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**A Rights-Based Approach to Addressing HIV/AIDS in the
Workplace: The Role and Contribution of the ILO and its
Constituents**

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Abstract

The human rights implications of the global HIV/AIDS epidemic stem mainly from stigma and discrimination directed at persons living with the virus. Violations of human rights on the basis of real or perceived HIV status represent a particular problem in the workplace and poses a major challenge for the International Labour Organisation (ILO) and its tripartite constituents (i.e. government, employers' and workers' organizations). HIV-related discrimination at work not only violates basic workers' rights as enshrined in the ILO's 'Declaration on Fundamental Principles and Rights at Work' (1998), but deprives workers and their families of income and household productivity. ILO's response to managing HIV/AIDS in the workplace is, therefore, grounded on a rights-based approach which recognizes the urgent need for specific policies and programmes to promote its fundamental principles and protect rights at work. These principles are examined from two perspectives in the specific context of HIV-related discrimination at work: (1) fundamental human rights of the individual and (2) key requirements for economic and social development. The normative and legal framework for managing HIV/AIDS in the world of work is presented and analysed, making use of a wide range of illustrative examples drawn from international conventions, national labour and anti-discrimination laws, workplace agreements and jurisprudence and case laws from both developing and developed countries. Conclusions from the analysis reinforces the importance of a rights-based approach for creating an enabling environment to prevent discrimination and managing HIV in a humane and in a dignified manner in the workplace.

Keywords:

ILO, HIV/AIDS, workplace, discrimination, fundamental principles, workers' rights, rights-based approach, conventions, legislation, jurisprudence.

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1. Introduction

A significant feature of the global HIV/AIDS epidemic is its concentration in the working age population and people in the prime of their productive life. It has been observed by the ILO (ILO) that about two-thirds of the estimated 40 million persons currently infected with HIV are workers in formal and informal employment (ILO/AIDS, 2004). The fact that the epidemic disproportionately affects those with critical social and economic roles has serious implications for economic growth and social progress, especially in highly affected countries and regions. This negative impact of HIV/AIDS on human and socio-economic development is further compounded by the another disturbing feature of the epidemic, the stigma and discrimination directed at persons living with HIV and AIDS which affect human capacity and dignity. In the workplace where the problem is particularly serious, discrimination on the basis of HIV status can lead to violations of basic workers' rights as well as affect the realisation of other fundamental human rights. The human rights implications of HIV/AIDS include the impact of the epidemic on vulnerable groups such as women, children and migrants, which can contribute to increasing gender inequalities and worsening problems of child and 'slave' labour. Rapid globalization and its impact on labour markets and working conditions has also increased the need to protect workers against AIDS-related and other human rights violations in the workplace (ILO/AIDS, 2006).

This paper presents a rights-based approach to addressing HIV/AIDS-related human rights violations in the workplace, and reviews the application of legislative and legal measures and procedures based on relevant ILO instruments and labour and employment laws. It specifically discusses issues relating to discrimination in the workplace on the basis of real or perceived HIV status, and the role of the ILO and its tripartite constituents (governments, employers and workers) in taking action to address this problem through the promotion of fundamental principles and rights at work. These principles and rights are examined from two perspectives: as a fundamental human right and as important elements of economic development and social progress. The paper highlights the normative and legislative framework for establishing and defending basic principles for managing HIV/AIDS in the workplace, and provides examples from a range of sources on the application of ILO and other instruments through national legislation and jurisprudence relating to HIV/AIDS and through provisions in workplace collective agreements. The conclusions are that a rights-based approach creates an enabling environment for preventing and addressing HIV/AIDS-related human rights violations; that the ILO doctrine and practice of tripartism and social dialogue facilitate the development and application of right-based HIV/AIDS laws; and that a rights-based approach provides a workable framework for mitigating the socio-economic impact of the epidemic and for efficient and fair governance of the labour market.

2. HIV/AIDS and the World of Work

HIV/AIDS has a particularly devastating impact in the world of work. It affects labour productivity and cost, managerial efficiency, output, profit and investment in enterprises and businesses in all sectors (public, private, formal and informal), through AIDS-related absenteeism, sickness, early retirement and death of key workers. This in turn deprives workers and their families of income and household

productivity which constitute a major source of sustainable livelihood and well-being. Overall, the labour and employment impact of HIV/AIDS can result in significant decline in national economic performance and pressure on social protection systems and general health services. In addition to the economic and social consequences of HIV/AIDS, a major concern of the ILO and its tripartite constituents is stigma and discrimination in the world of work on the basis of HIV status. Not only is discrimination inimical to the ILO doctrine of decent work and its fundamental principles and rights at work, but there is also evidence that discrimination undermines efforts to prevent the spread of the epidemic and mitigate its impact in the world of work¹.

As an organisation that was founded to promote social justice and equity and to protect the rights and dignity of workers, the ILO recognises HIV/AIDS as a workplace issue and is committed to fighting the epidemic in the workplace through the promotion of non-discrimination in employment, gender equality, healthy working environment and the elimination of child and forced labour. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work and its Follow-up (hereafter referred to as the ILO Declaration) (ILO, 1998) incorporates a number of core ILO Conventions and instruments about basic workers rights, and includes the principle of non-discrimination in respect of employment and occupation as one of the four fundamental principles.

