



FINAL CONSOLIDATED REPORT

REPORT OF THE LEGAL AND POLICY AUDIT AND EMERGING ISSUES FOR INCLUSION IN THE PROPOSED EAST AFRICAN LAW ON HIV/AIDS

Report compiled by African Vision Integrated Strategies (IS) Consultants)

List of Acrimony

AIDS	Acquired Immune Deficiency Syndrome
CBOs	Community Based Organizations
CSOs	Civil Society Organizations
EAC	East Africa Community
EANNASO	Eastern Africa Service Organization
EALA	East Africa Legislative Assembly
HIV	Human Immunodeficiency Virus
HAART	Highly Active AntriRetroviral Therapy
IDUs	Injecting Drug Users
IS	Africa Vision Integrated Strategies (IS)
ILO	International Labour Organization
MSM	Men who has Sex with Men
MARPS	Most at risk Population
NACC	National AIDS Control Council/Commission
NGOS	Non Governmental Organizations
OVCs	Orphans and vulnerable children
PLHIV	People Living with HIV
PMTCT	Prevention of mother to child transmission of HIV
PWD	Persons with Disability
SADC	Southern Africa Development Community
TACAIDS	Tanzania Commission for AIDS
UNAIDS	United Nation Joint Programme on HIV/AIDS
VCT	Voluntary counseling and Testing

Contents

Executive summary	3
1.0 Introduction	5
2.0 The HIV/AIDS epidemic in perspective	8
3.0 International and regional responses to HIV and AIDS	9
3.1 International instruments.....	10
3.2 Regional instruments	13
4.0 The emergence and development of regional model laws on HIV/AIDS. 15	
4.1 The concept of model laws and existing model laws on HIV/AIDS	15
5.0 The emerging East African Community Law on HIV/AIDS.....	20
6.0 Audit of legal and policy framework on HIV/AIDS in EAC countries	21
6.1 Burundi	21
6.2 Kenya	32
6.3 Rwanda	42
6.4 Tanzania.....	51
6.5 Uganda.....	65
6.6 Zanzibar	75
7.0 Consolidate recommendations for inclusion in the proposed EAC Law on HIV/AIDS.....	80
7.1 HIV and AIDS treatment as a right	80
7.2 Responsibility to take measures to use IP flexibilities	80
7.3 HIV and AIDS and discrimination	81
7.4 Children and HIV and AIDS	82
7.5 HIV/AIDS and criminal law	83
7.6 Testing and disclosure	84
7.7 Gender and HIV/AIDS	85
7.8 HIV/AIDS law and MARPs	85

Executive summary

Recent developments at the sub-regional levels in Africa have seen the emergence and development of regional model laws in the area of HIV/AIDS. Currently there exist two regional model laws on HIV and AIDS, one of the West African region and another for Southern African region. These model laws serve to offer standards of norms that national legislators should strive to emulate or duplicate. In emulating or duplicating the model laws, it is anticipated that legal harmony and common responses to the scourge of HIV/AIDS will be achieved.

Despite the significant role that such model laws play in the fight against the HIV/AIDS scourge, the East Africa region does not have such a regional law. It is against this backdrop that the East African Legislative Assembly (EALA) requested that a process be undertaken in a bid to generate a first draft of an East African regional law on HIV and AIDS for its consideration. In response to this request, a number of interested civil society organizations (CSOs), with the financial support of UNAIDS, initiated a process that saw the appointment of consultants who were tasked to conduct field studies in the EAC countries with a view of gathering views that would be incorporated in the proposed EAC Law on HIV and AIDS.

This Report presents a synthesis of the research conducted by the consultants, and most importantly, a summary of the views gathered from the country visits on the key issues to be incorporated in the proposed East Africa Law on HIV and AIDS. The reports of the country visits undertaken by the consultants have been attached to this Report as annexes.

In the main, the Report indicates that there is a huge support amongst key stakeholders for a regional law on HIV and AIDS. Across the region, there is a resounding emphasis for the reading of human rights issues into the fight against HIV and AIDS. In this regard, proposals made for inclusion in the proposed EAC Law on HIV and AIDS covers a range of issues including: HIV and AIDS treatment as a right; responsibility to take measures to use intellectual property flexibilities; HIV and AIDS and discrimination; children and HIV and AIDS; HIV/AIDS and criminal law; HIV testing, counseling and disclosure; biomedical research on HIV and AIDS; gender and HIV; and HIV and AIDS and Most at Risk Populations (MARPS).

The Report demonstrates that while there is almost uniform consensus on many issues to be included in the proposed law, the question of the rights of MARPs, especially commercial sex workers, Injecting Drug Users (IDUs) and Men who have Sex with Men (MSM), still remains a contentious one. It is nevertheless encouraging to note that the field studies conducted by the consultants have generated debate on this issue at the regional level, a fact that will go a long way, albeit gradually, in creating awareness and tolerance.

In the final analysis, it is anticipated that the adoption of the EAC Law on HIV and AIDS will usher a new impetus in the fight against HIV/AIDS scourge in the EAC region.

1.0 Introduction

1. In its estimated twenty six years of existence, the HIV/AIDS epidemic has, with unprecedented rage, killed millions of people across the world at their most productive age. The devastating impact of the epidemic has and continues to be felt in all spheres of human life, leaving in its wake hapless societies. For this reason, it has come to be accepted that exceptional measures are required to curb the HIV/AIDS epidemic. Speaking in 2008, the then UNAIDS Executive Director, Dr. Peter Piot, rightly observed that 'AIDS is exceptional' and that '[t]he response to AIDS needs to be equally exceptional'.¹ Marais lends credence to Piot's observation, noting that the HIV/AIDS epidemic is reiterating and intensifying already powerful features of society with such ferocity that it will require extraordinary boldness and invention to reclaim the future.²
2. That the HIV/AIDS epidemic requires 'exceptional response' and 'extraordinary boldness' to curb its spread and impact, rings true of Africa than of any other continent in the world. Africa is by far the worst affected in the world by the epidemic. While the continent constitutes just over 10% of the world population, it is the epicenter of the epidemic, being home to 67% of all people living with HIV/AIDS in the world.³ Alive to this fact and recognizing the gravity of the HIV/AIDs epidemic in the continent, African countries have adopted diverse responses to the scourge, including legislation in the area of HIV/AIDS. These responses have been undertaken at domestic, sub-regional and regional levels with

¹ P Piot 'Why AIDS is exceptional', speech given at the London School of Economics, 8 Feb 2008, available at <http://data.unaids.org> (accessed on 29 Dec 2009).

² H Marais *Buckling: The impact of AIDS in South Africa* (2005) 7.

³ UNAIDS 2008 *Report on the global AIDS epidemic* (2008) 1

- the effect that there are now concerted efforts to curb the epidemic in the continent.
3. At the sub-regional levels, recent developments have seen the emergence of regional model laws in the area of HIV/AIDS. Within the auspices of the Southern African Development Community (SADC) there is in place the Model Law on HIV and AIDS adopted by the SADC Parliamentary Forum in 2008. Similarly, there is in existence the West African Model Law on HIV prepared by the Action for West Africa Region - HIV and AIDS (AWARE - HIV and AIDS). These model laws serve to offer standards of norms that national legislators should strive to emulate or duplicate.⁴ In emulating or duplicating the model laws, it is anticipated that legal harmony and common responses to the scourge of HIV/AIDS will be achieved.
 4. In the East Africa region, however, such a regional law on HIV/AIDS is absent. It is against this backdrop that the East African Legislative Assembly (EALA) requested that a process be undertaken in a bid to generate a first draft of an East African regional law on HI and AIDS for its consideration. In response to this request, a number of interested civil society organizations (CSOs) formed the Task force on HIV and AIDS Law and Policy in Eastern Africa (The Task Force). The Task Force consists of organizations interested in galvanizing both a regional and a human rights approach to HIV/AIDS legislation in East Africa. The Eastern African National Networks on AIDS Service Organizations (EANNASO) chairs the Task Force, while the East Africa Law Society chairs its Legal Committee (The Committee).

⁴ See F Viljoen 'SADC PF Model Law on HIV: Analysis of issues and processes', available at www.chr.up.ac.za (accessed on 29 Dec 2009).

5. To generate the requested draft of an East African regional law on HIV and AIDS, EALS competitively sourced and secured, on behalf of the Task Force, the services of a consultancy firm that conducts development research on health and related fields: African Vision Integrated Strategies (IS) Consultants. The firm dedicated a team of eight consultants to undertake research, in the East African Community region, that would inform the draft law. In this required, the Terms of Reference required the consultants to undertake the following tasks:
 - i. Organize and facilitate in-country consultations on human rights and HIV and AIDS issues, as relevant to the proposed law.
 - ii. Draft a Bill, based on the recommendations from the in-country consultations and 'problematic' existing HIV and AIDS laws
 - iii. Organize and facilitate regional consultations on the draft law
 - iv. Submit to EALS a completed draft EAC HIV and AIDS Bill
 - v. Submit to EALS an analytical report on the process employed to draft the Bill, especially the national and regional consultations

6. Pursuant to the above Terms of Reference which are annexed to this report as **Annexure 1**, the consultants examined the legal and policy framework on HIV and AIDS in the EAC region. They conducted country visits to Burundi, Kenya, Rwanda, Tanzania and Uganda with the aim of identifying key issues that ought to be incorporated in the proposed East African Law on HIV and AIDS. In the country visits, key stakeholders were interviewed, questionnaires were administered, and workshops were held. Finally, the Consultants held a final workshop in December 2009 to discuss the results from the field studies. This report presents a synthesis of the research conducted by the consultants, and most importantly, a summary of the views gathered from the country visits on

the key issues to be incorporated in the proposed EA Law on HIV and AIDS. The reports of the country visits undertaken are annexed to this report for ease of reference.

7. The report is structured into six main parts. This part has offered an introduction to the Report. The second part that follows puts the scourge of HIV/AIDs in Africa within the global context. The third part is an exposition of the international and regional instruments that have been adopted to address the HIV/AIDS pandemic. This is followed, in the fourth part, by a discussion on the emergence and development of regional model laws on HIV and AIDS. The fifth part presents an audit of the legal, policy and institutional framework on HIV/AIDs in the EAC countries. A synthesis of the views of stakeholders gathered by the consultants during the country visits is also presented in this part. Finally, the sixth part draws the report to a conclusion.

2.0 The HIV/AIDS epidemic in perspective

8. It was in 1981 that scientists first identified HIV. Since then HIV and AIDS has developed into a human catastrophe.⁵ Within a span of 27 years, the global number of people who have been or are directly affected by this pandemic is close to 100 million.⁶ An estimated 60 million people have contracted the virus, while 25 million have since died as a result of the AIDS related illness.⁷ As of 2007, there were an estimated 33 million people living with HIV/AIDS.⁸ As a matter of fact, HIV and AIDS has not

⁵ See United Nations General Assembly Resolution 60/262, U.N. Doc. A/RES/60/262 (2 June 2006).

⁶ Ibid.

⁷ UNAIDS 2008 *Report on the global AIDS epidemic* (2008) 31.

⁸ Ibid.

only become the leading cause of death worldwide for adults aged 15-45, but it has also ravaged the lives of millions of children. Thus, while recent years have seen the stabilization of the epidemic across the world, there are still unacceptable high levels of new HIV infections and AIDS death.⁹

9. While the impact of the HIV/AIDS has been felt globally, Africa (particularly sub-Saharan Africa) has been the most heavily affected by the scourge. The continent constitutes just over 10% of the world population yet it accounts for 67% of all people living with HIV and 75% of AIDS death in the world. Women have been the most affected by the scourge reflecting the feminized nature of the epidemic. They account for 60% of HIV infections in the continent. Children too have been hit hard by the scourge. According to the UNAIDS, the epidemic has orphaned 12 million children in Africa. Moreover, new infections now occur in much younger age groups. Globally, young people aged between 15-24 accounts for an estimated 45% of new HIV infections. Almost 90% of them live in Sub-Saharan Africa. In sum, the HIV/AIDS has profoundly and adversely impacted human development in Africa. The impact of the epidemic in the continent can be seen in, amongst others, the reduced life expectancy by more than 20 years, the slowed economic growth in the continent, the deepening household poverty, and the skewed natural age distribution.

3.0 International and regional responses to HIV and AIDS

10. The emergence and magnitude of HIV and AIDS has raised serious legal and human rights questions and concerns even at the international level. Numerous attempts have been made at the international level to hold the

⁹ Ibid.

epidemic in check by different designs. However, the scale and impact of the epidemic has continued to grow, indicating a clear need for concerted and urgent action. It is globally acknowledged that the effective management of HIV will take a multi-sectoral approach that will see contributing interventions from the public health perspective and from other interventions that will address social, economic and cultural aspects that contribute to the flourishing of the epidemic.

11. In this light, the role of law and human rights has been acknowledged. Specifically, it is now acknowledged that there is a need to strengthen, adjust or formulate laws on HIV and AIDS, and to ensure a legal framework that supports the different interventions. To underscore this fact, most national HIV coordination mechanisms go beyond the public health focus and try to ensure inclusion of other strategies in the national policies. At the regional and international levels, a number of instruments provide the framework for guiding various sectoral actors on how to address human rights and other welfare of those affected and infected with HIV.¹⁰ In this section, an exposition of these international and regional instruments on HIV and AIDS is provided.

