikloof Estates Ltd.*,[197] held that the employee was not obligated to disclose his HIV status to his employer. The Court stated: "[i]t is trite law that the applicant was under no legal obligation to disclose his HIV status to his prospective employer and that the expectation that he should have so disclosed violates his right to dignity and privacy".[198]

Incarcerated individuals are especially vulnerable to violations of their rights when it comes to HIV. At least two United States courts have recognised the constitutional right of prisoners to keep their HIV status private. In *Doe v Delie*, the Court of Appeals determined that a prisoner retains his right to privacy in his medical information, including his HIV status.[199] However, the Court acknowledged that a prisoner's constitutional right to privacy of this type is subject to limitations to allow correctional officers to achieve "legitimate correctional goals and maintain institutional security".[200] This reasoning was adopted in full in *Moore v Prevo*, a Court of Appeals decision with regard to unauthorised disclosures of HIV status to other prison inmates.[201]

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[196] *Doe v City of New York*, 15 F.3d at 267. For procedural reasons, the Court did not determine whether Doe's right had been violated by the city's actions.

[197] *Allpass v Mooikloof Estates Ltd.*, 2011 (2) SA 638 (LC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZALC/2011/2.pdf.

[198] *Id.* at para. 63.

[199] *Doe v Delie*, 257 F.3d 309, 317 (3d Cir. 2001) (U.S).

[200] *Id.* at 317.

[201] *Moore v Prevo*, 379 Fed.Appx. 425, 427 (6th Cir. 2010) (U.S).

5.5 Conclusion

Courts throughout southern Africa and around the world have addressed unlawful HIV testing and unlawful disclosure of an individual's HIV status on a variety of legal bases, including constitutional, common and statutory law. Central to the court's inquiry is whether the necessary consent was provided prior to subjecting someone to an HIV test or disclosing an individual's HIV status. In numerous cases, courts have found violations of the constitutional rights to privacy, liberty, dignity and freedom from cruel, inhuman and degrading treatment as well as the common law right to privacy.

CHAPTER 6

Justifications used for HIV testing without informed consent and disclosures of HIV status

In cases of HIV testing without informed consent and disclosures of HIV status, a court will need to enquire into whether the testing and/or disclosure infringed on a particular right, and if so, whether the infringement is lawful.

In determining whether an infringement is lawful, a court will take into account a number of factors, such as whether the goal of the infringement is legitimate and whether the infringement is the least rights restrictive method to achieve the legitimate goal. However, each jurisdiction will have its own particular criteria that courts have taken into account when determining whether an infringement is lawful, and thus lawyers should consult domestic case law to ascertain the precise criteria used by courts in making such a determination.

This section will focus on the arguments made to justify HIV testing without informed consent or disclosure of an individual's HIV status and how courts have responded to such arguments.

Selection of relevant documents and cases discussed in this chapter

- Airedale NHS Trust v Bland
- Attorney General v Thwaites
- Diau v Botswana Building Society
- Glover v Eastern Nebraska Community Office of Retardation
- Hall v Victorian Amateur Football Association
- Harvey and Another v PD
- Hoffmann v South African Airways

- Irvin and Johnson Ltd v Trawler and Line fishing Union and Others
- Kingaipe and Another v Attorney General
- Maje v Botswana Life Insurance
- Makuto v S
- MX v ZY
- Nanditume v Minister of Defence
- NM v Smith
- Odafe v Attorney General
- S v Safiko
- Van Vuuren v Kruger
- X v Commonwealth of Australia

The chapter is divided into three sections:

- Scientific and medical information relating to HIV and AIDS
- Responses to arguments used to justify HIV testing without informed consent
- Responses to arguments used to justify disclosure of an individual's HIV status

6.1 Scientific and medical information relating to HIV and AIDS

Scientific and medical evidence of HIV and AIDS is essential to arguing cases relating to unlawful HIV testing and disclosure of HIV status. Scientific and medical evidence can provide the court with critical information about how HIV is transmitted, what measures are available to prevent HIV transmission, the course of the illness and the available treatment, and care and support, amongst other things. New developments in the field, such as the impact of antiretroviral treatment on a person's viral load and long-term survival, and information about effective occupational health and safety and public health responses to managing HIV and AIDS, may be crucial in responding to justifications put forth by other parties.

Reference to science in litigation

It is advisable to always prepare expert evidence to address case specific issues relating to the science of HIV and AIDS.

Depending on the legal and factual issues at stake, one might want to seek the services of a virologist to provide evidence relating to the risk of transmission of HIV, medical practitioners who specialise in HIV/AIDS to discuss the applicant's medical history and health status and/or public health experts to discuss HIV-related prevention, treatment and care.

When using expert evidence, it is important that any relevant documents of international and national health authorities pertaining to the issue are incorporated into the court record through reference to them in expert affidavits and by attaching them as annexures to the affidavits.

In the case of *Odafe v Attorney General*,[202] the Nigerian High Court was called upon to determine whether the failure to provide access to HIV treatment to awaiting trial prisoners was a violation of the right to life. It bemoaned the lack of scientific evidence placed before the Court:

> The nature and detailed consequences of the virus are not placed before the Court for me to arrive at the conclusion that the non-compliance is an infringement of their right to life. In other words, that if treatment is provided they will live, if not provided they will die. This is for an expert in the medical area concerned to tell the Court and there is no expert evidence before me.[203]

There are a number of ways lawyers can introduce medical and scientific evidence relating to HIV in particular cases. The specific procedural details will vary from jurisdiction to jurisdiction. However, two primary methods widely relevant within common law jurisdictions in southern Africa are to introduce expert evidence via affidavit or in legal submissions through citing court decisions, which have made specific findings related to the medical and scientific aspects of HIV and AIDS.