In accordance with the ILO Declaration, all ILO member states undertook, by virtue of their membership of the ILO, to respect, promote and achieve, in good faith and in conformity with the Constitution, four categories of principles and rights at work, even if they have not ratified the relevant Conventions, among which is the elimination of discrimination in respect to employment and occupation. While there is as yet no international labour Convention or Recommendation that specifically addresses the issue of HIV/AIDS in the workplace, the fundamental principle of non-discrimination and other relevant ILO instruments pertaining to rights at work and occupational health provide the foundation for an HIV/AIDS workplace policy based on that common value.

3. The Human Rights Implications of HIV/AIDS in the Workplace

HIV/AIDS-related discrimination is a violation of basic human rights. The fundamental principle of non-discrimination and the equality of all people is enshrined in the 1948 Universal Declaration of Human Rights, and other human rights instruments, such as the International Covenant on Civil and Political Rights of 1966, the International Covenant of Economic, Social and Cultural Rights of 1966, and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) of 1979. Discrimination based on race, colour, sex, language, religion, opinion, or other status is prohibited by these international legal instruments. The UN Commission on Human Rights deemed that the term 'other status', as used in several human rights instruments, 'must be interpreted as including health status, including HIV/AIDS', and that discrimination on a basis of presumed or known HIV-positive status is prohibited by current human rights standards.

The principle of non-discrimination in the workplace is enshrined in both the Constitution of the ILO and the ILO Declaration, as are other core ILO instruments about basic workers rights which are relevant for managing HIV/AIDS in the world of work. The ILO Code of Practice on HIV/AIDS and the World of Work (ILO, 2001), (hereafter referred to as the ILO Code), which was adopted unanimously by all member States of the ILO in May 2001, sets out key principles, including non-discrimination in employment and gender equality, as guidelines for policy and action to combat HIV/AIDS in the workplace. Through its technical cooperation programmes, ILO has sought to raise awareness about the economic and social impact of HIV/AIDS; strengthen the capacity of governments and their social partners in the world of work to respond effectively to HIV/AIDS in the workplace, including assistance with the framing of labour laws and policies; and disseminate examples of good HIV/AIDS workplace policies and programmes.

Yet in countries all over the world, there are well-known documented cases of job applicants not recruited, workers being dismissed, denied promotion, excluded from social benefits and other entitlements; as well as workers being refused entry into foreign territories for employment purpose, on account of their HIV status. In effect, these workers are being denied the right to work and earn a living, freedom of movement, and even healthcare. This in turn affects the realization of other basic human rights, such the right to education for their children, privacy, confidentiality, freedom from inhumane treatment, equality and dignity. As early as the mid-1980s many governments and the international community had realised that there were significant human rights implications of HIV/AIDS, linked mainly to the stigma and discrimination directed at infected and affected persons. Increased awareness about AIDS-related discrimination and the personal and societal impact of HIV/AIDS provided a compelling justification for safeguarding human rights in this area.

The Second International Consultation on HIV/AIDS and Human Rights, organised jointly by the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) in Geneva in September 1996, adopted and issued the International Guidelines on HIV/AIDS and Human Rights (OHCHR and UN, 2004). These guidelines, which have been updated and revised in subsequent consultations in recognition of the evolving nature of the epidemic and its impact, provide concrete measures that could be taken to protect human rights and health where HIV/AIDS is concerned. The International Guidelines called on governments to fulfil their State's obligation with regard to the rights of non-discrimination, health, information, education, employment, social welfare and public participation; this is seen as crucial to reducing vulnerability to HIV infection and to ensuring humane care and support for those infected and affected.

Specifically, as regards discrimination on the basis of HIV status, Guideline 5 exhorts States to 'enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both public and private sector establishments ensure privacy and confidentiality and ethics in research involving human subjects, emphasise education and conciliation, and provide the speedy and effective administrative and civil remedies' (OHCHR and UN, 2004). With respect to the workplace, Guideline 10 reads: 'States should ensure that government and the private sector (workplaces) develop codes of conduct regarding HIV/AIDS issues that translate human rights

principles into professional responsibility and practice, with accompanying mechanisms to implement and enforce these' (OHCHR and UN, 2004).

Although non-binding, the International Guidelines highlight fundamental aspects of discrimination, and recognizes that discrimination on the basis of HIV status is not only unjustifiable but also creates and maintains conditions which lead to social vulnerability to the epidemic, mainly because the prevailing environment is not conducive to behaviour change and for coping with the disease in a dignified way. In 2003, the Commission on Human Rights passed a resolution calling on member States to redouble their efforts to ensure universal respect for the human rights and fundamental freedoms of all HIV-positive persons and, thereby, reduce the risk of HIV transmission.

Back in 1988, the ILO and the World Health Organization (WHO) had adopted a Joint Declaration on HIV/AIDS in the Workplace, which set out general principles that should guide workplace response to the epidemic (WHO/ILO, 1988). The WHO and UNAIDS have also been providing policy advice and guidelines on public health and HIV/AIDS specific legislation, including legislation relating to employment, over the past decade (WHO, 1997, Directory of Legal Instruments dealing with HIV infection and AIDS; UNAIDS, 1999, Handbook for Legislators on HIV/AIDS, Law and Human Rights).