3.1 International instruments

12. International response to the HIV/AIDS epidemic dates back to 1985 when the first International AIDS Conference was held in Atlanta, United States of America. Since then, a number of instruments intended to address the HIV/AIDS scourge have been adopted at the international level, primarily under the ambit of the UN. These instruments include the

¹⁰ Patterson D. & London L. (2002). 'International Law, Human Rights and HIV/AIDS' in *Bulletin of the World Health Organisation*. WHO Publishers, p. 37.

following: the UN Declaration of Commitment on HIV/AIDS, 2001; the International Labour Organisation (ILO) Code of Practice on HIV/AIDS and the World of Work, 2001; and the United Nations Political Declaration on HIV and AIDS, 2006. A brief discussion of each of these instruments follows hereunder.

3.1.1 The UN Declaration of Commitment on HIV/AIDS, 2001

13. The UN Declaration of Commitment on HIV/AIDS was adopted by UN Member States at the first-ever Special Session on HIV/AIDS of the UN General Assembly in 2001. The Declaration marked the UN's initial commitment to the fight against HIV and AIDs. In the Declaration, Member States committed themselves to achieve stipulated responses to the HIV/AIDS epidemic within specific time-lines.

14. For instance, Member States pledged to '...ensure that at least 90 percent (by 2005), and by 2010 at least 95 percent of young men and women aged 15 to 24 years have access to the information, education, including peer education and youth specific HIV education, and services necessary to develop the life skills required to reduce their vulnerability to HIV infection...' The Member States also committed themselves to, by 2003, enact, strengthen or enforce legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV/AIDS in addition to ensuring that they enjoy all human rights and fundamental freedoms. The Declaration, therefore, lays a basis for national legislation on non-discriminatory measures in the context of HIV and AIDS.

3.1.2 ILO Code of Practice on HIV/AIDS and the World of Work, 2001

15. The ILO Code of Practice on HIV/AIDS and the World of Work, adopted in 2001, is a product of collaboration between the ILO and its tripartite constituents. The Code provides invaluable practical guidance to policy-makers, employer's and worker's organizations and other social partners for formulating and implementing appropriate workplace policy in relation to HIV/AIDS. It identifies several key principles as the basis for addressing the HIV/AIDS epidemic in the workplace. These principles include: the recognition of HIV and AIDS as a workplace issue; non-discrimination in employment; gender equality; screening and confidentiality; social dialogue; and prevention, care and support.

16. The Code implores states to incorporate its provisions in not only the national laws, but also in workplace agreements as well as in workplace policies and plans of action. By and large, the Code is a key instrument that accords commendable protection to the HIV/AIDS employee at the workplace.

3.1.3 The UN Political Declaration on HIV and AIDS, 2006

17. In 2006, The UN renewed its commitment to the worldwide struggle against HIV and AIDS through the adoption of the Political Declaration on HIV and AIDS. This Declaration was passed at a High-Level Meeting on AIDS in New York on 2 June 2006.¹¹ The High Level Meeting took place after a two day technical review of the progress that had been made

¹¹ See United Nations General Assembly Resolution S-26/2, U.N. Doc A/RES/60/262, 2 June 2006.

in implementing the Declaration of 2001.¹² The Political Declaration updated statistics, recognized the efforts that many Member States had already made, encouraged states to renew their commitments, and reiterated the goals of the UN's Global strategy.

18. The Political Declaration recognizes the importance of harm reduction strategies, especially in the realm of drug use. Noting the feminization of HIV/AIDS, the Declaration emphasizes the need for efforts to eliminate gender inequalities and discrimination based on gender in order to empower women to protect themselves from HIV and AIDS infection in an environment free from coercion, abuse and violence. In the Declaration, Member States committed themselves to take extraordinary action to move towards universal access to HIV prevention, treatment, care and support by 2010.

3.2 Regional instruments

3.2.1 Grand Bay (Mauritius) Declaration and Plan of Action, 1999

19. The Grand Bay (Mauritius) Declaration and Plan of Action was adopted by the African Union Council of Ministers in 1999. It underscores the basic necessity of addressing and observing the rights of people living with HIV/AIDS. In Article 7, the Declaration acknowledges that the rights of people living with HIV/AIDS have not been observed in Africa, and urges state parties to ensure respect for these rights.¹³ The Declaration recognized that the core values on which human rights are founded

¹² See UNAIDS, *High Level Meeting: Questions and Answers*, available at http://data.unaids.org/pub/InformationNote/2006/200605_HLM_QA_en.pdf, accessed last on 17 August 2008.

¹³ *Ibid*, Art 7.

include respect for the sanctity of life and human dignity, tolerance for differences and fairness.¹⁴ The Declaration lays a basis for the protection of people living with HIV/AIDS from discrimination in all areas including in legislative measures.

3.2.2 The Dakar Declaration

20. The Dakar Declaration outlines 10 cardinal legal and ethical principles to be observed in the fight against HIV and AIDS. It recognizes that the fundamental value of respect for human rights, life and human dignity provides the foundation on which the fight against HIV/AIDS is built. In this regard, Principle 5 of the Declaration states that 'Every person directly affected by the epidemic should remain an integral part of his or her community, with the right of equal access to work, with freedom of movement and association, alongside to counseling, care and treatment, justice and equality'.¹⁵ The Declaration represents one of the greatest endeavors, at continental level, to concretize the principles necessary for the eradication of discrimination of people living with HIV/AIDS.

3.2.3 Abuja Declaration and Plan of Action on HIV and AIDS, Tuberculosis and Other Related Infectious Diseases, 2001

21. In the Abuja Declaration, African leaders acknowledged that HIV and AIDS is an emergency in the continent and pledged to place the response to HIV and AIDS at the forefront as the highest priority issue in their respective national development plans. Principally, the leaders committed themselves to mobilize resources from within Africa and beyond, and to

¹⁴ Ibid, Art 5.

¹⁵ Dakar Declaration, Principle 5.

enact appropriate legislation and international trade regulations that would ensure availability of drugs at affordable prices to people living with HIV/AIDS. African States are therefore under obligation to guarantee availability of drugs to PLHIV.

4.0 The emergence and development of regional model laws on HIV/AIDS

4.1 The concept of model laws and existing model laws on HIV/AIDS

22. The concept of model laws is an emerging approach that is regarded as a useful tool for guiding the fight against HIV and AIDS in Africa. The idea is to set standards that should guide domestic legislative processes in a given region. As such, a model law is presented as offering the highest standards of norms that national legislators should strive to emulate or duplicate.¹⁶ It seeks to ensure some commonality in approaches to the management of HIV/AIDS and to achieve legal harmonization. The development of a model law also offers the advantage of sharing experiences and avoiding the duplication of drafting separate laws in each jurisdiction.

23. For a model law to achieve all the best practices in terms of human rights standards and good law, it must be a good model. If the model fails to uphold human rights standards then there is a danger of misleading states that may elect to rely heavily on such model law. So far, two model laws on HIV and AIDS exist in Africa: the SADC Model Law on HIV for the Southern African region; the N'djamena Model Law on HIV/AIDS for

¹⁶ F Viljoen 'SADC PF Model Law on HIV: Analysis of issues and processes', available at www.chr.up.ac.za (accessed on 29 Dec 2009).

West and Central African region. An analysis of these model laws follows hereunder.

4.1.1 The N'djamena Model Law on HIV/AIDS

24. The N'djamena Model Law on HIV/AIDS was adopted in September 2004 after a three-day workshop held in N'djamena, Chad. The workshop, which was an initiative of the Action for West Africa Region - HIV and AIDS (AWARE - HIV and AIDS), was attended by a large number of parliamentarians from the West and Central African region. The adoption of the Model Law was informed by, *inter alia*, the fact that 'the violation of the human rights of people affected or infected by HIV/AIDS is of critical concern in the prevention, treatment and management of HIV/AIDS'. As such, the Model Law offers a template of human rights legislation' for emulation or duplication by individual states in the region. Since its adoption, the Model Law has served as a basis for domestic laws on HIV/AIDS in the region including in Benin, Guinea, Guinea-Bissau, Mali, Niger, Togo and Sierra Leone.

25. The N'djamena Model Law embodies several positive features in relation to the fight against HIV/AIDS. These features include the following:
 - i. Provisions guaranteeing pre- and post-test counseling.
 - ii. Provisions guaranteeing health care services for people living with HIV/AIDS.
 - iii. Protections of medical confidentiality.
 - iv. Prohibitions of discrimination on the basis of actual or perceived HIV status, including in the workplace, in educational facilities, in

health care settings, and in relation to credit and insurance coverage.

26. Despite its positive features highlighted above, the N'djamena Model Law has come to be known for its weaknesses rather than strengths. It has largely been faulted for not meeting the required international human rights standards. Some of the shortcomings of the Model Law often cited include the following:

- i. The Model Law forbids the teaching of HIV/AIDS course to minors without the prior consultation with parents whose approval is required both for the content and the materials used for such course. This prohibition subjects HIV/AIDS education to the subjective perceptions of parents.
- ii. The Law has an overly broad provision on disclosure of HIV/AIDS. It requires people living with HIV to disclose that fact within six weeks of knowing their status. This provision has the potential to unjustifiably infringe privacy and the effect of exposing people living with HIV/AIDS to stigma, discrimination, violence, and other abuse.
- iii. The Law provides for mandatory HIV testing in certain circumstances including in the resolution of a matrimonial dispute. It also requires mandatory HIV testing for pregnant women. These provisions has the effect of opening the avenues for violating individuals' right to privacy and right to bodily integrity.
- iv. The Law creates an offence of willful transmission which has been couched in very broad terms.

- v. In addition to other omissions, the Law fails to provide for women's rights. It does not address any specific social, cultural, economic and legal factors that make women more vulnerable to HIV infection, and more prone to experience adverse effects as a result of infection.

27. Thus, for many commentators, the N'djamena Model Law on HIV/AIDS is an example of a bad model law.

4.1.2 SADC Model Law on HIV

28. The SADC Model Law on HIV was adopted by the SADC Parliamentary Forum (SADC PF) on 24 November 2008 during its 24th Assembly convened in Arusha, Tanzania, from the 20-27 November 2008. The Model Law was developed to serve the purpose of guiding SADC countries in developing their HIV and AIDS laws. In this regard, the Model Law has a three-fold objective: to serve as a guide, a yardstick, and as an advocacy tool for legislators in the Southern African region. The Law integrates the protection of human rights as a key element of an effective response to HIV, apart from dealing with patterns of transmission, prevalence rates as well as specific barriers to prevention, treatment and care. It covers the following areas, amongst others:

- i. HIV education and information for the general population and for vulnerable populations.
- ii. Need to address harmful cultural practices (female genital (FGM), early child marriages, forced marriages, wife inheritance etc).

- iii. Special measures for special groups including IDUs, Sex workers, same sex partners and prisoners.
- iv. Non discrimination on the basis of HIV
- v. Non disclosure or protection of confidentiality on the HIV status except in prescribed instances
- vi. Right to access care including palliative care
- vii. Protection of Children's rights and gender rights including protection from gender inequalities and gender based violence.
- viii. Use of TRIPs flexibilities to ensure access to HIV treatment and the treatment of opportunistic diseases.
- ix. Establishment of Ethical research bodies to address biomedical, social and clinical research on HIV and
- x. Support for PLHIV organisations.

29. The SADC Model Law is hailed as an elaborate and sound model law on HIV and AIDS. However, it is not without its shortcomings. For instance, whereas the subject of using criminal law measures to punish willful transmission of HIV is the most widely discussed topic in debates on HIV legislation, the SADC Model Law is silent on this matter. No criminal liability is expressly provided for with regard to transmission.¹⁷ Article 41 which provides for offences and penalties is couched in wide terms and states that any person who contravenes a provision of the Model Law shall commit an offence and be liable upon conviction to either a fine or imprisonment or both.

¹⁷ Article 28 deals only with transmission with regard to prisoners and not others

5.0 The emerging East African Community Law on HIV/AIDS

30. In light of the emergence and development of regional model laws on HIV/AIDS as discussed above, it has been found fitting that a HIV/AIDS law be promulgated within the auspices of the East African Community (EAC). The EAC was established in 1999 through the EAC Treaty as a quest for reconstructing the system of co-operation that had prevailed in the region in the 1960s and 1970s before the system collapsed in 1977. The EAC is in the main a regional economic bloc. It has a comprehensive system of co-operation in the areas of trade, investment and industrial development. The EAC Treaty sets out a bold vision for the eventual unification of the EAC into a political federation. Initially composed of three states – Kenya, Uganda and Tanzania- the EAC has since expanded with the entry of Rwanda and Burundi into the Community.

31. While it is primarily an economic oriented regional organization, the EAC is gradually making inroads into the realm of human rights and other non-economic issues that require regional collaboration. It is in this light that a regional law on HIV/AIDS is proposed to be promulgated within the auspices of the EAC. The basis for such a law is to be found in article 118 of the EAC Treaty which demonstrates the Community's willingness to take joint action to prevent and control HIV/AIDS in the region. Article 118 also requires Member States to develop drug policies that enhance procurement of affordable drugs, and to promote research on traditional medicine. Unlike the SADC and N'djamena model laws, the proposed EAC Law on HIV/AIDS will not be a model law as such, but a binding law on Member States since the EAC Treaty allows for the enactment of community law by the EALA.