This subsection will focus on medical and scientific findings from courts in southern Africa and around the world, which can be used in court submissions.

The case that provides some of the most detailed scientific and medical evidence regarding HIV testing and the progression of HIV to AIDS is the South African Constitutional Court's decision in *Hoffmann v South African Airways*.[204] It is important to note that the evidence in *Hoffmann* is accurate as of 2001. Since then, significant evidence has emerged, especially regarding the positive effects of antiretroviral treatment on viral load and thus risk of infection to other people, among others. Given that, lawyers should ensure they have the most up-to-date medical information prior to litigation.

In *Hoffmann*, the Court set out medical information relating to the progression of HIV to AIDS as follows:

> [HIV/AIDS] is a progressive disease of the immune system that is caused by the Human Immunodeficiency Virus, or HIV. HIV is a human retrovirus that affects essential white blood cells, called CD4+ lymphocytes. These cells play an essential part in the proper functioning of the human immune system. When all the interdependent parts of the immune system are functioning properly, a human body is able to fight off a variety of viruses and bacteria that are commonly present in our daily environment. When the body's immune system becomes suppressed or debilitated, these organisms are able to

[202] *Odafe v Attorney Gen.*, [2004] AHRLR 204.

[203] *Id.* at para. 37.

[204] *Hoffmann v South African Airways*, 2001 (1) SA 1.

flourish unimpeded. [The medical expert] identifies four stages in the progression of untreated HIV infection:

a. **Acute stage** – this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.

b. **Asymptomatic immunocompetent stage** – this follows the acute stage. During this stage the individual functions completely normally, and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.

c. **Asymptomatic immunosuppressed stage** – this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells per microlitre of blood. However, it is only when the count drops below 300 cells per microlitre of blood that an individual cannot be effectively vaccinated against yellow fever. Below 300 cells per microlitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and antimicrobials. Although the individual's immune system is now significantly depressed, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.

d. **AIDS (Acquired Immune Deficiency Syndrome) stage** – this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.[205]

In relation to HIV testing, viral load and immune function the Court recounted the unanimous views of medical experts as follows:

- The standard test to diagnose HIV is a screening ELISA test followed by confirmatory tests. There is a window period of between two to twelve weeks depending on the tests used, within which an HIV-positive individual will test negative.
- Predicting an individual's risk of developing AIDS can be done accurately by assessing the immune function and the level of HIV burden.

[205] *Hoffmann v South African Airways*, 2001 (1) SA 1 at para. 11.

- Immune function is determined by measuring a particular immune cell count in the blood, which is accepted as a marker. This is the CD4+ lymphocyte cell, which is attacked and destroyed by HIV. The CD4+ count is used to assess the risk of various opportunistic diseases.

- The level of HIV replication is assessed by quantifying the amount of HIV genetic materials in the blood (HIV-1 RNA). This measurement is usually referred to as the individual's viral load.[206]

Similarly, in the Namibian case of *Nanditume v Minister of Defence*,[207] the Labour Court heard evidence regarding what it means to test HIV-positive in terms of the course of the illness, and held in its decision that:

> [i]f a person tests HIV positive, that does not mean that such person has AIDS nor does it mean that such person is ill nor does it mean that such person will become ill soon. It may take several years, on average 8 to 12 years, for the HIV to damage the immune system so much that the person can be said to be ill. Furthermore it may take 1 to 2 months after being infected with HIV for there to be signs that an infected person has in fact become HIV positive. This is known as the 'window period'. *Therefore a blood test which indicates that a person is HIV positive is not an indication of that person's health on that date, while a person who tests negative may nevertheless be HIV positive.* Two other tests are necessary to determine whether an HIV positive person is ill. The first is to ascertain the infected person's CD4 count. This is measured as the number of cells per cubic millimetre of blood and indicates the degree of damage to the immune system. The lower the CD4 count, the more damaged the immune system is. CD4 counts below 200 cmm are associated with more rapid development of AIDS-related diseases. The second test necessary to ascertain the health of the person who is HIV positive, is known as the Viral Load test. It measures the amount of virus multiplying in the blood at a given time. A high viral load indicates high levels of viral infection and a shorter time to the inevitable development of the 'disease'. Obviously some people with HIV have low viral loads and some have high viral loads. A low viral load means a slower rate of disease progression. . . . There are drugs, that is, medicines and treatment which help to delay the onset and severity of the 'opportunistic infections', that is, AIDS proper.[208]

Although *Hoffmann* and *Nanditume* are older cases and science has progressed greatly in the past decade, these basic facts about HIV and AIDS remain largely unchanged.

In the South African case of *Van Vuuren v Kruger*,[209] the Supreme Court of Appeal considered scientific evidence regarding HIV transmission to others. In determining that a breach of a person's HIV status to medical practitioners was unjustified, the Court noted the following regarding the infectiousness of HIV:

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[206] *Hoffmann v South African Airways*, 2001 (1) SA 1 at para. 13(4)-13(7).

[207] *Nanditume v Minister of Defence*, 2000 NR 103 (LC) (Nam.), *available at* http://www.lac.org.na/projects/alu/Pdf/haindongo.pdf.

[208] *Id.* at 5 (emphasis added).

[209] *Van Vuuren v Kruger*, 1993 (4) SA 842.