In response to an ILO Resolution concerning HIV/AIDS and the World of Work, which was adopted by the International Labour Conference in June 2000, the ILO speedily developed and adopted the ILO Code to provide guidelines for policy and support practical efforts by the tripartite constituents to fight HIV/AIDS in the workplace. The ILO Code is based on the Organisation's fundamental principles and rights at work and incorporates a number of principles enshrined in ILO Conventions and instruments. It was developed through a process of widespread consultation involving the tripartite constituents at national, regional and global levels, and it is regarded as a consensus document of social partners.

The ILO Code contains 10 key principles that should guide governments, workers' and employers' organisations in member States on policy and practice in specific areas, including the adoption of legislation to cover HIV/AIDS in the workplace:

Recognition of HIV/AIDS as a workplace issue

- Non-discrimination based on real or perceived HIV status
- Gender equality
- Healthy work environment
- Social dialogue
- No HIV testing for purposes of exclusion from employment, promotion or benefit
- Confidentiality
- Continuation of employment relationship and adaptation of work
- Prevention
- Care and support

The ILO Code is rights-based and sets out fundamental principles, as well as rights and obligations from which concrete responses to HIV/AIDS can be developed at

enterprise, community and national levels. The ILO Code promotes a comprehensive approach to workplace programmes that covers:

- Protection of workers' rights, including non-discrimination, employment protection, gender equality and entitlement to benefits
- Prevention through education, gender awareness programmes, and practical support for behaviour change
- Care and support, including entitlement to reasonable accommodation at work and occupational schemes, affordable health services, treatment, and statutory social security programmes

Even though the ILO Code is voluntary, and therefore not legally binding (in contrast to international labour conventions), it is an important set of international guidelines for framing national laws for establishing and defending basic principles and rights concerning HIV/AIDS in the workplace. This importance was recognised in the UN Declaration of Commitment on HIV/AIDS, adopted by United Nations General Assembly in Special Session (UNGASS) in June 2001 (UN, 2001). The signatories to the Declaration (the governments of 189 States) committed themselves by 2003 to:

'develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at the greatest of HIV/AIDS, in consultation with representatives of employers and workers, taking into account of established international guidelines on HIV/AIDS in the workplace'. (UN, 2001, para 69)

The UNGASS Declaration also set 2005 as a target date for States to:

'strengthen the response to HIV/AIDS in the world of work by establishing and implementing prevention and care programmes in public, private and informal work sectors, and take measures to provide a supportive workplace environment for people living with HIV/AIDS'. (UN, 2001, para 49)

4. Responses by the ILO and its constituents to violations of workers' rights on the basis of HIV status

Recognition of fundamental principles and rights at work are a feature of ILO operations since its inception in 1919. As already noted, these rights and principles underline the dual role of the ILO as a protector of human rights and as a promoter of equitable economic and social development with political stability. Implicit in both roles is the recognition that governments have a duty to respect, protect and promote human rights for all, regardless of status, and as part of the wider process of development.

Based on its long tradition of standard-setting and the provision of technical assistance in the field of labour law and social policy, the ILO has been at the forefront of providing guidelines and assistance to its tripartite constituents in all regions worldwide to address HIV/AIDS in the workplace in a socially equitable, humane and compassionate manner. It is important in the domain of legislation concerning a sensitive and controversial issue as HIV/AIDS in the workplace, that all relevant stakeholders are involved in the process. Hence, the ILO strongly encourages the involvement of its tripartite constituents in the development, adoption and

implementation of HIV/AIDS-related legislation and programmes. Furthermore, the ILO recognises that the best way to respond to the human rights implications of HIV/AIDS in the workplace is to develop policies at the international, national and enterprise levels to protect the rights of those concerned.

4.1. International initiatives

In the absence of a specific ILO Convention or Recommendation on HIV/AIDS in the workplace, the fight against HIV/AIDS in the world of work depends on a large number of ILO instruments that covers both protection against discrimination and prevention against infection. These include:

- Discrimination (Employment and Occupation) Convention, 1958 (No.111)
- Termination of Employment Convention, 1982 (No.158)
- Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No.159)
- Occupational Safety and Health Convention, 1981 (No.155) and Occupational safety and Health recommendation, 1981 (No. 164)
- Employment Injury Benefits Convention, 1964 (No. 121)
- Social security (Minimum Standards) Convention, 1952 (No. 102)
- Migration for Employment Convention (Revised), 1949 (No.97) and Migrant Workers (Supplementary Provisions) Convention, 1975 (no.143)
- Part-time Work Convention, 1994 (No.175)
- Nursing Personnel Convention, 1977 (No.149).

As already stated, the ILO Code and, to a lesser degree, the ILO Declaration constitute two specific ILO instruments that underpin the efforts of ILO and its constituents to combat HIV/AIDS in the workplace. The Code represents an international tool, and the first of its kind, designed to provide guidance on HIV/AIDS in the specific framework of the workplace, based on social dialogue between governments, employers and workers. It establishes fundamental principles for policies at all levels and practical guidance for workplace responses. The fact that the ILO Code is based on the ILO Declaration and core ILO Conventions gives it legitimacy, and constitutes an obligation on the part of States (which have signed on to the Declaration and ratified relevant Conventions) to respect basic workers rights including non-discrimination and access to healthy and safe working environment. Taken together with the ILO the Declaration, the Code can be looked upon as a precondition for the exercise of workers rights.