32. It is noteworthy that already the EAC has taken measures to curb the HIV/AIDS scourge in the region. In 2007, the EAC adopted the Regional Integrated Multisectoral HIV/AIDS Strategic Plan 2007-2012, 2007. The Strategic Plan provides an overview of the response to HIV/AIDS in EAC Member States. It defines key actions and activities to be undertaken for a comprehensive and multisectoral response to HIV/AIDS in the region. Its second strategic objective aims at developing guidelines for mainstreaming HIV/AIDS in all EAC sectors and institutions, including the labour sector. Strategic objective seven provides measures to operationalise EAC workplace policy on HIV/AIDS framework and guidelines. Principally, the Plan seeks to promote and protect the rights and the dignity of HIV/AIDS employees in the workplace. It provides for elimination of stigma and discrimination based on real or perceived HIV/AIDS status and promotion of equity and an environment free of sexual harassment or coercion at the workplace.

6.0 Audit of legal and policy framework on HIV/AIDS in EAC countries

6.1 Burundi

33. The audit of Burundi's legal and policy framework on HIV/AIDS that follows below is based on literature review, and views from key stakeholders gathered during a field study in Burundi conducted by the consultants – Mr. Ojienda and Mr. Maleche. The consultants undertook the field study on 19 October 2009 in a bid to identify the ramifications of HIV and AIDS on various thematic areas. On 22 October 2009, the consultants held a workshop in Bujumbura, Burundi, so as to enable the

respondents share their experience on the impact of HIV and AIDS in Burundi. The respondents expressed the key issues that they thought should be incorporated in the proposed EAC HIV and AIDS law. A full report of the Consultant's field visit to Burundi is attached to this Report as **Annexure 2**.

6.1.1 HIV/AIDS in Burundi in context

34. With a population size estimated to be 7.3 million and an area size of 27,834 Square Kilometers, Burundi is situated in Central Africa. The first AIDS case in Burundi was diagnosed in 1983. Since then, the epidemic has grown rapidly, making HIV/AIDS one of the major causes of mortality in the country. The sociopolitical crisis of the 1990s in the country, poverty and large-scale displacement of populations, have contributed to the rapid spread of the epidemic. After more than 10 years of internal conflict, major vulnerable and affected groups include all armed forces (soldiers, customs agents, police officers, security forces and rebel groups), sex workers, youth (especially school dropouts) and internally displaced people and refugees. Women in general are increasingly vulnerable, especially in rural areas and refugee camps, as a result of their poor economic status, high rates of illiteracy and the prevalence of sexual violence against them.

35. The national prevalence of HIV and AIDS in Burundi was estimated to be at 2.9% as in 2007. The prevalence in the urban areas, semi urban areas and rural areas was estimated at 4.59%, 4.41% and 2.82% respectively. Generally, the current HIV Prevalence is 3.46 %. The impact of the HIV/AIDS scourge has adversely affected the country's economy. The hardest hit sectors of the economy include the education, agricultural, and health sectors.

6.1.2 The legislative and policy framework

36. Burundian law and policy on the issue of HIV/AIDS phenomenon are found in the Constitution, statutes, subsidiary legislation and policy guidelines. To begin with, the Constitution at article 22 specifically prohibits discrimination on the basis of HIV status. The Constitution also guarantees numerous other human rights and fundamental freedoms which are relevant in the context of HIV/AIDS. These rights and freedoms include, *inter alia*, the right to dignity (article 21) and the right to privacy (article 28).
37. In terms of legislation, Law No. 1/018 of 12 May 2005 provides the statutory framework for the protection of people living with HIV/AIDS in Burundi. The statute also specifies the obligations of people living with HIV/AIDS. In this regard, it is required that any person informed of his/her HIV positive status should refrain from unprotected sex so as to protect the partner. The statute also criminalizes willful transmission of HIV by any means. Other relevant legislation includes the Public Health Code, the Penal Code of 5 April 2009, and the Labour Code of 7 July 1993.
38. The relevant sections of the Penal Code are articles 558 and 567. Article 558 of the penal code provides for life imprisonment in case of willful transmission of incurable disease resulting from rape. Article 567 prohibits homosexuality. The article provides that a person convicted of this offence shall be liable to imprisonment for a period ranging from three months to two years or a fine of between 50,000 and 100,000 Burundian francs or both.

39. Burundi has also adopted an array of policies that seek to address various aspects of the fight against HIV/AIDS scourge. These policies include: the National Support Plan of Action for Orphans and Vulnerable Children, 2007-2011 (*Plan d'Action National d'Appui aux Orphelins et Autres Enfants Vulnérables*) and the National Policy on the Prevention from Mother to Child Transmission (*Politique Nationale de Prévention de la Transmission du VIH de la Mère à L'Enfant au Burundi*) developed in 2003 by the Ministry of Health. Other policy documents include the following:

- The National AIDS Strategic Plan 2007-2011 that identified four main axis with the following objectives: HIV transmission reduction; Improvement of the wellbeing of people infected or affected by HIV; poverty reduction and other vulnerability encouraging factors; and strengthening the management and coordination of the national multisectoral response.
- Revised National Policy on Condom (*Politique Nationale du Preservatif révisé*). This policy was developed in 2009 jointly by the Ministry in Charge of AIDS and The National AIDS Council. The policy aims at promoting the use of condom as a preventive measure, and involvement of the private sector through condoms marketing and sales.
- The Monitoring and Evaluation AIDS National Plan (*Plan National de suivi et évaluation des activités de lutte contre le SIDA au Burundi*). This Plan embodies the indicators for the implementation of the National AIDS Strategic Plan. It was developed in 2007 jointly by the National AIDS Council and the Ministry in charge of HIV and AIDS.
- National Guidelines on HIV Voluntary, Counseling and Testing (*Normes et Directives Nationales pour le Conseil et Dépistage*

Volontaire du VIH). These guidelines were developed in 2004 by the Ministry in Charge of AIDS and the National AIDS Council. It sets out the guidelines for the establishment and functioning of a VCT Centres in Burundi. In addition, the guidelines set eligibility criteria for an individual to undergo HIV testing (example: age for consent). In addition, HIV Testing confidentiality is provided under the guidelines.

40. Burundi is also a party to several international and regional human rights instruments. Article 19 of the Constitution of Burundi provides that rights and freedoms proclaimed and guaranteed *inter alia* by the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, African Charter on Human and Peoples' Rights, Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, are integral part of the Constitution of Burundi. Thus, Article 19 makes these international and regional treaties justiciable in Burundi and gives them precedence over other laws in Burundi.

6.1.3 Testing, screening and counseling

41. HIV testing and counseling in Burundi is regulated under chapter 2 of Law No. 1/018 and by the Strategy and Protocols on Voluntary Testing and Anonymity. As of June 2009, Burundi had 303 registered Voluntary Counseling and Testing Centres (VCTs) which had been established taking into consideration several factors: accessibility, privacy and anonymity, record keeping, well-trained staff and involvement of community members in the process. There is distinct infrastructure required for provision of counseling and testing services and specified

- standards to be followed in the testing process. Counseling entails pre- and post-test counseling.
42. Testing for pregnant women is done under the framework of Prevention of Mother to Child Transmission (PMTCT). Most of the respondents agreed that the policy protects the rights of the pregnant women since it is done with their consent and confidentiality is maintained. It was however noted that factors such as economic dependence and poverty hinder women's capacity to give informed consent. While there respondents pointed out that there is no policy for HIV testing for children, they observed that the practice is to test children with the parents' consent with guidance from the provider. With regard to couples, testing is done when people are engaged or want to get married, though the same is voluntary. Whereas HIV testing in Burundi is largely voluntary, some universities require pre-admission HIV testing.¹⁸
43. The challenge that the VCT Centres face in Burundi is the lack of exposure and of exchange of experiences of counselors with their peers in other countries. Also, most people in the community are not aware about the existing laws and policies on HIV testing.¹⁹
44. Overall, the respondents proposed a raft of measures to improve on the HIV legislation in Burundi. Most of the respondents interviewed felt that there was no need for testing before admission to educational institutions or recruitment and job promotions or for life insurance coverage. This they said would lead to discrimination. Moreover, the respondents argued

¹⁸ See comment by Mr. Ntahizanyie during the workshop on the development of a draft East African law on HIV & AIDS held in Bujumbura, Burundi, on 22nd October 2009.

¹⁹ See comment by Mr. Kubwumuremyi at workshop on the development of a draft East African law on HIV & AIDS held in Bujumbura, Burundi, on 22nd October 2009.

that to help improve HIV testing and counseling in the region, the EAC governments should not develop policies that restrict movement of people from one country to another on the basis of their HIV status.

6.1.4 Transmission of HIV and criminal law

45. Deliberate transmission of HIV is criminalized in Burundi. Articles 217 and 558 of the Penal Code provide for life imprisonment in cases where a person conscious of his HIV status deliberately infects another. Also, Article 42 of the Law No. 1/018 criminalizes willful transmission of HIV. As was reported by respondents, there have been a number of convictions of persons under these provisions. However no convictions have been registered in the case of discordant couples. Most respondents supported the punishing of deliberate transmission of HIV although they also noted that some of the penal provisions of HIV have negatively affected Most at Risk Populations (MARPs). For instance, penal provisions deter sex workers and intravenous drug users (IDUs) from seeking or accessing essential services that would alleviate their HIV status.

6.1.5 Information, education and communication

46. Owing to the stereotypes surrounding HIV in Burundi and the mode of its transmission, it is a taboo in to speak publicly about sexuality. As such it is difficult for the communities to talk about issues of HIV. IEC is therefore mostly conducted by civil society organizations. There is in place the National Strategy on HIV Education although the extent to which HIV education has reached the general public was debatable amongst respondents. In particular, it was pointed out that HIV education in primary schools and within informal settings and communities is scant.

47. HIV education amongst MARPS is constrained by penal sanctions in the Penal Code. Most respondents noted that the National Strategy on HIV Education did not extend to IDUs, and men who have sex with men (MSMs). It was however observed that the education extended to prisoners and female sex workers. A small number of respondents said the strategy extended to prisoners and female sex workers.
48. According to CSOs, the general content of IEC training packs is transmission, awareness on HIV, prevention and stigma reduction. Respondents noted that human rights is integrated in IEC programs in the country albeit only partly. Full integration is yet to be achieved. It was also noted that some content in the information pack presents the dangers of stigma and discrimination.

6.1.6 Discriminatory acts and policies

49. HIV positive persons are systematically discriminated against in Burundi in a number of institutions. There are a number of private universities that require an applicant to submit a HIV certificate before admission. Insurance companies require an insured to undergo HIV test in cases where the premium exceeds a certain limit.²⁰ Certain sectors of the civil service are also not open to PLHIV. For instance, it is a requirement that a person undergoes pre-employment HIV test before joining the army. Such policies are discriminatory as it is yet to be justified why a person should be denied an opportunity to serve in the army if the person is physically fit.

²⁰ Meeting with Permanent Secretary Ministry of Public Works and Social Services and the Director of Social Services in charge of workers' rights on the 20th day of October 2009 at 1500hrs.

50. Discrimination is also evident at the workplace. The salient provisions of the Code of Work in Burundi aiming at protecting HIV positive employees have not been taken into account by Law No. 1/018. This is notwithstanding that the foregoing law was enacted when proposals had been made by the Ministry of Labour and Social Security, which proposals are codified in the Code of Work. The Code proposes that testing before insurance and compulsory pre-employment testing should not be allowed. However, Law No. 1/018 disregards these proposals.
51. Vulnerable groups such as homosexuals, IDUs and sex workers also face discrimination. To help curb discrimination of HIV positive persons in Burundi, the respondents proposed that Law No. 1/018 should be amended to prohibit discrimination on the basis of HIV status in all sectors of the society, including in the armed forces, labour sector, private institutions and insurance companies.

6.1.7 Access to treatment, care and support

52. According to most of the respondents, health care is not accessible to all people in the country. Health facilities and personnel are also inadequate. Health care is however free for children less than five years and pregnant women. There are no measures to ensure that those who test positive are able to access care and treatment. HIV positive persons have access to ARVs and medicine for opportunistic infections but it is not accessible to all due to the high numbers of people with HIV.²¹

²¹Meeting with Member of Parliament, Hon. Norbert Ndiwokubwayo, the Chairman of Committee for Social affairs, equality and the fight against HIV & AIDS, at the Parliament buildings on the 20th day of October 2009 at 0930hrs.

53. The form of assistance extended to families and children of PLHIV was said to include provision food for those deprived, school fees, legal support, psychosocial and economic support. However, some of the respondents said that there was no assistance extended to the families due to lack of funds. The Government's role in ensuring care and treatment to PLHIV includes resource mobilization, purchasing of drugs and coordination management of health facilities. The Government has also set up a Ministry responsible for AIDS. The respondents agreed that more needs to be done to ensure care and treatment for HIV positive persons. They said that PLHIV need to be supported to have access to care, expansion

6.1.8 Most at risk populations

54. There are no specific laws in Burundi that address the plight of MARPs in the context of HIV/AIDS. Indeed, the activities of most MARPs are criminalized in the country. For instance, homosexuality and drug use are criminal offences and as such, it is difficult to reach out to MSMs and IDUs in addressing their plight in the context of HIV/AIDS. In this light, some respondents recommended that clear law and policies should be adopted on MARPs, they should be guaranteed access to HIV services, and their existence should be legalized.