> Even though the virus is highly infective, it is far less infectious than many other common viruses and can only be transmitted through the exchange of certain body fluids, viz semen, vaginal fluids and blood. The mode of spread of the infection generally follows well-defined routes namely unprotected sexual intercourse, the injection of infected blood, the infection of an unborn foetus whilst in the womb and, in exceptional cases, the infection of a new-born baby through the medium of breast milk.
>
> Not a single case of occupationally acquired HIV has been confirmed in South Africa. Although health care workers are therefore at risk, the risk is small and arises only if through an invasive procedure infected blood enters the worker's blood stream.
>
> There are many pathogens that are more infectious than HIV, such as hepatitis B, and a medical practitioner must, in the course of his ordinary practice, take steps to prevent their spread. Some of them are usually sufficient to prevent the spread of HIV in a professional context.[210]

Using these findings by courts, it is possible to refute many of the common justifications for mandatory HIV testing and unauthorised disclosure of HIV status.

6.2 Justifications for HIV testing without informed consent

This section examines the following common justifications invoked for mandatory HIV testing:

- The need to determine a person's capacity to perform the inherent requirements of a job;[211]
- The need to protect the health of others;
- The need to protect the patient him or herself (e.g. by providing treatment and support);[212] and
- The need to protect the public interest (e.g. by deterring crimes relating to HIV transmission or exposure).

Determining capacity to fulfil inherent requirements of a job

A common justification provided for HIV testing without informed consent of an applicant or employee is the need to determine that person's capacity to fulfil the inherent requirements of a position. This justification is based on the assumption that a person's HIV status usually on its own is capable of determining their health status, including their capacity to work. Courts have consistently rejected the view that solely a person's HIV status reflects the capacity to perform the inherent requirements of a position.

[210] *Van Vuuren*, 1993 (4) SA 842 at 27-28.

[211] In some cases, employees or job applicants may be asked to disclose information on a medical questionnaire relating to their HIV status, in which case similar justifications are raised for the requirement. Since this practice is less common than requiring HIV testing of an employee or applicant, it is not dealt with here.

[212] Adapted from *Hoffmann v South African Airways*, 2001 (1) SA 1 at para. 14.

In the South African Constitutional Court case of *Hoffmann v South African Airways*, the appellant passed a four-stage employment selection process during which he was found to be a suitable candidate for employment. However, he was required to undergo a final medical examination, including a test for HIV, in order to be employed by South African Airways (SAA). SAA argued that it was important to determine an applicant's HIV status since flight crew had to be "fit for world-wide duty".[213] SAA claimed that a person testing HIV-positive did not fulfil this criterion since he or she may react negatively to a yellow fever vaccination (required of all crew flying to endemic countries), may contract yellow fever if he or she is not vaccinated, may contract other opportunistic infections and may have a shortened life expectancy. [214]

The Court, however, found that an HIV test was not determinative of an applicant's health status.[215] The Court accepted expert evidence that the inherent requirements of a cabin crew attendant's position are such that an asymptomatic HIV-positive person could perform the work competently, rejecting SAA's claim that a positive HIV test should automatically be equated with ill health.

Similarly, in the Namibian case of *Nanditume v Minister of Defence*, the Labour Court also argued that HIV testing an individual's HIV status alone was not a reliable indicator of a person's health:

> If the test is to ascertain whether a recruit is fit for military service, an HIV test only will not achieve this purpose. In addition to the HIV test, there must be a CD4 count test and a viral load test. If the military does not and will not do these latter two tests then the HIV test should also be abandoned. It will not achieve the purpose for which medical examinations are held.[216]

The Court further stated:

> The medical experts who testified agreed that an HIV positive person can be as fit and as healthy as any other normal person in similar circumstances, but as that person's CD4 count decreases and the viral load increases, such person's well-being progressively deteriorates. Clinically as soon as the CD4 drops below 200 such person is said to suffer from AIDS. A combination of these two indicators can serve as a prognosis as to the time period that will elapse before a person will suffer from AIDS proper.[217]

The applicant provided medical evidence of his health status, including an affidavit by a medical expert, showing that he was "in good and sound health".[218]

The Court furthermore noted the irrationality of pre-employment HIV testing for determining fitness to work, since existing employees were not tested for HIV despite high HIV prevalence within the armed forces. It said as follows:

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[213] *Hoffmann v South African Airways*, 2001 (1) SA 1 at para. 7.

[214] *Id.*

[215] *Id.* at para. 39.

[216] *Nanditume vs Minister of Defence,* 2000 NR 103 at 7.

[217] *Id.* at 11.

[218] *Id.* at 8.

> Apparently because of the large numbers of persons in the military who are HIV positive Dr Clive Evian who was called by respondent to testify, conceded that an HIV test, not followed by a CD4 and viral load test, before enlistment, cannot be justified on the basis of keeping "the military an aids-free workplace." The case for applicant in this regard was considerably strengthened when Major Maiba testifying for respondent, said that personnel in the military, although this is a high risk environment are not tested for HIV once they have enlisted.[219]

Similarly, in the Botswana case of *Diau v Botswana Building Society*, a job applicant refused to undertake an HIV test as a condition of employment. The Industrial Court took the view that "the instruction to undergo an HIV test was irrational and unreasonable to the extent that such a test could not be said to have been related to the inherent requirements of the job", and the applicant was "entitled to disobey the order".[220]

In the Indian case of *MX v ZY*,[221] the High Court examined the employer's policy of HIV testing and denying employment to those who tested positive. Although the Court's findings relate primarily to the discrimination following on from the required HIV testing, its findings were based on the fact that the HIV test result cannot determine a person's ability to perform the job requirements. For this reason it found the denial of employment based on the outcome of the HIV test to be discriminatory:

> [T]he impugned rule which denies employment to the HIV-infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at the workplace is clearly arbitrary and unreasonable and infringes the wholesome requirement of Article 14 as well as Article 21 of the Constitution of India. Accordingly, we hold that the [employer's] circular ... insofar as it directs that if the employee is found to be HIV-positive by ELISA test, his services will be terminated is unconstitutional, illegal and invalid and, therefore, is quashed.[222]

These decisions undermine attempts to justify mandatory HIV testing as an effort to determine suitability for employment. It is settled science that an HIV-positive diagnosis on its own reveals nothing about the current health status of an individual or his or her ability to perform the inherent requirements of a work position. However, this justification should be refuted carefully; as seen in *Nanditume*, courts have allowed for the possibility that additional medical tests designed to determine a particular individual's health may be permissible.