The ILO Code has been a remarkable success. It was presented to the UN Secretary-General during the UNGASS, and contributed in guiding heads of state and government toward an UNGASS consensus on addressing HIV/AIDS in the workplace. The Code now exists in over 35 international and local languages which cover the needs of the tripartite constituents in close to 90 per cent of countries globally, and has been launched or is being applied in about 75 countries worldwide as the basis of national legislation or policies and enterprise level programmes. The key principles of the ILO Code are being applied through national legislation and jurisprudence relating to managing HIV/AIDS in the workplace and concerning the rights and entitlements of persons affected by HIV and AIDS.

4.2. National action

National legislative provisions relating to HIV/AIDS are found in:

- HIV/AIDS-specific laws
- Labour and employment laws
- Laws and constitutional provisions on human rights and non-discrimination
- Disability laws
- Case law

While there is no ‘model law’ to manage HIV/AIDS in the workplace, the ILO’s position is that HIV/AIDS legislation should be rights-based in accordance with universally recognised human rights instruments, and, more specifically, the ILO Code. In general, the legislative framework should address pertinent issues such as prevention, care and support, non-discrimination and impact mitigation. In order to be effectively implemented, HIV/AIDS legislation should be clear and unambiguous about the purpose of the law including the problem it is meant to address, and how it relates to a rights-based approach. In this connection, the legislation should also include clear provisions on grievance procedures and should be accompanied by enforcement mechanisms. In any given context, the legislation must be consistent with HIV/AIDS policies and standards adopted at national and international levels. Ideally, HIV/AIDS legislation should be the outcome of necessary consultations involving the social partners in the world of work to ensure that the provisions are realistic and implementable.

4.2.1. HIV/AIDS-specific Laws

Most existing HIV/AIDS-specific laws are of very recent origin, having been adopted in the past decade or so in response to increasing concern about the human rights implications of the epidemic and violations of rights especially in the workplace. Existing national laws tend to be comprehensive in coverage, addressing a wide range of HIV/AIDS issues from prevention, education, care and support, testing and confidentiality, non-discrimination and protection of rights including job security and sick leave to national coordination and budgetary allocation, such as Cambodia’s Law on the Prevention and Control of HIV/AIDS, 2002, Costa Rica’s General Act on HIV/AIDS, 1999, Kenya’s HIV and AIDS Prevention and Control Act, 2003, and the Philippines AIDS Prevention and Control Act, 1998. Other national HIV/AIDS laws such as the Mozambican AIDS Act, 2002, and the Zambian Employment Act, 2002, specifically address issues relating to HIV/AIDS in the world of work such as discrimination, dismissal and exclusion from social protection benefits, and have definitions and provisions that are guided by the ILO Code and the ILO Employment Convention No.111. The Mozambique Act is unique in that its coverage extends to all workers including those in domestic and some types of non-formal employment, although it is less clear on sanctions and responsibilities. This is in contrast to the laws of Costa Rica, Cambodia and Zimbabwe which include clear and detailed grievance procedures for dealing with violations of right at work on the basis of HIV status; and in the case of Zimbabwe and Cambodia clearly stated sanctions and disciplinary actions (including fines and imprisonment) for such violations, which could raise question of proportionality between offence and punishment.

4.2.2. Labour and Employment Legislation

Labour and employment legislation are widely used to regulate relationship between employers and employees and to establish the framework for labour relations including collective bargaining. Most existing labour laws provide guarantee for

workers rights, consistent with ILO's fundamental principles and rights at work. In the absence of HIV/AIDS-specific legislation, several countries have taken steps to integrate provisions prohibiting HIV discrimination and protecting the rights of HIV positive workers and job seekers into existing labour legislation. The Bahamas Employment Act, 2001, provides a good example of the inclusion of specific provision prohibiting discrimination against an employee or job applicant on the basis of 'real or perceived HIV status'; it is anchored in a rights-based approach, using human rights as its standard. A number of labour laws that address HIV/AIDS also cover requirements that extend the fundamental principle of non-discrimination to the gender and immigration dimensions of the epidemic with specific provisions to protect women and migrant workers from discrimination (for example the Cambodian Act and the Bahamas Act). At the same time, ignorance and fear of HIV/AIDS have led some countries to introduce restrictions on the entry of foreigners for work, studies and tourism. For example, Vietnam's Ordinance on the Prevention and Fight Against HIV/AIDS Infection, 1995, requires that 'a foreigner infected by HIV/AIDS must declare his/her infection when entering' the country.

Broad-based consultations on HIV/AIDS among the social partners in the world of work have resulted in the amendment of national labour laws to take into account the impact of the epidemic in the workplace. In 1998, the Namibian government, in consultation with its social partners, developed a comprehensive (Namibia) National Code on HIV/AIDS and Employment which was adopted into law under the country's Labour Act. Similarly, the Zimbabwe government, on the basis of consultations with employers' and workers' organisations, amended its Labour Relations Act in 1998 and again in 2002 to include specific regulations and provisions on HIV/AIDS; these address issues of non-discrimination, no testing without consent, confidentiality and safe practices against occupational transmission of HIV, and provide penalties for violations including payment of damages and reinstatement in employment. The South African Employment Equality Act, 1998, influenced by lobbying from trade unions and similar groups, incorporates non-discrimination regarding HIV status into the provision on 'equality of opportunity for all citizens in matters relating to employment.'