6.1.9 Gender and HIV/AIDS

55. Burundi has ratified a number of international human instruments relevant to the issue of gender and HIV including the Convention on the Elimination of All Forms of Discrimination Against Women. Burundi has not however ratified the Protocol to the African Charter on Human and

Peoples' Rights on the Rights of Women in Africa. As has been discussed in several sub-headings above, Burundi has taken several measures that touch on the question of gender and HIV/AIDS. For instance, the Constitution prohibits discrimination on the basis of gender. A comprehensive policy on gender and HIV/AIDS is however lacking and as such, the need for such a policy cannot be emphasized.

6.1.10 Implementation of HIV/AIDS law and policy

56. The implementation of HIV/AIDS law and policy in Burundi is coordinated by a state Ministry. The country has adopted a multi-sectoral approach to the fight against HIV/AIDS. The implementation of HIV laws and policies is, however, faced with a number of hiccups including lack of finances.

6.1.11 On proposed HIV/AIDS law for EAC

57. Key stakeholders interviewed during the field study in Burundi indicated that they would support a common approach to the strategies on prevention, treatment of HIV and AIDS for the Eastern Africa countries. They stated that a common EAC law would facilitate access to services through a common approach. The following proposals were made for inclusion in the proposed East African HIV and AIDS Law:

- a) Propositions that take into considerations the context of a country
- b) Access to treatment for all
- c) Cross-border treatment
- d) Prevention of HIV while maintaining human rights
- e) Protection of vulnerable persons due to HIV (OVC)

- f) Information and education on HIV
- g) Establishment of AIDS control coordinating agencies
- h) Emphasis of policies on MARPS and HIV
- i) Decriminalization of homosexuality and promotion of their rights
- j) Facilitation of access to prevention services, healthcare and treatment
- k) Provisions integrating PWD specific needs for equitable access to HIV services
- l) All existing laws of member countries should be considered
- m) Make it mandatory to have VCTs and treatment in all primary health facilities
- n) Have a network of East African MPs against HIV

58. However, some felt that Burundi being of a different legal system, the integration of such a law would be problematic.

6.2 Kenya

59. The full report of the field study conducted by the Consultants in Kenya in a bid to gather views and suggestions for inclusion in the proposed EAC Law on HIV and AIDS is annexed to this report as **Annexure 3**.

6.2.1 The HIV/AIDS scourge in Kenya in context

60. The first HIV case in Kenya was diagnosed in 1984. The impact of the HIV and AIDS on the population and on the entire economy has grown tremendously over the years, with the consequence that gains made in the health status of the population by early 90s have been reversed.

61. The Kenya 2007 HIV and AIDS Estimates and Interim Projected HIV Prevalence and Incidence Trends for 2008 to 2015 shows that the number of adults and children living with HIV in 2007 stood at 1.49 million. Of this, the number of adults over 15 years was 1.377,472 million (570,000 males and 806,000 females) while children from 0-14 years living with HIV were 110,000. The annual number of new infection among the adults was 135,081 (58,032 males and 77,049 females) while in children the new infections were 34,000. It is estimated that the annual AIDS deaths stands at 71,000. Latest statistics show that the HIV/AIDS scourge in Kenya is steadily declining.

6.2.2 The legal and policy framework

62. There are several pieces of legislation that address and/or are relevant to the issue of HIV/AIDS in Kenya. The HIV and AIDS Prevention and Control Act, 2006, is the main law guiding matters dealing with HIV/AIDS. The fight against HIV/AIDS is coordinated by the National Aids Control Council (NACC). NACC coordinates a multi-sectoral response on HIV and AIDS. To make it more effective and to ensure a smooth implementation of the HIV and AIDS Prevention and Control Act, there is an Equity Tribunal that handles any disputes that arise out of the breach of any provisions of the Act.

6.2.3 Stigma and discrimination

63. One of the principle protections of the Constitution of Kenya is one of non discrimination. The Constitution widely defines discrimination but it does not expressly prohibit discrimination on the basis of HIV status. The HIV and AIDS Prevention and Control Act fill this gap by specifically

prohibiting discrimination on the basis of HIV status. Pursuant to the Act, for instance, no person is to be denied access to any employment for which he/she is qualified, denied promotion or be terminated on the grounds of his actual, perceived or suspected HIV status. The Act also recognises that people living with HIV/AIDS need to access health care without discrimination. The Employment Act, 2007, also prohibits discrimination in the workplace on the basis of HIV status.

64. Respondents interviewed during the field study reported that HIV-related stigma has reduced in Kenya but it is still high especially in the rural areas and remote areas like North Eastern, where religion and culture prevail. In these settings, PLHIV are not embraced in the society. The environment in which PLHIVS are stigmatized include at the work place, in learning institutions, government facilities, health facilities ,in social places, religious places, within the family and in the community.

6.2.4 Testing and confidentiality

65. The policy on HIV testing in Kenya is embodied under National Guidelines of HIV Testing and Counselling in Kenya, 2008; the Guidelines for HIV Testing in Clinical Settings, 2006; and the HIV and AIDS Prevention and Control Act. The general import of these policies and law is to ensure counselling and testing is conducted professionally and is based on the twin principles of consent and confidentiality.
66. Compulsory HIV testing is permitted under the Sexual Offences Act, 2006, for a person charged with an offence of sexual nature. The Act also provides for compulsory HIV testing where one is charged with the offence of deliberate transmission of HIV and AIDS or any life threatening

sexual disease. The test can be taken voluntarily under the Police Act during investigation, but where the same is contested, one can get an order from the court to get such test carried out. Compulsory testing may also be conducted on any one who requires to donate a body organ or tissue.

67. Under the PMTCT program, every pregnant woman must be tested for HIV. On this issue, most respondents agreed that the policy protects women's human rights while some disagreed saying that some women are never aware that they are being tested for HIV. On the policy on disclosure of test results to clients and third parties, respondents noted that this should be done with the client's consent and that confidentiality should be maintained.
68. On testing for children, the HIV Prevention and Control Act states that children should be tested only with their parent's consent or in the presence of their parents. On persons with disability (PWD), there is no specific policy that deals with PWDs in the context of HIV/AIDS.
69. Most of the respondents felt that there was no need for testing before recruitment and job promotions. On similar note, the respondents interviewed agreed that pupils ought not to be tested before they are admitted to educational institutions. This they felt would lead to discrimination and every child has a right to education irrespective of their HIV status. Similarly, respondents felt that there was no need for people to be tested before they are give life insurance. The same sentiments were voiced in relation to testing for admission of individuals into countries other than their own. On couples planning to be married, some respondents felt that they had to undergo testing. This was so that

they know their status and are able to plan their future, make informed decisions and stop further spread of disease. While others felt that testing should be voluntary, they nevertheless noted that couples planning to be married should be encouraged to do HIV test.

6.2.5 Information dissemination

70. The Constitution of Kenya guarantees the right to receive information and to impart information. It also protects the freedom of expression. In particular reference to HIV/AIDS education, the National HIV and AIDS Prevention and Control stipulates that one of its objects and purposes is to promote public awareness about the causes, modes of transmission, consequences and means of prevention and control of HIV and AIDS. In this regard, Part II of the ACT provides for HIV and AIDS Education and information. The Act mandates the Government to promote public awareness on HIV and Aids. This is to be done through a comprehensive nationwide educational information campaign conducted by the Government through the various ministries, departments, authorities and other agencies.

71. Pursuant to the Act, HIV/AIDS education activities can be carried out in schools (public and private schools, at primary, secondary and tertiary levels including formal and indigenous learning systems), and other institutions of learning, all prisons, remand homes and other places of confinement, amongst the disciplined forces, all places of work in all communities throughout the country, in government ministries, departments and agencies, to private sector employees and informal sectors, and given as part of the health care services by health care providers.

72. Provisions for HIV/AIDS education are also contained under the National Guidelines of HIV Testing and Counselling in Kenya, and the Kenya National Action and Strategic Plan 2005-2010.
73. According to the field study conducted in Kenya, Most of the respondents interviewed agreed that the national strategy on HIV education extended to the general public, girls and boys aged 14 years and below, female and male youth 14-21 years, female and male youth above 21 years and formal education institutions. However, the respondents noted that the national strategy does not cover IDUs, MSM, and female sex workers.
74. According to the respondents, the general content of the HIV education information and training packs is stigma reduction, comprehensive care and treatment. They however observed that human rights are not emphasized in the education strategy.

6.2.6 Access to health care

75. Access to health care is one of the objectives of the National HIV and AIDS Prevention and Control Act. The Act ensures the provision of basic health care and social services for person infected with HIV and AIDS. The Children Act guarantees healthcare to children. However, under the Ministry of Health Guidelines, only children under the age of five are guaranteed free medical treatment. An authorised officer under the Children's Act can however take a child to need of medical care to a registered health institution and where such institution shall provide appropriate treatment for both inpatient and out -patient. Any expenses incurred in connection with the medical treatment or hospital

- accommodation are be defrayed out of public funds. The Act also guarantees medical treatment to children in foster homes.
76. A number of other statutes guarantee access to health care for people living with HIV/AIDS especially in the workplace. These statutes include: The Safety and Occupational Health Act No 15 of 2007; and the Work Injury and Benefits Act. Other relevant policies include the National Home Based Care Programme and Service Guidelines and the Child Survival and Development Strategy 2008-2015.
77. Despite having the above mentioned laws and policies in place, most of the respondents in the field study observed that health care is not accessible to all people in the country. In essence, there are no concrete measures in place to ensure that those who test positive are able to access care and treatment. Therefore, while health care for the PLHIV is free, some of the respondents said that the comprehensive care centres in the country were few.
78. Form of assistance extended to families/ children of HIV positive persons mentioned include psychosocial support and sometimes material support. However some of the respondents said that there was no assistance extended to the families due to lack of funds. Thus, the respondents agreed that more needs to be done to ensure care and treatment for PLHIVS. This they said the PLHIVS needed to be provided with food as they take their medication; and more clinics should be set up. Most of the respondents agreed that there are research organizations in the country working with HIV positive persons.

6.2.7 Most at risk populations

79. The Kenyan Penal Code makes it an offence for Men to have sex with Men by way of criminalizing homosexuality and sodomy. For sex workers, while prostitution is not an offence in itself, it is an offence to live on the earnings of prostitution. It is also an offence to run a brothel or any facility that will be used for prostitution. In many cases, persons are never charged with prostitution but with the offence of loitering and soliciting for prostitution or arrested to be tested for infectious diseases such as gonorrhoea under the Public Health Act. This puts sex workers arrested by the law enforcement officer to endure more sexual violence and exploitation under the hands of the law enforcement officers in silence due to lack of effective legal protection.
80. With regard to IDUs, the Dangerous Drugs and Psychotropic Substance Act makes it a crime to have any substance for use which is not for medical purpose and provides for stiff sentences with the minimum sentence being 3 years. It also provides for the setting up of rehabilitation centres to cater for those addicted to drugs and substance abuse.
81. The National HIV Testing and Counseling Guidelines provide that testing and counseling should be extended to MARPs including commercial sex workers and MSM. Similarly, KNASP 2005-2010 requires that the national response to the HIV/AIDS scourge should seek to cover vulnerable groups including sex workers. Respondents interviewed during the country visit advocated for the legalizing of commercial sex in addition to enhancing of health care access for MARPs.

6.2.8 HIV transmission and criminal law

82. Under the National HIV and AIDS Prevention and Control Act, the deliberate or reckless transmission of HIV by one person to another is considered an offence. A person who is infected and is aware of the same is expected to take reasonable measures and precautions to prevent the transmission of HIV to others. Anyone who is infected is prohibited from putting another person at the risk of becoming infected with HIV either recklessly or knowingly. It is not an offence if the other person actually knew of one's status and voluntarily accepted the risk of being infected. This provision in the Act has however been embargoed and therefore it is of no consequence.
83. The Sexual Offences Act similarly creates an offence of deliberate transmission of HIV or any other life threatening sexually transmitted disease. The offence carries the sentence of 15 years but which can be enhanced. The Act provides that a person will be convicted of this offence if it is proved that they were infected with HIV or any other life threatening diseases regardless of whether or not they were aware of their status.

6.2.9 Research

84. The HIV and AIDS Prevention and Control Act allows for HIV and AIDS related research to be carried out in the area of biomedical research or on tissue or blood given by any person involved in the research. Such research must conform to the requirements of the Science and Technology Act which requires that written informed consent must be obtained from the person involved in the research. However, there are instances where

anonymous testing can be used to carry out research guided by any guidelines that maybe put in place to regulate this. In this regard there is in place the Guidelines for Research and Development on HIV and AIDS Vaccines, 2005, which contains protocols on research.