[219] *Nanditume v Minister of Defence,* 2000, NR 103 at 10-11 (emphasis omitted).

[220] *Diau v Botswana Building Society*, 2003 (2) BLR 409 at 17.

[221] *MX v ZY*, 1997 A.I.R. (Bom.) 406 (India), *available at* http://indiankanoon.org/doc/1264404/.

[222] *Id.* at para. 54.

Protecting the health of others

Another common justification for mandatory HIV testing is the need to identify those who are infected so as to reduce the risk of HIV transmission to others.

Since the early stages of the HIV epidemic, employers in particular have often raised the alleged risk of HIV transmission in the working environment and their obligation to promote occupational health and safety as reasons to conduct mandatory HIV testing of job applicants and employees. Risks to others as a justification is also used by schools and within the penal system. Courts have repeatedly found against those who use the risk of HIV transmission as a justification for conducting mandatory HIV testing for various reasons, including:

- The low risk of transmission of HIV;
- The fact that mandatory HIV testing, unless conducted amongst all applicants and employees on an on-going basis does not protect others' health; and
- Less rights restrictive measures which protect others from all possible infection through blood or bodily fluids are available.

The case law relevant to rebutting this justification tends to be about discrimination, but the insights of the courts are nevertheless useful in litigating cases on mandatory testing.

In the South African case of *Hoffmann v South African Airways*, the Constitutional Court rejected the argument that there was a risk to other employees or clients posed by a cabin attendant with HIV, finding that the risk was "inconsequential and, insofar as it may ever be necessary, well-established universal precautions can be utilised".[223]

In the United States case of *Glover v Eastern Nebraska Community Office of Retardation*,[224] the Court of Appeals considered a challenge to a policy requiring certain health care employees at a community-based programme serving persons with intellectual disabilities to test for HIV and disclose if they were HIV-positive. The policy applied to all workers who had frequent and direct contact with clients; the rationale for mandatory testing was the agency's concern that violent or aggressive clients who bit or scratched an infected employee would be at risk of contracting HIV.[225]

The Court rejected this rationale, agreeing with the lower court that:

> [t]he [expert testimony] establishes that the risk of transmission of the AIDS virus from staff to client, assuming a staff member is infected with [the AIDS virus], in the ENCOR environment is extremely low, approaching zero. The medical evidence is undisputed that the disease is not contracted by casual contact. The risk of transmission of the disease to clients as a result of a client biting or scratching a staff member, and potentially drawing blood, is extraordinarily low, also approaching zero . . . In short, the evidence in this case establishes that the risk of transmission of the [AIDS] virus at ENCOR is minuscule at

[223] *Hoffmann v South African Airways*, 2001 (1) SA 1 at para. 14.

[224] *Glover v E. Neb. Cmty. Office of Retardation*, 867 F.2d 461 (8th Cir. 1989) (U.S).

[225] *Id.* at 462-63.

> best and will have little, if any, effect in preventing the spread of [AIDS] or in protecting the clients. Further, from a medical viewpoint, this policy is not necessary to protect clients from any medical risks.[226]

While the Court was careful not to set down a broad-based rule with regard to testing employees for infectious diseases, it emphatically rejected the justification offered by the agency that mandatory HIV testing was required to protect the health of the clients of the community-based programme.

Within the context of the military, it has been argued that mandatory HIV testing is justified because employing HIV-positive persons in the military would pose a risk of HIV transmission on the battlefield and elsewhere to other soldiers. The High Court of Australia, in *X v Commonwealth of Australia*, determined that it was important to examine this justification to establish whether there was a real risk to other persons in the case of an HIV-positive person's employment in the military.[227] However, the Court cautioned that the military must show that any real risk "cannot be eliminated or appropriately nullified by the provision of services or facilities which can be provided without unjustifiable hardship".[228]

With respect to athletes in team sports, the Australian Victorian Civil and Administrative Tribunal considered in detail the potential risk of transmission of HIV during football in *Hall v Victorian Amateur Football Association*.[229] Although the case centred around the respondent's ban of the applicant from playing football rather than on mandatory HIV testing, the findings in relation to the risk of HIV transmission and the measures to counter the risk are nevertheless useful. An epidemiologist and an actuary were called upon to testify in an attempt to quantify the risk of HIV transmission while playing football. The Tribunal accepted evidence in relation to the negligible risk of HIV transmission as well as the effectiveness of procedures to deal with the risk in finding that there was limited risk to the health and safety of other players.

The Tribunal noted:

> Whilst we conclude that not all risk to the health and safety of [players and officials in the Football Association] from transmission of HIV from Matthew Hall to other parties can be excluded if Matthew Hall is permitted to play football, the risk is so low (and can be excluded by the proper application of [the Football Association] policy), that it is not "reasonably necessary" to discriminate against him by banning him from playing football. In our view the health and safety of the [players and officials] is better protected by an understanding of the nature of the very low risk and by an understanding of and the implementation of the proper procedures to be taken in further reducing such risk, than by banning Hall.[230]

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[226] *Glover v E. Neb. Cmty. Office of Retardation*, 867 F.2d at 463 (quoting Glover v E. Neb. Cmty. Office of Retardation, 686 F.Supp. 243, 249 (D.C. Neb. 1988)).