4.2.3. Human Rights and Anti-discrimination Legislation

Use has been made of umbrella human rights and anti-discrimination legislation to address problems of HIV-based discrimination in the workplace as violations of fundamental rights and freedoms under these laws. In some cases, action takes the form of complaints filed before specialized tribunals or human rights commissions where remedies are sought in the form of claims for compensation and reinstatement. Sometimes the decisions of employment tribunals go beyond punishment for violation of rights at work to cover such innovative remedies as public information and workplace education that address prejudice and ignorance which are seen as the root cause of discrimination. The Quebec Charter of Human Rights and Freedoms prohibits discrimination in employment on the basis of several grounds including a handicap, and in May 2000 the Supreme Court of Canada ruled that the interpretation of 'handicap' in the Quebec Charter extended to HIV positive persons. In 2002, the Romanian government adopted an Emergency Ordinance aimed at preventing and punishing all forms of discrimination, including against persons living with HIV/AIDS, with respect to employment and remuneration; the Ordinance provides for the fielding of complaints to the National Council for the Prevention of

Discrimination, and for the adoption of affirmative action measures and sanctions to ensure the elimination of discrimination.

4.2.4. Disability Laws

Disability Laws have been used to offer protection to people infected with HIV against discrimination and exclusion, and to integrate them fully as possible into society. With respect to the workplace, disability laws usually contain detailed provisions on the obligations of employers to make 'reasonable accommodation' to help disabled persons remain in employment for as long as possible. In relation to HIV/AIDS workers, these laws can be useful for protecting the right to work and to remain employment of persons who are infected with the virus or have started to develop HIV-related symptoms but are still fit for work. However, the protection of rights of asymptomatic HIV-positive persons will depend on the definition of disability used in the laws and its interpretations in the courts or by tribunals. For example, most US courts have accepted that HIV/AIDS is a disability per se and protection is offered to people with asymptomatic HIV under the American with Disabilities Act, 1990. Another rights-based approach is found in the China, Hong Kong Special Administrative Region's, Disability Discrimination Ordinance, 1995, which prohibits discrimination or harassment based on disability in several areas including all aspects of employment. The definition of disability under the Hong Kong law includes the presence of disease-causing organisms in the body, and as such comprises HIV/AIDS even when asymptomatic. A Code of Practice on Employment has been issued under the Hong Kong Ordinance to assist employers and employees in understanding their responsibilities and to provide practical guidelines to management on procedures and practices that can help prevent discrimination in the workplace. Employers may be held responsible for acts of discrimination committed on their premises, and complaints can be lodged with the Equal Opportunities Commission which will investigate with the aim of resolving them through reconciliation.

The UK's Disability Discrimination Act, 1995, prohibits discrimination against an employee or a job-seeker with disability in all aspects of employment. The definition of disability under the Act includes HIV/AIDS; initially it covered only HIV at the symptomatic stage but a recent amendment has extended coverage to HIV from the moment of diagnosis. Under the UK Act, which applies to workplaces with 15 or more employees, it is illegal to dismiss a worker simply because of his or her HIV status and, furthermore, employers are obliged to make reasonable adjustments in the workplace (for example changes to premises, working time, job specification, etc) to enable people with HIV to remain at work. Employers in the UK are liable for the discriminatory action of their employees or agents, even if such action occurs without their knowledge or approval.

4.2.5. Case Law

Numerous court cases have arisen involving HIV/AIDS issues, and there is a growing body of jurisprudence in national labour courts and human rights tribunals on the epidemic and its impact in the world of work. This in part reflects growing awareness of the existence of legislation designed to protect the rights at work of HIV-positive persons, and in part increased numbers of HIV-related violations of workers rights especially in relation to discriminatory acts and dismissals. The courts have been

instrumental in clarifying definitions and concepts pertaining to managing HIV/AIDS in the workplace on the basis of the fundamental principles and rights at work.

In the Namibian case of *Haindongo Nghidipohamba Nanditume v. Minister of Defence*, the Minister was sued by a potential recruit whose application to join the Namibian Defence Force (NDF) was rejected solely on the basis of his HIV-positive status; the Labour Court ruled that the NDF cannot exclude any person from joining the force who is otherwise fit and healthy, but has tested HIV-positive. The court concluded that the NDF had to determine the extent to which an HIV-positive applicant's immune system had been damaged by the infection in relation to physical fitness to perform normal duty in the NDF, and found that an HIV test alone will not achieve this purpose. The court ordered that the NDF should enlist the applicant, if he re-applied for enlistment, provided that he is still fit and healthy for work. This judgement which represented a landmark in the fight against discrimination on the basis of HIV status in Namibia was, however, subsequently nullified by the Defence Amendment Act adopted by the National Assembly in 2002 which appears to enable the NDF to exclude persons solely on the basis of their HIV status.

In Canada, almost a decade earlier, an important decision was handed down concerning HIV and the armed forces in *Thwaites v. Canada (Canadian Armed Forces [CAF])*. Mr. Thwaites, a master seafarer in the CAF, filed a complaint against the CAF for terminating his employment because he was HIV-positive. The Human Rights Tribunal found that Thwaites had been discriminated against because of his disability, and that the CAF had failed in its legal obligation under the Canadian Human Rights Act to accommodate him according to his capabilities so that he can remain in employment for as long as possible. The court also held that the increased risk posed by retaining a disabled person in the Forces had to be more than minimal risk before the Forces could justify dismissal outright. The decision was upheld by the Canadian Federal Court. However, shortly after the Thwaites decision the Federal Court of Appeal took a step backward when it decided in two cases that the military could release or refuse to hire a person if retaining that person poses any greater risk than retaining an able-bodied member, regardless of how small that increase in risk might be.