6.2.10 Gender and HIV/AIDS

85. Kenya is a party to a number of international human rights instruments. In relation to gender issues, Kenya is a party to the Convention on Elimination of All Forms of Discrimination Against Women. While there is not particular legislation or policy that deals with the question of gender and HIV/AIDS, there are a number of statutes and policies that touch on this theme. In this regard, some of the statutes enhance women's vulnerability to the scourge. To start with, the Judicature Act recognises the application of African customary law practices some of which are disadvantageous to women. Similarly under the existing law on marriage, girls can be married off, with the consent of their parents, at the age of 12. This has led to early child/early marriages. The law also recognizes customary/polygamous marriages.

86. Other statutes relevant to the theme of gender and HIV/AIDS include the Succession Act, Married Women's Property Act of 1882, HIV and AIDS Prevention and Control Act, Penal Code, and the Sexual Offences Act. There is also a raft of bills which if adopted into law will impact on the question of gender and HIV/AIDS. The bills include the Draft Domestic Violence (Family Protection) Bill, Draft Marriage Bill, and the Matrimonial Property Bill.

6.2.11 Recommendations on proposed HIV law for EAC

87. Most of the respondents said they would support a common approach to the strategies on prevention, treatment of HIV and AIDS for the Eastern Africa countries. This, they argued, would promote friendship, flow of information and ideas, and that regionalizing policies and strategies will go a long way in ensuring cohesion and integration of HIV and AIDS issues.
88. The following are the proposals for inclusion in the proposed East African HIV law
- a) access to treatment for all cross-border treatment
 - b) education on HIV and AIDS
 - c) Protection of women and children
 - d) Access to health care, services, VCT centres/ access to testing
 - e) TB and HIV and AIDS law
 - f) Study and Harmonization of all the East African laws
 - g) Rights of PLHIV
 - h) Rights of MARPs
 - i) Criminalization of deliberate infection
 - j) Public health policies and practices
 - k) Address HIV related stigma and discrimination
 - l) All government sectors to address HIV and AIDS issues
 - m) Research on HIV
 - n) Gender issues
 - o) Emphasize the policies on MARPS and HIV.

6.3 Rwanda

89. The audit of Rwanda's legal and policy framework on HIV/AIDS that follows below is based on literature review, and views from key stakeholders gathered during a field study in Rwanda conducted by the consultants – Mr. Ambrose Rachier and Mr. Allan Maleche. The

consultants held an inception meeting with country stakeholders on 14 September 2009. They conducted interviews on 15 and 16 September 2009. The stakeholder workshop was held from 17 to 18 September 2009. A full report of the country visit is attached to this report as **Annexure 4**.

6.3.1 The HIV/AIDS scourge in Rwanda in context

90. Rwanda's population size is estimated to be 9.3 million and the country size 26,340 square Kilometers.²² In 1983, the first case of AIDS was diagnosed in Rwanda at Kigali Hospital Centre, commonly known in French as *Centre Hospitalier de Kigali*. In 2004, the National AIDS Control Commission (NACC) or *CNLS* in French released its report whereby it was established that HIV prevalence was 13.5% at the national level in 2003.²³ The latest Demographic Health Survey indicates that the HIV prevalence rate stands at 3%.²⁴ It is worth mentioning that Rwanda has made tremendous efforts in the fight of HIV/AIDS.²⁵

²² Information available at :<< http://www.gov.rw/page.php?id_rubrique=8 >> Accessed on 5/11/009.

²³ S Mukakaragwe *Impact du VIH /SIDA sur le bien-être socio-économique des familles infectées et affectées : cas de l'Association GIRUBUZIMA-RUHUKA du District de Huye* (2006) 22 [Thesis - Unpublished]

²⁴ The Demographic Health Survey (2005) Available at : <<<http://statistics.gov.rw/images/PDF/DHS-Rwanda2005.pdf>>> Accessed on 12/11/2009

²⁵ For further reading, Rwanda UNGASS 2008 Report. This information is available at : <<<http://www.cnls.gov.rw/pdf/ungass.pdf> >> Accessed on 10/11/2009

6.3.2 The Legal and policy framework

91. The Constitution of Rwanda contains a Bill of Rights that is relevant in the fight against HIV/AIDS. Article 11(2) of the Constitution prohibits any form of discrimination. Article 15 provides for the right to physical and mental integrity for every individual while the right to privacy is provided under article 22 of the Constitution. Freedom of movement is provided under article 23 of the Constitution. Children are protected under article 28 of the Constitution while article 40 guarantees the right to education.
92. With regard to the enforcement of the Bill of Rights, article 44 of the Constitution provides that the judiciary is the guardian of rights and freedoms of the public by ensuring that human rights are respected. With regard to the position of International Human Rights instruments in domestic law, article 190 of the Constitution provides for the supremacy of the international treaties ratified and published in the official gazette over ordinary laws (Statute Acts and Acts of Parliament).
93. In terms of legislation, while there is no specific statute dealing with the questioning of HIV/AIDS, there are several pieces of legislation that address the issue indirectly. For instance, article 35 of Law No 27/2001 of 28/04/2001 relating to rights and protection of child violence, provides for sanctions against transmission of an incurable disease. Similarly, article 16(3) of Law No 59/2008 of 10/09/2008 on Prevention and Punishment of Gender Based Violence provides that a person convicted of rape is liable for life imprisonment if the rape results to the transmission of an incurable disease. Article 29 of the Act provides for life imprisonment in the case of willful transmission of an incurable disease.

94. At the policy level, Rwanda has developed a number of policies and strategic plans relating to HIV/AIDS. In this regard, the NACC has developed the following policies and strategic plans: The National Strategic Plan for the fight against HIV (2009-2012); National AIDS Policy; Condom National Policy; and the National Operational guide for the Implementation of BCC Programmes in the Fight against HIV/AIDS to Priority Target Groups.
95. On its part, the Ministry of Health has adopted the following policies: National Health Policy; Mutual Health Insurance Policy; National Policy on Blood Transfusion; National Plan for HIV/AIDS Treatment and Care (2003-2007); *Plan stratégique des Orphelins et Enfants Vulnérables (2007)* ; and the Ministerial Instruction on Prevention from Mother to Child Transmission.
96. Other government ministries have also adopted policies that are relevant in the fight against HIV/AIDS. The Ministry of Public Service and Labour has in place the National Employment Policy which provides, *inter alia*, that the Rwandan government shall social protection for people affected by HIV/AIDS, irrespective of their employment status (employed or unemployed). On its part, the Ministry of Local Government and Social Affairs adopted, in 2003, the National Policy for Orphans and Other Vulnerable Children which, amongst other things, calls for the integration of assistance for children affected or infected by HIV/AIDS.

6.3.3 Stigma and discrimination

97. Most of the respondents interviewed during the field visit reported the existence of HIV-related stigma. The environment in which PLHIVS are stigmatized include at the work place, health care institutions, insurance companies and learning institutions.
98. Among the myths, social, cultural, religious and stereotypes that contribute to HIV related stigma include the following: PLHIV are considered lazy; they are seen as already dead, and witchcraft is associated with the disease.
99. Most of the respondents who were aware of people who had suffered HIV-related discrimination claimed that the discriminated individuals did not take any action to address their discrimination. On legal measures that prohibit discrimination of PLHIV, the respondents noted that there are no specific measures related to HIV.

6.3.4 Testing and Confidentiality

100. According to most of the respondents, Rwanda has laws/ policies on HIV testing. Testing is voluntary. The key strategies used in the country to ensure that people get to know their status include awareness on voluntary testing. The strategies according to the respondents promote respect for human rights.
101. The policy on pregnant women testing is that it is mandatory for every pregnant woman to undergo testing. Most of the respondents agreed that the policy protects the women's human rights since it protects the baby from infection. On the policy on disclosure of test results to clients and third parties, the respondents noted that that the results are confidential

except for couples. The national policy on testing for children is that every child is tested at birth. On PWD most of the respondents said that it was the same as for other people. They are tested voluntarily without discrimination.

102. Most of those interviewed felt that there was no need for testing before recruitment and job promotions most of the respondents felt that there was no need it should be determined whether the person can perform. The respondents interviewed agreed that pupils ought not to be tested before they are admitted to educational institutions. Testing should only be done so as to know their health status with the aim of providing services but not for admission. On couples planning to be married some respondents felt that they had to undergo testing. This is because they may have had sexual relations before marriage, so as to make decisions about their future.
103. Some felt that there was no need for people to be tested before they are given life insurance. The test should not serve to exclude, increase premiums, commercial interest instead it should be for information. This they said this was discriminatory. Some of the respondents thought that people should be tested before they are given any insurance cover since the insurance companies have a right to know the probability of risk for which they are insuring and set premiums.
104. For people being tested before travelling or admitted into other countries most of the respondents felt it is not necessary as it is a form of discrimination and does not conform to the right of movement.

6.3.5 Information Dissemination

105. Most of the respondents agreed that the national strategy on HIV education extended to the general population. Some of the respondents interviewed agreed on that the national strategy on HIV education extended to the general public, Girls and boys aged 14 years and below, female and male youth 14-21 years, female and male youth above 21 years and formal education institutions.
106. When asked whether the national strategy on HIV education extended to informal settings, some of the respondents said it did, while others said it didn't. On most at risk populations (MARPS); most of the respondents said the national strategy did not extended to Injecting drug users, Men having sex with men, Female sex workers and prisoners.
107. Some did not know the general content of the HIV education information and training packs is definition, origin, infection, prevention. Most of the respondents said that HIV related Human rights are emphasized in the education strategy while others did not know if it is included in the education strategy.

6.3.6 Access to Health Care and Research

108. According to most of the respondents health care is accessible to all people in the country since there is cost sharing however for children under five years it is free. However, there is an insurance fund called MTUELLE DE SANTE system that makes health care accessible to all.

109. The measures in place to ensure that those who test positive are able to access care and treatment mentioned are; social groups are sensitized to access free treatment, medical insurance, the principle of health for all, and assistance to all. Whereas, for the HIV positive people's health care is free, some said it was not.
110. Form of assistance extended to families/ children of HIV persons mentioned are; they are placed within organizations and assisted in different manners.
111. When asked about the Government's role in ensuring care and treatment to HIV positive persons the respondents mentioned health protection as far as treatment is concerned, advocacy on their behalf, making drugs available and subsidized the costs, and expansion of health facilities.
112. The respondents agreed that more needs to be done to ensure care and treatment for HIV positive persons. They said that the Government should set aside a special fund for HIV positive person in order to provide more drugs to them. Most of them agreed that there are research organizations in the country working with HIV positive persons.
113. The laws /policies, ethical standards and protocols that are in place to ensure that organizations preserve the dignity and confidentiality of HIV positive persons mentioned are; elimination of stigmatization and discrimination.

6.3.7 Most at Risk Populations

114. When asked whether there were any laws in the country specifically relating to MARPS, most of the respondents said that there were no laws. However, a few said that MARPS are criminalized. The legal provision that they would recommend to facilitate better access to HIV services by MARPS include; there should be specific laws for each MARPS group, non-criminalization of MARPS, existence of domestic legislation giving modalities and rights.

6.3.8 HIV Transmission and Criminal Law

115. According to most of the respondents there is no law, there are only principles in the country criminalizing certain forms of HIV transmission. However, some respondents mentioned the sexual offences law. When asked whether they thought the criminal process should be applied to certain forms of HIV transmission. Most of the respondents agreed.

6.3.9 On proposed HIV law for EAC

116. Most of the organizations said they would support a common approach to the strategies on prevention, treatment of HIV and AIDS for the Eastern Africa countries. As it would harmonize things, eradicate limitation of state of health care, joint effort in the fight against HIV and AIDS ensure free travel and access to facilities.

117. The following are what they said they would like included in the East African HIV law

- a) Medical care should be free (access ARVs)

- b) Opportunistic diseases should be treated free
- c) Society participation in the creation of the law
- d) Sharing of responsibilities
- e) Involvement of all the various layers
- f) Fight against commercial sex work as it is the main method of HIV transmission
- g) Human rights should not inhibit moral values that extend life even society
- h) HIV transmission and violence punish those who willfully transmit HIV.

6.4 Tanzania

118. The full report of the field study conducted by the Consultants in Tanzania in a bid to gather views and suggestions for inclusion in the proposed EAC Law on HIV and AIDS is annexed to this report as **Annexure 5**.