[227] *X v Commonwealth*, [1999] HCA 63, para. 50 (Aust.), *available at* http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/high_ct/1999/63.html?query=~%20x%20commonwealth.

[228] *Id.* at para. 73.

[229] *Hall v Victorian Amateur Football Assoc.*, [1999] VCAT 627 (Aust.), *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/1999/627.html.

[230] *Id.* at para. 7.

Protecting the health of the patient

HIV testing without consent is often justified as being in the best interest of the patient. Employers, health care providers, government officials and others argue that such testing is necessary to provide adequate treatment, care and support for individuals infected with HIV.

This justification has been raised in the working environment, particularly in the military, where employers have argued that HIV testing without informed consent identifies those who are HIV-positive and thus facilitates the provision of appropriate health care services and helps the employer avoid exposing their workers to occupational hazards to their health. The argument has also been raised in the health sector as justification for testing without consent.

In the working environment, courts have rejected this justification on several grounds, including the fact that HIV testing alone cannot determine an individual's state of health and/or vulnerability within the working environment and the fact that an individual can take measures to monitor his or her own health.

Within the military, it has been argued that the working conditions themselves may pose a risk to the health of the HIV-positive individual. For instance, the armed forces have argued that the strenuous and sometimes remote nature of the job may have an adverse effect on the health of an HIV-positive member, and it is in his or her best interests to determine his or her HIV status and avoid such dangers.

This argument was rejected by the Federal Court of Canada in *Attorney General v Thwaites*,[231] fully affirming the findings of the Canadian Human Rights Tribunal.[232] Although the *Thwaites* case focused on the dismissal of a Navy serviceman subsequent to his HIV status and sexual orientation becoming known, the Court's findings in relation to the health justifications are relevant to HIV testing litigation.

Thwaites was an HIV-positive master seaman in the Canadian Armed Forces (CAF) on antiretroviral treatment. The CAF argued in part that the nature of his job required Thwaites to be at sea for long periods of time, placing his health at risk. In particular, the CAF argued that if Thwaites were to acquire opportunistic infections at sea, he would be far away from the required help, and that Thwaites' HIV treatment regimen left him dependent on specialist medical care that would not be available when he was at sea.[233]

The Court rejected the CAF's explanation, accepting evidence put forward by experts at trial that close monitoring by a medical specialist of an HIV-positive person on treatment was unnecessary.[234] The Court also accepted that opportunistic infections were gradual

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[231] *Attorney Gen. v Thwaites*, [1994] 3 F.C. 38 (Can.), *available at* http://www.canlii.org/en/ca/fct/doc/1994/1994canlii3469/1994canlii3469.html.

[232] *Thwaites v Canadian Armed Forces*, (1993) 19 C.H.R.R. 259 (Can.), *available at* http://www.canlii.org/en/ca/chrt/doc/1993/1993canlii342/1993canlii342.html.

[233] *Id.* at sec. V.

[234] *Id.* at sec. VI(b)(ii). "Our conclusion is that . . . it appears that it was not absolutely necessary to have the AZT distributed to patients directly from a specialist or for the specialist to do the monthly assessment. A general practitioner, sufficiently instructed by a specialist, could carry on this role."

in their onset and that a patient who was monitoring his own health would have enough time to get care for any oncoming opportunistic infection.[235]

Specifically addressing the justification offered by the CAF, the Court stated that decisions regarding the exclusion of an employee had to be based on sound medical and scientific information: "Whenever an employer relies on health and safety considerations to justify its exclusion of the employee, it must show that the risk is based on the most authoritative and up to date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalizations."[236]

The same reasoning can be applied to mandatory HIV testing. When an employer attempts to justify compulsory testing by saying it is necessary to protect the employee's health, he or she should be able to demonstrate that an HIV-positive individual *needs* some special protection or consideration. Given the scientific evidence that an HIV test alone is insufficient to determine whether a person is ill, and the fact that individuals are capable of monitoring their own health, the argument is unlikely to succeed.

Employers may also justify the need for mandatory HIV testing in order to assess HIV prevalence in the workforce, so that they can provide appropriate health care and support to their employees. However, courts have held that voluntary and anonymous HIV testing can achieve similar objectives, and thus have rejected the need for HIV testing without informed consent.

For example, in the South African case of *Irvin and Johnson Ltd v Trawler and Line Fishing Union and Others*,[237] the applicant wished to conduct HIV testing among its workforce in order to:

> assess the potential impact of HIV/AIDS on the workforce; to enable the applicant to engage in appropriate manpower planning so as to minimise the impact of HIV/AIDS mortalities and HIV/AIDS-related conditions on its operation; to enable it to put in place adequate support structures to cater for the needs of employees living with HIV/AIDS; and to facilitate the effective implementation of proactive steps to prevent employees from becoming infected with HIV/AIDS.[238]

Since the applicant wished to conduct only voluntary and anonymous HIV testing in order to establish this information, the Labour Court held that the HIV testing programme was lawful and did not require Labour Court authorisation in terms of section 7 of the Employment Equity Act.[239]

Health care providers sometimes also claim that mandatory HIV testing is justified because it is in the patient's best interests. However, courts have not readily accepted this justification in the health care context. In Zambia, the High Court took issue with a doctor who decided the two petitioners in *Kingaipe and Another v Attorney General* should

[235] *Thwaites v Canadian Armed Forces,* (1993) 19 C.H.R.R. at sec. VI(b)(v).