In the case of *Hoffmann v. South African Airways (SAA)*, Mr. Hoffmann was refused a job in SAA as a cabin attendant because he was HIV-positive. The SAA argued before the court in 2000 that its decision was based on medical, safety and operational grounds, and that harm could be done to its commercial interest if it were known that it employed HIV-positive workers in certain capacities. The Constitutional Court found that 'an asymptomatic HIV person can perform the work of a cabin attendant competently', and that 'hazards to which (the) cabin attendant may be exposed can be managed by counselling, monitoring and appropriate (treatment) if necessary', and, furthermore, that 'the risks to passengers and other third parties arising from the employment of an asymptomatic cabin crew member are therefore inconsequential and, if necessary, well-established universal precautions can be utilised'. In addition, the court addressed the concern of SAA about its public image and its commercial interests, vis-à-vis its competitors, with a clear message about such presumptions by stating that: 'we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests,' and stressed that 'the greater interests of

society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination’.

In a Venezuelan case in 2003, a professional footballer was fired because he tested HIV-positive. His employer carried out the test without his consent, and the result was made known to other players. The Labour Tribunal ordered his reinstatement with full employment benefits. In so doing, the tribunal also established an important precedent by ruling that the agreement signed by the footballer under pressure from his employer waiving his right was void.

4.3. Workplace HIV/AIDS Programmes

All of the evidence supports the proposition that workplace programmes are an effective instrument for mobilising effective response to HIV/AIDS. This is the case in both developing and developed countries, and it is true in both private and public sectors. The willingness to support workplace programmes arises usually from a recognition of the value that such programmes have in sustaining the enterprise’s human resources, and can be shown to be both economically and socially desirable.

Increasing numbers of private sector employers, including many multinational enterprises (MNEs), are now implementing comprehensive HIV/AIDS workplace programmes that address issues of prevention, care and support, and increasing issues of treatment in response to the impact of the epidemic in their own workforce and enterprise. Many of these employers now realise that the epidemic threatens their capacity to retain a stable, skilled and experienced workforce, including supervisors and managers; to maintain productivity and competitiveness and remain profitable; to attract investment; to support viable health and pension schemes; and to retain and expand markets. Activities carried out within the framework of comprehensive workplace strategies and programmes, in accordance with the ILO Code, include awareness-raising, prevention through workplace education and practical support for behaviour change and safe sex, and care and support, which in turn contribute to the promotion of non-discrimination and protection of workers rights including employment security and gender equality. Workplace programmes have been found to be particularly effective in addressing stigma and discrimination and for extending services to families and communities, as several examples drawn from the experience of major companies in South Africa now illustrate (BMW, Anglo-American mining group, Daimler-Chrysler, VW, Old Mutual Insurance, Barclays Bank).

More recently, workplace HIV/AIDS programmes have been embraced by the public sector, especially in highly affected countries where the epidemic has had a heavy toll on key public servants such as teachers, doctors and nurses, magistrates and judges, as well as uniformed services. The impact of the epidemic in the public sector constitutes a real threat to the delivery of essential administrative and social services and the maintenance of national security. In recognition of the exposure of health sector workers to the risk of HIV, health ministries in all regions have been at the forefront in taking measures to educate and protect their personnel. On a wider scale, the South African Department of Public Service and Administration is a good example of a major public sector institution that has taken the initiative to fight AIDS throughout the public sector in the country; the Department coordinates and monitors through focal points the implementation of non-discriminatory policies and integrated programmes in public sector workplaces in all three tiers (state, provincial and local)

of government throughout the country. This has contributed significantly to minimising the problem of stigma and discrimination among public sector workers.

Interventions at the enterprise level in both the private and public sectors are critical to sustaining human resource capacity in all sectors, which is a fundamental requirement and objective for social and economic development. In the community, workplace-oriented initiatives can become vehicles for social mobilization not only to prevent and treat HIV/AIDS but also to promote local-level development. Enterprises are finding that the implementation of comprehensive workplace HIV/AIDS programme, including access to treatment and care, also help them to define, plan and implement wider programmes of corporate social responsibility (CSR). Such initiatives are justified from the standpoints of both a 'rights-based' and a 'development-oriented' approach, and represents a balance between practical ('business case') motives and altruism as well as between regulatory and voluntary action. Some enterprises have worked with local communities to mobilise religious, traditional and age/sex-specific group leaders and local NGOs to promote understanding about HIV/AIDS and to foster respect and compassion for people living with HIV/AIDS, and thereby contribute to reducing stigma and discrimination.