6.4.1 HIV/AIDS in Tanzania in context

119. The first HIV and AIDS case was first reported in Tanzania in 1983 and since then, over 2 million people have been infected with HIV, and thousands have since died of AIDS.²⁶ While about 98% of the adult populations are aware of HIV and AIDS and its mode of transmission, new infection continues. Indeed the NACP 2005 report showed that there were around 7% of total new infections. About 5.7% of adults aged 15-49 years (6.6% of women and 4.6% of men) in Tanzania or approximately 1.5

²⁶ National Policy on HIV/AIDS, Dodoma November, 2001

million of the 38 million people in Tanzania are HIV-infected, approximately 10% of them are children²⁷

120. HIV/AIDS has had an impact on the health services and also economic impact in the country. In the health sector, the epidemic as a public health problem, imposes overwhelming pressure on the capacity and efficiency of the already overburdened health care system leading to further decline of quality of care. In the economic sector, with a GDP of \$478 per capita (200) Tanzania is one of the poorest countries in the world. The Poverty Reduction Strategy Paper (PRSP) considers HIV and AIDS as a central development challenge, requiring that all sectoral plans and medium term expenditure frameworks (MTEF) as well as district plans and budgets to include HIV and AIDS activities.
121. Thus, Tanzania is one of the countries experiencing a reversal in human development due to the HIV and AIDS pandemic. It has been estimated that Tanzania's future GDP will be 15-20% lower in 2010 than it would have been without the AIDS pandemic. Productive sectors of the economy are experiencing a loss of skilled labour, increasing recruitment costs, sick leave costs and reduced revenue.²⁸

6.4.2 Legal and policy framework

122. Legislative and policies responses to various issues around HIV and AIDS in Tanzania are found in the Constitution and in various specific laws and

²⁷ Dr. Subilaga K.K (October 2009) HIV Epidemic in Tanzania presentation made at the regional workshop on Development of Draft East Africa HIV Law on 8th October 2009

²⁸ Health Sector Strategy for HIV/AIDS 92003-2006)

- policy guidelines. The Constitution guarantees everyone the right to enjoy their fundamental human rights.
123. One of the main acts dealing with HIV and AIDS in Tanzania is The HIV and AIDS (Prevention and Control) Act 2008. This law was ascended to in 2009 but is not fully operational as it awaits the development of regulations. This is an act according to the preamble to provide for prevention, treatment, care , support and control of HIV and AIDS, for promotion of public health in relation to HIV and AIDS, to provide for appropriate treatment, care and support using available resources to people living with or at risk to HIV and AIDS and to provide for related matters.
 124. government of Tanzania has responded to the challenges brought in by the epidemic through the formulation of various policies which includes the National HIV and AIDS Policy, The National Multi-sectoral HIV and AIDS strategic framework, National guidelines for testing (VCT, PICT), NMSF I and II and Children policies on HIV The Trade Union Congress of Tanzania (TUCTA) HIV and AIDS policy at workplace and many others. The National Policy on HIV and AIDS creates the Tanzania Commission for AIDS (TACAIDS) to coordinate and spearhead programmes on HIV
 125. Apart from the laws and policies, the Government has created institutions that would lead in the response to HIV and AIDS. In 1985, the Government created the National AIDS Control Program (NACP) under the Ministry of Health. This body was viewed as health sector initiative and not suitable for coordinating a multi-sectoral response on HIV and AIDS. This led to the creation of the Tanzania Commission for AIDS

(TACAIDS) 2001 under the Prime Minister's Office. This body is to coordinate a multi-sectoral response on HIV and AIDS.

6.4.3 Stigma and discrimination

126. While the Constitution of Tanzania prohibits discrimination on a number of grounds, HIV status is not one of those grounds. However, the HIV and AIDS Prevention and Control Act prohibit medical facilities public or private from discriminating anyone in the provision of health care services on the basis of their HIV status. The law prohibits discriminatory laws, policies and practices to be formulated or enacted in a manner that discriminated directly or by its implication persons living with HIV and AIDS, orphans or their families. Health practitioners are prohibited from dealing with persons living with HIV and AIDS in a discriminatory manner in the provisions of those services
127. The Employment and Labour Relations Act has put in place provisions that prohibit discrimination in the work place and promotes equal opportunities. To this end an employer is to file a plan for carrying out these objectives. An employer cannot discriminate directly or indirectly through policies or practice on various grounds which include sex, gender, pregnancy, disability, HIV and AIDS, age or station of life.
128. Employee organisations are also not allowed to discriminate against their members. The Act prohibits discrimination in trade unions and employer associations in its admission, representation, or termination of membership, in any employment policy or practice or in any collective agreement.

129. A number of policies also address the issue of discrimination on the basis of HIV status. These policies include: the National Voluntary Counselling and Testing Guidelines; Policy on Clinical Management of HIV and AIDS; and the National Policy on HIV and AIDS.

6.4.4 Testing and confidentiality

130. The provision of HIV and AIDS related counselling services started in 1988. At the beginning, these services were offered by Faith Based Organisations and Non Governmental Organisations to clients who sought such services. Efforts to establish VCT services in the public sector started in 1989.
131. One of the objectives of the Tanzanian Constitution is to preserve the dignity of all citizens. The Constitution also provides for the right to privacy. Pursuant to these guarantees, HIV testing and counselling is conducted on the basis of consent and confidentiality. The HIV and AIDS Prevention and Control Act recognise every public health care facility as a VCT centre. It requires VCT centres to be physically accessible to persons with disability. The VCT centres must have trained personnel to provide pre and post HIV test counselling. This is to ensure that no one is discriminated in terms of getting the services offered.
132. HIV testing is voluntary or with the consent of parents or guardians where children or persons with inability to comprehend the results are concerned. No consent is required for HIV testing which is made under a court order, or on a donor of human organs and tissues, and on sexual offenders. Apart from these exceptions, the law prohibits compulsory testing whether for educational purpose, in marriage, in employment,

- entry into or travel out of the country, provision of health care, insurance cover or any other service.
133. A number of guidelines regulate the conduct of HIV testing and counselling in Tanzania. These are: the National Policy on HIV and AIDS; National Guidelines for the clinical Management of HIV and AID, 2005; National Guidelines for Voluntary Counselling and Testing, 2005; and the Guidelines for HIV Testing and Counselling in Clinical Settings. Thus, According to most of the respondents interviewed during the field visit, Tanzania has elaborate laws and policies on HIV testing.
 134. The key strategies used in the country to ensure that people get to know their status include: voluntary HIV testing, care and support to PLHIV, establishment of VCT centres, testing of pregnant mothers who attend clinics, blood donors, PITC, presidential massive testing, NMSF strategy, the MMAM program. The strategies according to the respondents promote respect for human rights.
 135. Testing for pregnant women should be voluntary and in conformity with the provisions of the HIV and AIDS Prevention and Control Act. Some respondents noted that in practice, however, every pregnant is tested for HIV.
 136. On the policy on disclosure of test results to clients and third parties, the HIV and AIDS Prevention and control Act states that results are confidential and shall be released only to the person being tested. While respondents lauded this provision, they expressed concern for an exception in the Act to the effect that results of an HIV test may be released to a spouse or sexual partner of the HIV positive person.

137. Testing for children, as already mentioned above, must be done with consent of their parent(s) or guardian(s) consent. Respondents agreed that such a requirement secures the rights of children. As pointed out above in respect to Burundi, Kenya and Rwanda, there is similarly no specific HIV testing policy for PWDs. As such, respondents in Tanzania rightly observed that the HIV testing policy for PWDs is the same as for the general public. Noteworthy, the Tanzanian National HIV and AIDS policy, describes PWDs as a special group that needs extra attention.
138. Most of those interviewed felt that there was no need for testing before recruitment and job promotions since PLHIV have skills and qualification just like everybody else. According to some respondents, pre-employment testing is illegal in the country.
139. The respondents interviewed agreed that pupils ought not to be tested before they are admitted to educational institutions as such testing would instigate stigma and discrimination. Other respondents, however, felt that children ought to be tested so that they know their status and are guided on the risks of exposure and how they could protect themselves.
140. On couples planning to be married, some respondents felt that they had to undergo testing in order to help them know their status, plan their future and make informed decisions. Other respondents, however, felt that testing for couples planning to be married should be voluntary but the couples should be encouraged to undergo testing.
141. On the question of HIV testing in the context of insurance, some respondents felt that there was no need for people to be tested before they are given life insurance. The respondents observed that permitting such

testing would be discriminative. The respondents similarly noted testing individuals before they travelled or were admitted into other countries would be a violation of their human rights. The respondents argued that HIV/AIDS cannot be controlled by imposing quarantine measures. However, some respondents felt that people should be tested so that they may afforded care and support in the countries they are travelling to.

6.4.5 Information dissemination

142. The Tanzanian National Policy on HIV and AIDS acknowledges that HIV is preventable and that its prevention can only be achieved through changes in individual behavior. Hence, the policy underscores the relevance of education and information in the fight against the scourge. Similarly, one of the main targets of the Strategic Plan for the Control of HIV and AIDS for Health Workers at the Workplace (2006-2011) is to prevent new HIV infection by targeting workers and family members who are HIV negative by informing and empowering them. The role of information dissemination in fighting the HIV/AIDS scourge is also underscored by the Policy on Clinical Management of HIV and AIDS and by the National Guidelines for Voluntary Counseling and Testing, 2005.

143. The Constitution lays the foundation for dissemination of HIV/AIDS information by guaranteeing freedom of expression. The HIV and AIDS Prevention and Control Act provides for public education and programmes on HIV and AIDS. The Act stipulates that such education should cater for all categories of the society. It also requires the wide participation of various stakeholders in the provision of information on the epidemic. Noteworthy, it is a requirement of the Act that all stakeholders who provide information are to ensure that the information

- is provided in appropriate format, technology and is accessible to the disabled persons. Employers too are required to coordinate a workplace programme on HIV and AIDS for employees. Such a programme should include the provision of gender responsive HIV and AIDS education.
144. Other policies that call for dissemination of information on HIV and AIDS in Tanzania include the following: the National HIV and AIDS Communication and Advocacy Strategy which is essentially a guide for all HIV/AIDS information providers; the Health Sector Strategy for HIV and AIDS (2003-2006) which provides for the training on HIV and AIDS for health care workers; and the Tri-partite Code of Conduct on HIV and AIDS at the Workplace in Tanzania Mainland which recognizes the importance of information and education in combating the spread of the pandemic.
 145. It is estimated that approximately 98% of the adult population in Tanzania is aware of HIV and AIDS and its mode of transmission. However, HIV infection continues to spread in the country at an unacceptable rate. One of the factors that contribute to the high rate of HIV infection in the country is the inadequate advocacy on HIV and AIDS prevention. Respondents interviewed during the field study in Tanzania were divided on whether the National Strategy on HIV Education extends to persons of all age groups. When asked whether the Strategy extends to informal settings and communities, most of the respondents said it did. On MARPs, most of the respondents said the Strategy did not extend to IDUs, prisoners, MSMs and commercial sex workers.
 146. According to organizations involved in HIV and AIDS information dissemination, the general content of the HIV education and training

packs is basic information on HIV and AIDS, availability of care and treatment, prevention of new infections, rights of PLHIV and OVCs. They noted that the information targets mostly those living in the urban areas than those in the rural areas. The organizations also indicated that human rights issues are not emphasized in the Education Strategy.

6.4.6 Access to treatment, care and support

147. The Tanzanian government has made a commitment to provide basic health care to PLHIV. This service is provided in conjunction with CBOs, NGOs and other service providers. In this regard, the HIV and AIDS Prevention and Control Act guarantees access to health care to persons living with HIV and AIDS. Such services are to be provided without discrimination both by public and private facilities. The government is also expected to take steps to ensure the availability of ARVs and other health care services and medicines to PLHIV and those exposed to the risk of HIV infection.

148. A number of policies set out the framework for ensuring PLHIV access treatment, care and support. The National Care and Treatment Plan provides the framework for the establishment and scaling up of a five year programme aimed at enrolling patients to anti-retroviral treatment. The National Policy on HIV and AIDS stipulates that PLHIV have the right to comprehensive health care. In certain instances, however, PLHIV may be required to meet some of the cost of the highly active anti-retroviral therapy (HAART). The Health Care Strategy for HIV 2003-2006 provides the guiding principles for the provision of care and treatment.

149. Despite the statutory guarantees and policy framework mentioned above, most of the respondents interviewed during the field study in Tanzania observed that health care is not accessible to all people in the country. They noted that health care is only accessible to those in urban areas while in the rural areas the health facilities are few and lack equipments. Health care is however free for children below five years and elderly persons above 65 years.
150. On the form of assistance extended to families/children of PLHIV, the respondents indicated that food allowance is provided under the Tripartite Code and Conduct on HIV and AIDS at Work Place in Tanzania Mainland. The respondents however noted that support to PLHIV and their families is generally hindered by lack of resources.

6.4.7 Biomedical research

151. Biomedical research on HIV/AIDS in Tanzania is regulated under a number of statutes and policies. The HIV and AIDS Prevention and Control Act provides that PLHIV have an obligation to share in scientific advancement and its benefits. This research is guided by a committee on HIV and AIDS which evaluates and approves all research proposals. The Act requires that research undertaken by international research groups must include local researchers.
152. On its part, the Tanzanian National Policy on HIV/AIDS provides the framework for promoting and coordinating multi-sectoral and multidisciplinary research activities for HIV and AIDS. While carrying out such research and disseminating the results, the policy requires that ethics

that govern interventions in HIV/AIDS be upheld. The Health Sector Strategy for HIV and AIDS (2003-2006) also acknowledges the relevance of research in the fight against HIV/AIDS scourge in Tanzania.