[236] *Attorney Gen. v Thwaites*, [1994] 3 F.C. at para. 20.

[237] *Irvin & Johnson Ltd. v Trawler & Line Fishing Union* (2003) 24 ILJ 565.

[238] *Id.* at para. 4.

[239] *Id.* at para. 42.

be tested for HIV, and arranged for the tests without their informed consent. The High Court found that a patient's right to refuse HIV testing, even when testing is in his best interests, must be respected.[240] The Zambian Court quoted the United Kingdom's House of Lords in the case of *Airedale NHS Trust v Bland*, which held:

> If the patient is capable of making a decision on whether to permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient that adverse consequences and death will or may ensue.[241]

In *Kingaipe*, the Court found that the petitioners were in a position to make their own decision regarding HIV testing, and therefore the question of what was arguably in their best interests was legally irrelevant.[242]

Protecting the public interest

Mandatory HIV testing for evidentiary purposes may be argued as justifiable in the public interest, particularly in criminal matters. For instance, suspects arrested for sexual offences (e.g. sex workers or rape suspects) may be subjected to mandatory HIV testing, with the results of the HIV test used as evidence to prove the commission of an offence relating to HIV transmission or exposure. Likewise, sexual offenders may also be subjected to mandatory HIV testing for purposes of sentence enhancement (where an offender's HIV-positive status is considered to be an aggravating factor), which is meant not only to punish culpable behaviour but also to deter would-be criminals.[243]

The courts in a number of cases have refused to find that mandatory HIV testing of a sexual offender at the time of *conviction* is adequate proof of HIV status (or of a person's knowledge of his or her HIV status) at the time of the *offence*. These findings are in line with scientific information concerning HIV testing, since an HIV-positive test result does not indicate when a person became HIV-positive, and there is always the possibility of an HIV-negative test result when a person is in the "window period".

In Botswana, the courts have repeatedly rejected mandatory HIV testing of sexual offenders for purposes of sentencing.

For instance, in the Botswana case of *Makuto v S*,[244] the Court of Appeal examined the Penal Code (Amendment) Act 1998, which requires that offenders convicted of rape and

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[240] *Kingaipe and Another v Attorney-Gen.*, (2010) 2009/HL/86 at J43.

[241] *Airedale NHS Trust v Bland*, [1992] UKHL 5, [39], *available at* http://www.bailii.org/uk/cases/UKHL/1992/5.html.

[242] Courts have proven more willing to accept HIV testing without consent when it is perceived to be in the best interests of a *child* patient. *See in re* C (A Child), [1999] EWCA (Civ) 3007 (Eng.) (ordering the child of an HIV-positive, AIDS denialist woman to be tested for HIV, despite her mother's objections), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/1999/3007.html.

[243] *See Makuto v S*, 2000 (2) BLR 130 (CA) (Bots.), *available at* http://www.saflii.org/bw/cases/BWCA/2000/21.html.

[244] *Makuto v S*, 2000 (2) BLR 130. *See also Lejony v State*, [2000] 2 BLR 145 (CA) (Bots.), *available at* http://www.saflii.org/bw/cases/BWCA/2000/20.html.

defilement be tested for HIV after conviction and be subjected to higher sentences if found to be HIV-positive.[245] This was challenged on the basis that it discriminated against people living with HIV and in the alternative, that the statute unfairly "presumes that the convicted person who, after trial and conviction, tests HIV positive must have transmitted the virus to the victim and therefore must be harshly punished".[246]

The state claimed the law was needed to deter HIV-positive offenders from potentially transmitting HIV to their victims.[247] The Court rejected the state's claims. The Court noted that offenders were tested for HIV only after they were convicted, which could be months after the commission of the offence. Given the lapse in time, the Court reasoned that it was possible that convicted offenders who tested positive for HIV may have acquired the virus after committing the offense and indeed, could have acquired HIV from the victim.[248] Based on these factors, the Court held that testing convicted offenders for HIV months after the commission of the crime and imposing higher sentences for those found to be HIV-positive would not meet any legitimate government aim.[249]

The Court of Appeal announced:

> A law enacted for the purpose of providing an enhanced punishment for an offence which takes into account circumstances which occur after and which are unconnected with the commission of that offence cannot be considered a law for the punishment of that offence. Neither can it be considered to deter people from the commission of that offence. It is neither just nor necessary for the prevention of the offence because it bears no relationship with the crime which the law seeks to punish.[250]

In an attempt to save the statute, the Court interpreted the statute to provide for higher minimum sentences only if a convicted offender was proven to be HIV-positive at the time of the commission of the offense.[251] The Court found that the Constitution did not allow for mandatory HIV testing *after* the rape to serve as the basis for an increased sentence. In particular, it noted that:

> the status must, to make sense, be related to, and affecting the offender when he commits the rape; it would therefore have to be in existence at the time of the offence. Otherwise it would appear as if Parliament intended to impose such a severe minimum sentence on persons not for the rape committed, but simply because they had HIV. That cannot be right and cannot be the intention of Parliament.[252]

The Court held that this narrow reading could be seen as furthering a legitimate state interest in combating HIV transmission in rape cases.[253]

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[245] The statute provides separately for cases where a convicted offender knew at the time of the offence that he was HIV-positive and thus that was not at issue in this case.

[246] *Makuto v S*, 2000 (2) BLR 130 at 3.

[247] *Id.* at 10.

[248] *Id.* at 14-15

[249] *Id.* at 16.

[250] *Id.* at 14.

[251] *Id.* at 17.

[252] *Id.* at 16.

[253] *Id.* at 17.