The ILO Code and the advocacy and technical cooperation activities of the ILO's Global Programme on HIV/AIDS and the World of Work provide a universal framework and support to guide and assess the progress and impact of workplace HIV/AIDS programmes. The ILO Code encourages coordination of rights and responsibilities among the tripartite constituents, and supports a scope for action reaching beyond the legally-mandated employment and workplace relationships to include families, former employees, communities and even suppliers. The ILO Code also encourages new workplace initiatives regarding social dialogue and knowledge management and sharing linked to ILO standards and examples of good practices, as well as effective public-private partnerships (PPP), for achieving its objectives in matters of prevention, treatment and protection of workers' and non-discrimination. ILO technical cooperation programmes on HIV/AIDS and the world of work, including training for labour tribunal judges and magistrates and prevention education for women and informal sector workers, have been useful in helping to build up and strengthen national capacity to ensure an effective response to the epidemic and to defend workers rights.

5. HIV/AIDS in the workplace and Globalization

The impact of globalization on labour markets and on addressing and managing HIV/AIDS in the workplace has precipitated commensurately global approaches to the human rights implications. Several countries have reacted to the threat of the epidemic within their borders by passing legislation or introducing policies that ban or restrict entry and prolonged residence on their territories of HIV-positive aliens. In 2002, the United States Department of State published a list of about 60 countries that required, under various circumstances, foreigners to be tested for HIV prior to entry into their territories. Notably, these are mostly immigrant seeking to enter for work or personal reasons. Restrictions on the entry and stay of HIV-positive persons and related mandatory HIV screening in the country of origin before departure entail violations of the human rights of those concerned. Even though such restrictions might have been imposed to meet the legitimate concern of states regarding public

health and general well-being of the population in a democratic society, they are not justified in accordance with international law and have, therefore, been systematically condemned by the UN and its specialized agencies and by NGOs working in the HIV/AIDS field.

ILO Conventions on migrant workers were drafted long before the emergence of HIV/AIDS. They remain highly relevant as the wider framework within which to protect the rights of migrant workers in the context of HIV/AIDS. The aim of the ILO in adopting these instruments was twofold: to regulate migration conditions, and to specifically address a category of workers in need of protection. The Conventions aim to provide for equality of treatment between nationals and aliens in the field of social security, and to institute an international system to preserve acquired rights and rights being acquired in the case of workers who move.

From a human rights perspective, it is important to explore alternative approaches to controlling the spread of HIV/AIDS through immigration controls, especially as years of experience of fighting the epidemic now show that the promotion and defence of human rights represents an essential part of prevention in transmission of HIV and a lowering of the incidence of HIV/AIDS. Indications are that many countries are still not convinced that restrictions on entry aimed at controlling the spread of HIV/AIDS could be administered in a manner that does not violate fundamental human rights. The low number of ratifications of the main international instruments specifically addressing the rights of migrants, such as ILO Conventions Nos. 97 and 143 and the UN Convention on the Protection of Migrant Workers supports the contention that numerous countries are resistant to letting international law influence their immigration policies as far as HIV/AIDS, in particular, and health issues, in general, are concerned.

The protection of migrants' rights is important to respect their dignity and to reduce HIV transmission. Countries of origin and of destination can benefit from both, and should take necessary steps to ensure the protection of migrating workers' rights to eliminate factors that contribute to their exposure to risk. In this respect, the United Nations Special Rapporteur on the Human Rights of Migrants encourages initiatives at regional level in order to stimulate dialogue between governments of countries of origin and transit and those of intended destination². United Nations agencies, specialized institutions and NGOs working in the field of HIV/AIDS have consistently stressed that the restrictions relating to entry or residence of foreigners on health grounds, including HIV/AIDS, should be applied in a humane and non-discriminatory manner and in accordance with basic human rights (of migrants and others) pertaining legal protection for refugees, children and the family and to privacy and dignity³.

The opportunity to make use of the workplace to provide health education and care and support, in accordance with the ILO Code, is missed in certain workplaces, such as those in Export Processing Zones (EPZs) where labour standards pertaining to health and safety and social benefits are sometimes inadequate or even non-applicable. Set up mainly to attract foreign investment and create jobs in a highly competitive global context, some national authorities are willing to lower established labour standards or turn a blind eye to non-observance of standards and poor working conditions in favour of investment. This can lead to abuse of workers rights and even

increase risk and exposure to occupational and health hazards, including sexually transmissible diseases and HIV infection. A report on Madagascar prepared by the ILO in 2005 raised the problem of HIV/AIDS in EPZs with respect to workers rights and highlighted the fact that workers were not benefiting from information and knowledge about HIV and its transmission and how to reduce risk of infection. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has noted on numerous occasions contradiction between obligations and standards applied in EPZs, including in relation to occupational health, and have requested governments concerned to take action to ensure that foreign investors in EPZs respect ILO standards

6. Monitoring and Enforcement

Once a member State has ratified a Convention, and it has entered into force, it becomes a legal instrument and the State is obliged to bring its legislation and practice into conformity with the dispositions of the Convention. Periodic reporting on the application in law and practice of international labour Conventions by member States to the supervisory bodies of the ILO provides an opportunity to monitor progress in the implementation and the impact of ratified instruments including those concerning non-discrimination in employment and protection of workers rights in other areas. Country reports on ratified Conventions are examined by the CEACR. In 1999, the Committee noted that reports from a minority of States referred to HIV/AIDS screening for various categories of migrant workers, and stated its concern at the alarming development of the phenomenon of HIV/AIDS screening on arrival (ILO, 1999). As a consequence, the Committee found it necessary to restate that it considered refusal of entry or repatriation on grounds that the worker concerned had an infection or illness of any kind, which had no effect on the task for which he had been recruited, to constitute an unacceptable form of discrimination.