6.4.8 Most at risk populations

153. Like in the other East African countries already discussed, the plight of MARPs in the context of HIV/AIDS in Tanzania has been paid little attention. Indeed, the activities of some groups that constitute MARPs like IDUs and commercial sex workers are criminal offences and as such, reaching out to them is constrained. According to the Drugs and Prevention of Illicit Trafficking Act, the state is obligated to take measures to prevent and combat drug abuse and trafficking of narcotic drugs and psychotropic substances. In the same vein, the Penal Code makes it an offence to loiter or solicit in any public place for the purposes of prostitution.
154. Despite the above-mentioned legislative sanctions, the Tanzanian Policy on Clinical Management of HIV and AIDS acknowledges that increased access to health services for groups such as sex workers, MSMs and IDUs will reduce transmission of HIV infection not only among these populations but also among the general population. Thus, the Policy acknowledges the support needed by NGOs, CBOs and other agencies working with these groups.
155. The National Voluntary Counseling and Testing Guidelines enhances the right of MSM to access health care by providing that VCT services shall be provided without discrimination based on a number of grounds including sexual orientation. Likewise, the Health Sector HIV and AIDS Strategy for

Tanzania (2003-2006) acknowledges that, for a long time, female sex workers, MSM, and IDUs have largely been ignored in the government's response to the HIV/AIDS scourge. The Policy therefore provides for the development, in a participatory manner, of interventions aimed at increasing access to health care services for these groups. The interventions include supporting NGOs, CBOs and others who work with these groups and stimulating them to document and exchange learning/experiences among themselves.

6.4.9 HIV transmission and criminal law

156. The HIV and AIDS Prevention and Control Act criminalizes the intentional transmission of HIV in Tanzania. A person found guilty of such an offence is liable to imprisonment for a term of not less than five years. Thus, pursuant to the National Policy on HIV and AIDS, communities and individuals have the right to legal protection from willful and intentional acts of spreading HIV.
157. The HIV and AIDS Prevention and Control Act also requires anyone who has knowledge of being infected with HIV after being tested to immediately inform his/her spouse or sexual partner of the fact and to take reasonable measures and precautions to prevent the transmission of HIV to others. The Act further provides for criminal sanctions against anyone who abuses his spouse or sexual partner either verbally, physically or by conduct.

6.4.10 On proposed HIV law for EAC

158. Most of the respondents interviewed during the field study in Tanzania indicated that they would support a common approach in the fight against the HIV/AIDS epidemic in the region. The following are the proposals that the respondents suggested should be included in the proposed EAC law on HIV:

- a) Compulsory testing for prevention, care and support.
- b) Budgeting on HIV and AIDS.
- c) HIV and AIDS care and support to be accessible to all.
- d) Issues of stigma and discrimination.
- e) Dual obligation on protection to infection.
- f) Standard of proof for criminalization.
- g) State measures of protection and prevention.
- h) Common challenges to be addressed.
- i) Definition of intentional/willful transmission of HIV.
- j) Address human rights issues.
- k) Testing and confidentiality.
- l) Remove criminalization.
- m) Governments to provide services irrespective of availability of resources.
- n) Law to address the issue of recruitment in the military and police forces.
- o) The law to address the weaknesses and differences found in the individual country laws.
- p) Accessibility of treatment in EAC.
- q) Collaboration in research.
- r) Harmonize the laws.

- s) Workplace and programs and policies.

6.5 Uganda

- 159. The full report of the field study conducted by the Consultants in Uganda in a bid to gather views and suggestions for inclusion in the proposed EAC Law on HIV and AIDS is annexed to this report as **Annexure 6**.

6.5.1 HIV/AIDS in Uganda in context

- 160. Uganda is one of the few countries in the sub-Sahara that has recorded a dramatic decline of the HIV and AIDS prevalence. After the end of the civil war in 1986, the Ugandan government enforced an effective public education campaigns based on the ABC programme of abstinence, faithfulness and use of condom. This campaign, coupled with grassroots peer education and support networks, served to constrict the number of new HIV infection in the country. Furthermore, intense funding efforts from both the government and international donors resulted in access to free antiretroviral medicines for Ugandans by 2004.
- 161. Despite the afore-mentioned tremendous achievements, there still remain a substantial number of people to the tune of 6.7% of Uganda's population living with HIV and AIDS. In fact, a slight increase in prevalence has been reported since 2006.

6.5.2 Legislative and policy framework

- 162. Unlike Kenya and Tanzania which have elaborate and specific legislation on HIV and AIDS, Uganda is yet to have such legislation. As at the time of

preparing of this Report, there were two pertinent bills that were still pending in parliament: the HIV and AIDS Prevention and Control Bill and the Domestic Relations Bill.

163. The HIV and AIDS Prevention and Control Bill, if enacted, will be the first law in Uganda to deal exclusively with the problem of HIV and AIDS transmission. The Bill has been subject to much criticism from civil society. Provisions in the Bill on mandatory testing and criminalization of intentional transmission of HIV have been cited as contraventions of human rights treaties that Uganda has ratified. It is feared that these provisions if enacted into law will adversely affect disclosure and increase the rates of 'silent transmission'.
164. The Domestic Relations Bill is an amalgamation of gender related domestic laws. The Bill seeks to promote, among other things, the protection of women against discrimination or harmful practices that translate to higher rates of transmission.
165. While Uganda has no legislation specifically dealing with the issue of HIV/AIDS, the country has in place a raft of policies and guidelines that have played an important role in addressing various aspects of the fight against HIV/AIDS. These policies and guidelines include the following: the National Strategic Plan for HIV (2009-2012); Policy on HIV and Workplace 2008; National Strategic Framework for Expansion of HIV and AIDS Care and Support; Guidelines for Service Providers on Nutritional Care and Support for People Living with HIV and AIDS; and the National Antiretroviral Treatment and Care Guidelines for Adults and Children.

6.5.3 Stigma and discrimination

166. The 1995 Ugandan Constitution prohibits discrimination on a number of grounds. HIV status is not however specifically mentioned as one of the grounds. Thus, the HIV and AIDS Prevention and Control Bill proposes to provide protection for PLHIV from discrimination. The Bill protects the right to travel to and out of Uganda regardless of one's HIV status. It prohibits against the quarantine, isolation, denial of entry or deportation or those suspected or known to be HIV positive. HIV related discrimination in schools is also prohibited. The Bill proposes penalties for any discriminatory acts and practices. Within the workplace, the Ugandan Employment Act prohibits discrimination on the basis of HIV status.

167. Respondents interviewed during the field study in Uganda reported that HIV related stigma exists in the country. Most of the respondents were also aware of cases of individuals who had suffered HIV-related discrimination. The environments in which HIV positive persons are stigmatized include at the workplace, educational institutions, health facilities, political arenas and in the communities. The respondents noted that among the factors that instigate stigma include religious leaders claiming to be healing HIV/AIDS.

168. Some of the respondents noted that lack of an appropriate law made it difficult for PLHIV to get fair judgment in court when the discriminated individuals any help to address their discrimination. Individuals have been referred to legal aid advisory centres. Most of the respondents reported having participated in matters touching on HIV related discrimination or stigmatization in the country.

6.5.4 Testing and confidentiality

169. HIV testing in Uganda is conducted on the basis of the informed consent of the person concerned. Every test is preceded by a counseling session, and another counseling session is given after the test irrespective of the test results. Test results are confidential. The HIV and AIDS Prevention and Control Act proposes to address, at great length, matters pertaining to consent, testing and confidentiality.
170. According to respondents interviewed during the field visit in Uganda, testing for pregnant women is routine/mandatory when they visit antenatal clinics. Respondents noted that such routine/mandatory testing violates the rights of pregnant women.
171. On disclosure of test results to clients and third parties, respondents noted that there is no clear policy in the country. Similarly, they noted that there is no national policy on testing for children and PWDs. Most of those interviewed felt that there was no need for testing before recruitment and job promotions because it would lead to stigma and discrimination. On the same basis, the respondents agreed that pupils ought not to be tested before they are admitted to educational facilities.
172. On couples planning to be married, some respondents felt that they should undergo testing in a bid to ensure that they know their status and therefore be able to plan their future, make informed decisions. On the contrary, others felt that testing for such couples should be voluntary and that couples should be encouraged to undergo testing.

173. The respondents opined that they did not see the need for testing before individuals are given life insurance. Similarly, they advised against testing individuals before they travelled or admitted into other countries.

6.5.5 Information dissemination

174. The Constitution of Uganda guarantees every individual's right to education and as such, everyone is entitled access to HIV and AIDS education. It is however disturbing that the HIV and AIDS Prevention and Control Bill does not deal with the role of information and education in combating HIV and AIDS. On a positive note, the National Youth Policy calls for the promotion of education, training and capacity building in the area of HIV and AIDS. It indicates that the education, training and capacity building should cover the girl child, the youth, migrants including pastoralists, internally displaced persons, refugees, street children, and the disabled. The implementation of the Policy is however undermined by the unavailability of funds.

175. Most of the respondents interviewed during the field study in Uganda noted that the national strategy on HIV education did not extend to the general public and particularly to vulnerable groups such as MSM, IDUs and female sex workers. According to the respondents, there is no specific package on HIV education. They also noted that there is no fusion between HIV education and human rights.

6.5.6 Access to health care and treatment

176. Several policies and guidelines provide the framework for the provision of health care and treatment to PLHIV. The National Antiretroviral

Treatment and Care Guidelines for Adults and Children seek to ensure universal access to ARV drugs in Uganda. The Policy objectives are to standardize the delivery of ART and related support service for adults and children, build the capacity of health workers and physical infrastructure to provide ART services in a safe, effective and integrated manner and to ensure uninterrupted supply of ARV drugs, laboratory reagents and medical supplies.

177. The Guidelines for Service Providers on Nutritional Care and Support for People Living with HIV and AIDS recognizes that good nutrition is a key component in the care and support for PLHIV. As such, the guidelines are meant for use by service providers who have primary responsibility of support and care of PLHIV. The Guidelines define the actions that service providers need to undertake in order to provide quality care and support to PLHIV.
178. The National Strategic Framework for Expansion of HIV and AIDS Care and Support aims at reducing morbidity, disability and mortality due to HIV and AIDS and to improve the quality of lives of PLHIV. The Policy aims at, amongst other objectives, the building of capacity for the provision of care, the standardization of the care, and the provision of essential drugs and supplies to PLHIV.
179. According to most respondents interviewed in Uganda, health care is not accessible to all people in the country. This situation was attributed to lack of drugs and health personnel. They noted that the country lacks measures to ensure those who test positive are able to access care and treatment.

180. In like manner, there is no form of assistance extended to families and/or children of HIV positive persons. The respondents noted that there are some NGOs that support families and/or children of PLHIV.

6.5.7 Biomedical research

181. Like in many countries in sub-Saharan Africa, the promotion of biomedical research in Uganda is hampered by limited resources. Biomedical research in Uganda is regulated under the Uganda National Council for Science and Technology Act and the code of research ethics established under the Act. However, the legal and policy framework for the regulation of biomedical research in the field of HIV and AIDS is not much developed. As such, the HIV and AIDS Prevention and Control Bill proposes to give the Ministry of Health and other relevant institutions the mandate to institute trials on HIV and AIDS vaccines, medicines and other bio-products within the country. It stipulates that all persons contracted to engage in HIV and AIDs based trials and research should do so voluntarily, and with their informed consent.

182. Most respondents interviewed during the field study in Uganda agreed that there are research organizations in the country working with HIV positive persons. The respondents reported that there is some form of policy that outlines the ethical standards and protocols in conducting biomedical research in the country in order to preserve the dignity and confidentiality of HIV positive persons. However, some respondents were not aware of such a policy.

6.5.8 Most at risk populations

183. Interviews conducted during the field study in Uganda revealed that the country has no specific laws or policies relating to MARPs. Homosexuality and injecting drug use are criminal offences punishable in law. Indeed, the Anti-homosexuality Bill which is yet to be tabled in the Ugandan Parliament proposes harsh penalties for same-sex sexual activities.
184. Prisoners indicated that they received scant attention in so far their HIV status was concerned. This situation persists despite the fact that the Ugandan Constitution provides for the right to access medical treatment for persons who are restricted or detained.

6.5.9 HIV transmission and criminal law

185. The HIV and AIDS Prevention and Control Bill provides for criminal sanctions against any person who wilfully and intentionally transmits HIV to another person. If convicted of this offence, the offender is liable to life imprisonment unless the other person was aware of the offender's HIV status but nevertheless accepted the risk. Exemptions have also been made to transmission of HIV from the mother to her child before or during the birth of her child.

6.5.10 Gender and HIV

186. Uganda recognizes the significant role that women play in society. The Constitution guarantees full and equal dignity of women. It prohibits

- laws, cultures, customs and traditions which violate the human rights of women.
187. Several pieces of legislation relate to women but they have been criticised for undermining their rights. The Marriage Act, for instance, provides for the marriage of a minor and the invalidation of a marriage on the basis of disease. Certain provisions in the Divorce Act have been criticized for being discriminatory. For instance, the Act delineates the conditions under which a husband and a wife can petition for a divorce. However, the wife is restricted to petitioning for a divorce on the ground of adultery only when it is coupled with other acts such as bigamy, rape, sodomy, bestiality, cruelty or desertion. The husband on the other hand
188. On a progressive note, the Domestic Relations Bill seeks to address, *inter alia*, the afore-mentioned gaps in existing legislation touching on women's rights. The Bill covers such issues as women's property in marriage, women's right to negotiate sex on the ground of health, minimum age of marriage, female genital mutilation, widow inheritance, and marital rape. At the policy level, the National Youth Policy and the National Gender Policy calls for the protection of women against gender based violence. The policies also call for support for women with HIV/AIDS.