Courts elsewhere in southern Africa have also recognised the limitations of HIV testing for evidentiary purposes during criminal proceedings. For example, in *State v Safiko*,[254] the Zimbabwean High Court refused to accept the results of an HIV test conducted approximately five months after the offence as proof of the offender's HIV status at the time he committed the offence. The Court urged that "there must be evidence before the magistrate that the accused was infected with [HIV] at the time he committed the offence".[255]

These cases show that courts have consistently recognised that states must carefully limit how penalty enhancement is used to punish certain criminal behaviours that expose others to HIV and thus the legitimacy for mandatory HIV testing of those arrested is questionable.

6.3 Justifications for disclosure of an individual's HIV status

When courts are called upon to adjudicate on laws, policies and practices that allow for disclosure of a person's confidential medical information, they are required to determine whether such a disclosure is lawful, reasonable and justifiable in the circumstances. In doing so, courts will examine a range of issues, such as the manner in which the confidential information was obtained, the intimate nature of the information, the purpose for which the information was given and subsequently used, and the nature and extent of the disclosure.

This section considers some common arguments raised as justifications for breaches of the right to confidentiality, including:

- The need to protect the health of others;
- The fact that a person's HIV status is already publicly known; and
- The lack of harm caused by disclosure.

Protecting the health of others

Attempts have been made to justify breaches of confidentiality on the basis that such action was necessary to protect the health of others, including health care workers, fellow employees or an identified third party at specific risk of HIV transmission. This is a complicated area of law and much will depend on the facts of the particular case. In most instances, courts have rejected this justification in cases of disclosure of another's HIV status, specifically when there is little scientific evidence of likely transmission. This is not always the case when courts are faced with facts where transmission is likely based on scientific evidence.

[254] *State v Safiko*, [2005] ZWHHC 31 (Zim.) *available at* http://www.saflii.org/zw/cases/ZWHHC/2005/31.html.

[255] *Id.* at 2.

In the South African case of *Van Vuuren v Kruger*,[256] the plaintiff alleged that his right to privacy was violated when his doctor disclosed his HIV-positive status to medical colleagues without the patient's consent. The defendant argued that the disclosure of the patient's HIV status was lawful since, amongst other things, he was trying to warn his colleagues (a doctor and a dentist who had treated the plaintiff in the past and might have treated him in the future) against possible exposure to the virus.[257]

The Supreme Court of Appeal rejected the potential risk of HIV transmission to other medical practitioners as a justification for breaching the patient's right to confidentiality. In so doing, it examined evidence regarding occupational infection with HIV and also weighed up the public health importance of the right to medical confidentiality:

> AIDS is a dangerous condition. That on its own does not detract from the right of privacy of the afflicted person, especially if that right is founded in the doctor-patient relationship. A patient has the right to expect due compliance by the practitioner with his professional ethical standards . . . [The other medical practitioners] had not, objectively speaking, been at risk and there was no reason to assume that they had to fear a prospective exposure.[258]

The New South Wales Court of Appeal in Australia has taken up the issue of the medical duty of confidentiality when there is a specific third party known to be at risk of exposure to HIV. In *Harvey and Another v PD*,[259] the Court was asked to consider whether two doctors of an HIV-positive woman were in breach of their professional duty to the respondent in not taking sufficient steps to warn her that her future husband, also their patient, had tested positive for HIV. The respondent and her future husband attended a joint consultation with the doctors to test for HIV and other sexually transmitted infections; the respondent's future husband tested positive for HIV but deliberately deceived her into believing that he had not.[260]

The appellant doctors argued that they had a legal obligation not to disclose their patient's HIV status. The court seems to accept this claim, but suggests alternative measures the doctors could have taken to protect the respondent without breaching their other patient's right to confidentiality:

> PD and FH arranged the tests through Dr Harvey by requiring a joint consultation. This was for the clearly stated purpose of ascertaining whether either had any sexually transmitted diseases, before engaging in unprotected sex in contemplation of a new relationship. Those findings and that evidence underpin the conclusion I reach. It is that, had Dr Harvey done what he was in duty bound to do, namely raised the question of consent to disclosure, mutual disclosure of results and the possibility of discordant

[256] *Van Vuuren v Kruger* 1993 (4) SA 842.

[257] *Id.* at 36.

[258] *Id.* at 37-38.

[259] *Harvey & Anor. v PD*, [2004] NSWCA 97 (Aust.), *available at* http://www.chr.up.ac.za/undp/other/docs/caselaw3.pdf.

[260] *Id.* at para. 13.

> results, the parties would more likely than not have consented to their results being made available to each other by Dr Harvey at a further joint consultation.[261]

Thus, where an identified third party is at risk of exposure to HIV, confidentiality of the patient's HIV status should still be maintained, but health care providers may and should take alternative measures to protect the health of the other individual whenever possible. These other measures might include accurate and detailed post-test counselling where HIV-positive individuals are urged to warn specific individuals in their lives about their infection.

Disclosures without consent in the case of an identified third party at risk have received limited attention by southern African courts. Disclosures without consent may occur in practice, and more recently may be provided for in law. A number of recent HIV laws and practices in the SADC region set out exceptions to the right to confidentiality with regard to HIV status, where disclosure is arguably permitted without the consent of the individual with HIV. To date, the courts have not been called upon to examine these laws and to consider whether they are reasonable and justifiable limitations of constitutional rights to privacy, dignity and psychological integrity.

Public knowledge of a person's HIV status

Another justification that has been raised for breaches of confidentiality is that the information is already public knowledge, perhaps even with the consent of the person whose status was disclosed. This requires an examination of the facts of the matter, including the nature and extent of the consent provided for disclosure.