The effect of international labour conventions and other standards is not, however, limited to countries which have ratified them, as implied under the constitutional obligation of membership and signatory to the ILO Declaration. In addition, states also use ILO standards and Conventions as models, and number of countries that have not ratified certain relevant Conventions have nevertheless tended to follow the broad lines of their provisions.

Endnotes

¹ Stigma and discrimination undermine prevention by forcing the epidemic underground: people are reluctant to find out whether or not they are infected, to seek treatment, to stop and change risky behaviour in order to avoid raising suspicion about their HIV status.

² See the report of the Special Rapporteur on the Human Rights of Migrants, presented at the 56th Session of the Commission on Human Rights, E/CN.4/2000/82, para. 77-78; Filer, D P (1997) 'Return of the Fourth Horseman: Emerging Infectious Diseases and International Law' *Minnesota Law Review* 81, pp 771-868; Fitzpatrick, J and Bennet, W (1995) 'Symposium on Immigration Policy: A Lion in the Path? The Influence of International Law on Immigration Policy of the United States', *Washington Law Review* 70, pp 589-628.

³ See Guidelines on HIV/AIDS and Human rights, Office of the High Commissioner for Human Rights and UNAIDS, Geneva, 23-25 September 1996, HR/98/PUB/1 and the UNAIDS/IOM Joint Declaration on travel restrictions based on HIV/AIDS, 2004.

References

Botswana Network on Ethics, Law, and HIV/AIDS (ed.) (2004) *Challenging HIV-Related Discrimination: Protection for Employees in the Workplace* (Gaborone, Pyramid Publishing).

Chartier, M-C (2005) 'Legal Initiatives to Address HIV/AIDS in the World of Work' *Research and Policy Analysis No. 1*.

Cohen, D (2002) 'Human capital and the HIV epidemic in sub-Saharan Africa', *ILO/AIDS Working Paper No. 2*.

Filer, D P (1997) 'Return of the Fourth Horseman: Emerging Infectious Diseases and International Law' *Minnesota Law Review* 81, pp 771-868

Fitzpatrick, J and Bennet, W (1995) 'Symposium on Immigration Policy: A Lion in the Path? The Influence of International Law on Immigration Policy of the United States', *Washington Law Review* 70, pp 589-628

Hodges, J (2004) 'Guidelines on addressing HIV/AIDS in the workplace through employment and labour law', *Infocus Programme on Social Dialogue, Labour Law and Labour Administration Paper No. 3*.

International Labour Organization (ILO) (1994) *Constitution of the ILO and Standing Orders of the International Labour Conference* (Geneva, International Labour Organization).

ILO (1997) *The ILO, Standard Setting and Globalization. Report of the Director General*, International Labour Conference, 85th Session, Geneva.

ILO (1998) *ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, ILO).

ILO (1999) *Migrant Workers. General survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No.143), and Recommendation (No.151), 1975, Report III (Part 4 B)* International Labour Conference, 87th Session, Geneva.

ILO (2001) *An ILO Code of Practice on HIV/AIDS and the World of Work* (Geneva, ILO).

ILO (2004) *Organising for social justice. Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (Geneva, ILO).

ILO Programme on HIV/AIDS and the World of Work (ILO/AIDS) (2003a) *Workplace Action on HIV/AIDS: identifying and sharing best practice* (Geneva, ILO).

- ILO/AIDS (2003b) *Global compact: Policy dialogue on HIV/AIDS. Meeting report* (Geneva, ILO).
- ILO/AIDS (2004) *HIV/AIDS and Work: Global estimates, impact and response* (Geneva, ILO).
- ILO/AIDS (2005a) *HIV/AIDS and Work. Guidelines for Labour Judges and Magistrates* (Geneva, ILO).
- ILO/AIDS (2005b) *A Handbook on HIV/AIDS for Labour and Factory Inspectors*, (Geneva, ILO).
- ILO/AIDS (2006) *HIV/AIDS and Work in a Globalization World 2005* (Geneva, ILO).
- Joint United Nations Programme on HIV/AIDS (UNAIDS) (1999) *Handbook for Legislators on HIV/AIDS, Law and Human Rights*, (Geneva, UNAIDS).
- UNAIDS and World Health Organization (WHO) (2005) *AIDS epidemic update, December 2005* (Geneva, ILO).
- UNAIDS (2005) 'HIV-related stigma, discrimination and human rights violations: Case studies of successful programmes', *UNAIDS Best Practice Collection* (Geneva, ILO).
- Lisk, F (2002) 'The Labour Market and Employment implications of HIV/AIDS' *ILO/AIDS Working Paper No. 1*.
- N'Daba, L and Hodges, J (eds.) (1998) *HIV/AIDS and Employment*, (Geneva, ILO).
- Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (OHCHR/UNAIDS) (2004) *HIV/AIDS and Human Rights, International Guidelines* (New York and Geneva, UN).
- United Nations (2001) 'Declaration of Commitment on HIV/AIDS', United Nations General Assembly Special Session on HIV/AIDS, 25-27 June 2001, New York.
- World Health Organization (WHO) (1997) *Directory of Legal Instruments dealing with HIV infection and AIDS*, (Geneva, WHO).
- WHO and ILO (1988) 'Statement from the consultation on AIDS and the Workplace, 27-29 June 1988, Geneva.