6.5.11 Children and HIV/AIDS

189. The rights of children are protected under section 34 of the Ugandan Constitution. It accords special protection to orphans and other vulnerable children, including the right to medical treatment and education. While the HIV and AIDS Prevention and Control Bill proposes to address the plight of children living with HIV, it defines a child as a person who is 12

years and below, a definition which is contrary to internationally agreed definition of a child, that is, a person under the age of 18 years.

6.5.12 On proposed HIV law for EAC

190. Most of the respondents said that they would support a common approach to the strategies on prevention, treatment of HIV and AIDS for the Eastern African countries. The following are what the respondents proposed should be included in the EAC law on HIV and AIDS:

- a) Homosexuality should be put on the agenda.
- b) Commercial sexual workers should not be shunned.
- c) Prohibition of mandatory testing.
- d) Prohibition of forced disclosure and upholding of confidentiality of test results.
- e) Inclusion of reproductive health rights of PLHIV.
- f) All communicable diseases like HIV and Hepatitis should be equally addressed.
- g) Treatment based approach to prevention is crucial.
- h) Universal access to both HIV testing and treatment.
- i) Provision of minimum standard of health care.
- j) Non-discriminatory policies or laws on employment, education and travel.

191. The respondents also proposed that civic education on human rights should be carried out for the whole of East Africa and that HIV positive persons should be involved in making all decisions that relate to HIV and AIDs.

6.6 Zanzibar

192. The audit of Zanzibar's legal and policy framework on HIV/AIDS that follows below is based on literature review, and views from key stakeholders gathered during a field study in Zanzibar conducted by the consultants - Ms. Catherine Mumma and Mr. Ali Hassan Ali. The Consultants held an inception meeting with key stakeholders on 7 September 2009. They conducted interviews on 8 and 9 September 2009 and held a stakeholders' workshop on 11 and 12 September 2009. A full report of the Consultant's field visit to Burundi is attached to this Report as **Annexure 7**.

6.6.1 Stigma and discrimination

193. According to 72% of the respondents interviewed by the Consultants during the field study in Zanzibar reported that HIV/AIDS-related stigma is rampant. They noted that PLHIV are often not embraced in the society. They observed that often PLHIV are denied rental houses or dismissed from work on the basis of their HIV status. Similarly, HIV positive children are frequently sent away from school. A huge percentage of the respondents, 82%, were aware of myths, social, cultural, religious and stereotypes that contribute to HIV-related stigma. 27% of the respondents claimed that the discriminated individuals never seek any help to address their discrimination while 18% of them noted that such individuals either inform AIDS agencies or take legal action. 75% of the organizations interviewed reported that they did not take part in matters related to stigma and discrimination of HIV persons.

194. Most of the organizations did not know of any legal measures that prohibit discrimination of PLHIV. More than half of the organizations, 57%, have been involved in activities that advocate against HIV related discrimination.

6.6.2 Testing and confidentiality

195. According to most of the respondents (63%), Zanzibar has policies and guidelines on HIV testing. The key strategies used in the territory to ensure that people get to know their status are: education, and increased VCT coverage. Confidentiality is highly maintained.

196. The policy on testing for pregnant women is that they the freedom to choose whether they should be tested or not. Most of the respondents agreed that the policy protects women's human rights.

197. Upto 46% of those interviewed felt that there was no need for testing before recruitment and job promotions while 53% said that employers had no right to test or dismiss employees found to be positive.

198. Out of the total respondents interviewed, 56% felt that pupils ought not to be tested before they are admitted to educational institutions. They supported their view by noting that access to education as a basic right should not be based on one's HIV status.

199. On couples planning to get married, 78% of the respondents felt that they had to undergo HIV testing. They observed that testing was necessary to enable the couples plan their future. On the contrary, 22% of the

respondents felt that testing should be voluntary hence no need for testing before marriage.

200. A large percentage of the respondents (66%) indicated that there was no need or individuals to be tested before they are afforded life insurance. They observed that testing individuals before advancing life insurance would be discriminatory and it would instigate stigma.

6.6.3 Information dissemination

201. HIV education in Zanzibar, according to most of the respondents, entails skill building, life skills, awareness and prevention. 64% of the respondents agreed that the national strategy on HIV education extended to the general public, girls and boys aged 14 years and below, female and male youth aged 14-21 years, and female and male youth above 21 years. When asked whether the national strategy on HIV education extended to informal settings, 14% of the respondents did not know while 72% answered to the affirmative.
202. On MARPs, 45% of the respondents said that the national strategy on education and the national HIV and AIDS policy extended to IDUs, MSM and female sex workers. 27% of the respondents said that the strategy did not extend to prisoners while 85% of them felt that sex work and homosexuality should not be decriminalised. In enhancing HIV education, 53% of the organizations interviewed claimed having played a role.
203. According to these organizations, the general content of the HIV education information and training packs is stigma reduction, prevention, and positive living. HIV related human rights issues are not emphasized

in the education strategy. 27% of the organizations noted that the level of acceptance of inclusion of information for high risk populations in the general HIV information packs was low.

6.6.4 Access to health care and research

204. When asked whether health care is accessible to all people in the territory, most of the organizations noted that while health care for PLHIV is free, the drugs for treating opportunistic diseases are not readily available for all that need them. They also observed that in rural and remote areas, physical access to health care facilities is difficult. As for the laws/policies to ensure that accessibility to medication by PHIV in the country, 45% of the organizations interviewed said that they were no such laws/policies.
205. Upto 73% of the organizations felt that the government of Zanzibar should have an affirmative action strategy to facilitate access to treatment for HIV persons in the territory. 64% of the respondents said that there were research organizations dealing with HIV persons but they were not sure of the existence of ethical guidelines or laws applicable to biomedical research.

6.6.5 On proposed HIV law for EAC

206. Upto 73% of the organizations interviewed in Zanzibar said they would support a common approach to the strategies on prevention, treatment of HIV and AIDS for the EAC countries. They observed that such an approach would bring common standards on HIV across the borders, help facilitate follow-up and adherence, sharing of ideas and planning. The

following are what they proposed should be included in the proposed EAC law on HIV and AIDS.

- a) Protection of PLHIV against discrimination and stigma by having, for instance, a common workplace policy.
- b) Free flow of information and education on HIV/AIDS.
- c) Provision of services to MARPs.
- d) Access to health care services and VCT services.
- e) Easy access to treatment anywhere in East Africa.
- f) Modification of the penal law on HIV transmission and rape cases.
- g) Establishment of a special fund for the PLHIV.
- h) Measures to be adopted to address the challenges.
- i) Need for inter-country interventions.
- j) Deal with drug dealers to curb drug use.
- k) Governments budget to target PLHIV.
- l) Primary care for OVCs.
- m) Emphasis on HIV and AIDS education.
- n) Emphasis on PWD and HIV.
- o) All government sectors to address HIV and AIDS issues.
- p) HIV and AIDS and tourism.
- q) Criminalize commercial sex and same-sex activities.
- r) Clauses to facilitate service delivery, management of sexually transmitted infections.
- s) Establishment of regional AIDS control coordinating agency.
- t) Emphasis on policies on MARPS and HIV.

7.0 Consolidate recommendations for inclusion in the proposed EAC Law on HIV/AIDS

7.1 HIV and AIDS treatment as a right

207. It is recommended that the proposed EAC HIV and AIDS Law includes a clause that recognizes the right (in human rights terms) of PLHIV to access health care services, including ARV treatment and essential medicines for the management of opportunistic infections as well as palliative care and treatments to address pain associated with AIDS.

7.2 Responsibility to take measures to use IP flexibilities

208. It is recommended that the proposed EAC HIV and AIDS Law includes a clause requiring that the partner states take all appropriate measures to use TRIPS flexibilities to facilitate the availability and access to HIV medicines in their countries. This recommendation is critical to ensure that that the EAC countries take full advantage of all the key public health-related flexibilities, which it has been demonstrated have had a dramatic effect in improving the availability and access to HIV treatments around the world, including in the EAC region. Additionally the proposed law should:

- Provide for prevention of mother to child transmission even with lower than threshold CD counts.
- Provide for subsidizing of medicines.
- Provide for free treatment of opportunistic diseases in PLHIV.
- Address intellectual property regimes to address TRIPS flexibilities: free generic competition, parallel importation,

international exhaustion, compulsory licensing and government use.

- Provide for application of exception to patent rights for research.
- Provide for pool procurement of HIV and AIDS medicines by partner states.

7.3 HIV and AIDS and discrimination

209. It is recommended that the proposed EAC Law on HIV and AIDS should contain the following in relation to the issue of discrimination:

- a) Provide for broad protection against discrimination on the ground of HIV and AIDS.
- b) Provide for protection against discrimination on the ground of membership of a group made more vulnerable to HIV and AIDS.
- c) Contain the following substantive features:
 - Coverage of direct and indirect discrimination.
 - Coverage of those presumed to be infected as well as carriers, partners, family and associates.
 - Coverage of vilification.
 - Provide that the ground complained of only needs to be one of several reasons for the discriminatory act.
 - Narrow exemptions and exceptions (e.g. life insurance on the basis of reasonable actuarial data).
 - Wide jurisdiction in the public and private sectors.
 - Provide for appropriate administrative features for complaint and redress.

- Provide adequately for the powers and functions for the institution(s) administering the legislation.
- Circumscribe very carefully the criminalization of HIV transmission or exposure.
- Prohibit compulsory testing.
- Provide for safe practices and procedures.
- Provide penalties for discriminatory practices.

7.4 Children and HIV and AIDS

210. It is recommended that the proposed law should incorporate provisions that clearly indicate that the member states are under an obligation to fulfill the rights of children as enshrined in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.
211. The proposed law should also incorporate provisions that adequately address the provision of PMTCT services that are satiable to all the family members needs, with a specific focus on the needs of the child.
212. The proposed law should also incorporate the needs of orphans and vulnerable children, who are affected by HIV. Responsibility should be placed on the governments of member states to take into account the social and economic need of such children.
213. The right to access treatment and essential medicines should also be made specific to children in the proposed law. It has been the practice not to make specific reference to children in relation to access treatment. The need for pediatric HIV treatment cannot be emphasized.

214. The cases of mature minors or emancipated minors should be taken into account by the proposed law and provisions should be included to ensure parental consent is not an obstacle to HIV testing, counseling and disclosure by such children.
215. Finally, the proposed law should incorporate the principles of non-discrimination and best interest of the child as the underlying principles when enforcing the rights of children.

7.5 HIV/AIDS and criminal law

216. It is recommended that the proposed law should require that any domestic law criminalizing HIV transmission should strike a balance between moral duties and legal obligations of the HIV person. Such a law should however endeavour to succeed in ordering attitudes of all people including HIV persons towards their sexual partners. It should also seek to order the attitude of the general public towards HIV positive persons, by ensuring that the public does not vilify and/or stigmatise HIV positive persons. It should seek reduce rather than enhance violations of human rights of those affected and infected with HIV. Moreover, the following suggestions should be taken into account:

- It would not be positive to have an HIV specific offence while not dealing with other diseases e.g. hepatitis.
- It is also advised that the drafting of this law should be futuristic and take into account the possibility that a cure for HIV could be found and also that other diseases with characteristics of HIV do exist and may develop.

- Any provisions addressing wilful infection should not be located in the HIV and AIDS law but should be in the penal code and drafted in general language to cater for the characteristics of HIV without mentioning HIV.
- The law should create an obligation to protect others although sharing information on status that will enable others to make choices that can protect against transmission.
- The law should specify the sexual offences, which if committed by a person who is aware of being infected with a life threatening disease may attract an enhanced penalty, and the nature of such enhanced penalty.
- The law should provide for sufficient safeguards as to afford fair trial of an HIV positive accused person of sexual offence.
- The law should not include mother to child transmission as a form of criminal transmission.
- The law should provide for access to PEP and counselling services for victims of sexual abuse.
- In relation to existing legal provisions criminalizing transmission, the respective governments should repeal such provisions.

7.6 Testing and disclosure

217. It is recommended that the proposed EAC Law on HIV and AIDS should have the following provisions in relation to testing and disclosure:

- Prohibit mandatory testing (pre-employment, pre-marriage, insurance, travel, education) except in a few instances of criminal offences.
- Testing should be voluntary and with informed consent.

- Allow anonymous and unlinked testing.
- Observe confidentiality of all testing and results except in limited criminal law settings.

7.7 Gender and HIV/AIDS

218. It is recommended that the proposed EAC Law on HIV and AIDS should have the following provisions in relation to gender and HIV/AIDS:

- Anti-discrimination provisions should be enacted to reduce human rights violations against women in the context of HIV and AIDS so as to reduce vulnerability of women to infection and to the impact of HIV and AIDs.
- There should be provisions outlawing gender based violence.
- HIV and AIDS programmes to be gender sensitive focusing on both men and women.
- There should be specific prohibition of gender based discrimination in its various facets.
- The law should promote equality of treatment of women in respect of: property acquisition, ownership and disposal; marital relations; sexual and reproductive rights; and employment.

7.8 HIV/AIDS law and MARPs

219. It is recommended that the proposed law should not decriminalize sex work, injecting drug use and homosexual activities. Provisions should however be made for extending treatment and health services to these groups despite their legal status.