In the South African case of *NM v Smith*,[262] the names and HIV-positive statuses of three women were published in a book without their consent. The respondents argued before the Constitutional Court that the HIV status of the applicants was not a private fact at the time of the publication of the book. They pointed out that the applicants had consented to attend a meeting with media in attendance connected to an HIV treatment trial in which they had participated.[263]

There was a dispute on the record as to whether the three women actually attended the meeting, but the Court determined that it ultimately did not matter, stating:

> [A] court should not lightly conclude that what is a private fact has been rendered a public fact simply because a small number of people may have come to know of it. The question will be one of fact, in particular, whether the fact has been disclosed to such an extent that, viewed objectively, it can no longer genuinely be considered to be private.[264]

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[261] *Harvey & Anor. v PD*, [2004] NSWCA 97 at para. 88, *available at* http://www.chr.up.ac.za/undp/other/docs/caselaw3.pdf.

[262] *NM v Smith*, [2007] (5) SA 250.

[263] *Id.* at para. 142.

[264] *Id.* at para. 143.

With specific regard to private medical information, the Court explained:

> The assumption that others are allowed access to private medical information once it has left the hands of authorised physicians and other personnel involved in the facilitation of medical care, [*sic*] is fundamentally flawed. It fails to take into account an individual's desire to control information about him or herself and to keep it confidential from others. It does not follow that an individual automatically consents to or expects the release of information to others outside the administration of health care. As appears from what has gone before there is nothing on the record to suggest that the applicants' HIV status had become a matter of public knowledge.[265]

NM has two important implications. The first is that a person does not have to keep his or her HIV status completely secret in order to preserve a right to confidentiality in the information. Second, actors other than medical professionals can violate the right to confidentiality, and that right does not dissipate just because an initial breach occurs.

Limited harm

Courts have accepted that breaches of confidentiality in relation to HIV cause actual and potential harm. The extent and nature of the harm is taken into account when determining damages. Parties may argue that though there was unlawful disclosure there was limited harm for purposes of assessing damages. However, a number of courts in southern Africa have made clear that the effects of stigma and discrimination against people with HIV should be taken into account when assessing harm.

For example, in the South African case of *Van Vuuren v Kruger*, the Supreme Court of Appeal noted:

> There are in the case of HIV and AIDS special circumstances justifying the protection of confidentiality . . . Disclosure of the condition has serious personal or social consequences for the patient. He is often isolated or rejected by others, which may lead to increased anxiety, depression and psychological conditions that tend to hasten the onset of so-called full-blown AIDS.[266]

Similarly, in *NM v Smith*, the South African Constitutional Court found that "[t]he disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure".[267]

In the Botswana High Court case of *Maje v Botswana Life Insurance*,[268] the plaintiff sued the defendants for the publication of her photograph in the company's newsletter under a headline about being HIV-positive. The High Court noted the potential for harm in impliedly publishing a person's HIV status and held that where the photo's publication caused offence or humiliation to that person there was an actionable wrong.[269]

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[265] *NM v Smith*, [2007] (5) SA 250 at para. 44.

[266] *Van Vuuren v Kruger*, 1993 (4) SA 842 at 31.

[267] *NM v Smith*, [2007] (5) SA 250 at para. 42.

[268] *Maje v Botswana Life Insurance*, 2001 (2) BLR 626.

[269] *Id.* at 3.

6.4 Conclusion

Courts around the world have regularly addressed justifications for HIV testing without informed consent and disclosure of another's HIV status. In most cases, courts have rejected these justifications, relying heavily on scientific and medical evidence relating to HIV and HIV transmission. Thus, it is critical for lawyers to ensure they brief courts with the relevant scientific and medical evidence. It may further be useful for lawyers to use decisions of other courts that have previously addressed the specific justification at issue in the case in support of their litigation.

CHAPTER 7

Useful online resources

International human rights law

- International Labour Organization
  http://www.ilo.org
- Searchable database of decisions from international treaty monitoring bodies: Universal Human Rights Index
  http://www.universalhumanrightsindex.org
- UN international human rights treaties and their monitoring bodies
  http://www.ohchr.org
  http://www.treaties.un.org

African human rights law

- African Commission on Human and Peoples' Rights (includes texts of primary African human rights treaties)
  http://www.achpr.org
- African Court on Human and Peoples' Rights
  http://www.african-court.org/en/
- African human rights case law and document database
  http://www.chr.up.ac.za
- African Union
  http://www.au.int/en/
- Searchable database of African Commission decisions: African Human Rights Case Law Analyser
  http://caselaw/ihrda.org/

SADC documents on HIV/AIDS

- SADC regional documents
  http://www.sadc.int
  http://www.sadc-tribunal.org

Comparative jurisprudence

- Decisions from courts throughout Africa: African Legal Information Institute
  http://www.africanlii.org
- Decisions from courts throughout southern Africa: Southern African Legal Information Institute
  http://www.saflii.org
- Decisions from courts around the world: World Legal Information Institute
  http://www.worldlii.org
- Worldwide HIV jurisprudence and legislation: AIDSLex
  http://www.aidslex.org

General HIV/AIDS related information

- AIDS Portal
  http://www.aidsportal.org
- Joint United Nations Programme on HIV/AIDS
  http://www.unaids.org
- World Health Organization
  http://www.who.int

For particular research assistance or for hard copies of the documents referenced in the manual, please contact the Southern Africa Litigation Centre.

Notes

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SOUTHERN AFRICA LITIGATION CENTRE

Second Floor
President Place, 1 Hood Avenue, Rosebank,
Johannesburg, South Africa, 2196

T: +27 (0) 11 587 5065
F: +27 (0) 11 587 5099

www.southernafricalitigationcentre.org